e-ISSN 2545-384X

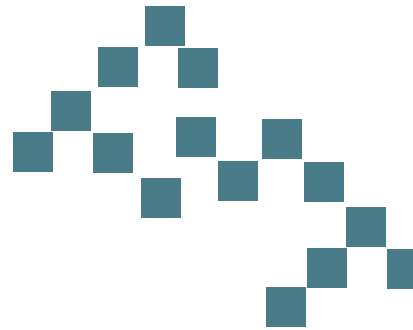
REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 41 2020/2

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 41 2020/2



Wydawnictwo KUL
Lublin 2020

Cover design
Agnieszka Gawryszuk

Typesetting
Jarosław Łukasik

Note to Authors

The Editor will be pleased to consider contributions provided they are not submitted for publication in other journals. Articles must be presented in their final form in English. Special attention should be given to quotations, footnotes and references, which should be accurate and complete (specific formatting rules are available on the Review website). The submission of the text indicates that authors consent, in the event of its publication, to the automatic transfer of all copyrights therefore to the Publisher of the Review of European and Comparative Law.

e-ISSN 2545-384X

The original version is the electronic version.

Wydawnictwo KUL, ul. Konstantynów 1 H,
20-708 Lublin, tel. 81 740-93-40, fax 81 740-93-50,
e-mail: wydawnictwo@kul.lublin.pl,
http://wydawnictwo.kul.lublin.pl

TABLE OF CONTENTS

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 7-33
DOI: https://doi.org/10.31743/recl.6128

DIRECTIVE 2013/48/EU AND THE REQUESTED PERSON'S RIGHT TO APPOINT A LAWYER IN THE ISSUING MEMBER STATE IN EUROPEAN ARREST WARRANT PROCEEDINGS

*Prof. dr. Vincent Glerum**

ABSTRACT

Directive 2013/48/EU gives persons who are subject to European arrest warrant proceedings the right to "dual representation": not only the right of access to a lawyer in the executing Member State but also the right to appoint a lawyer in the issuing Member State, whose limited role it is to provide information and advice to the lawyer in the executing Member State with a view to the effective exercise of the requested person's rights under Framework Decision 2002/584/JHA. The right to appoint a lawyer in the issuing Member State is supposed to contribute to facilitating judicial cooperation. This article takes a closer look at that right and tries to establish whether – and, if so, to what extent – that right does indeed facilitate judicial cooperation.

Key words: Directive 2013/48/EU; European arrest warrant; dual representation; rights under Framework Decision 2002/584/JHA

* Professor (by special appointment) of international and European criminal law, University of Groningen; legal advisor to the Extradition Chamber of the District Court of Amsterdam (the Netherlands); e-mail: v.h.glerum@rug.nl; https://orcid.org/0000-0001-7668-1939.

1. INTRODUCTION

According to the Framework Decision 2002/584/JHA on the European arrest warrant[1] (FD 2002/584/JHA), the person against whom a European arrest warrant (EAW) is issued – the requested person – has a number of procedural rights in EAW proceedings in the executing Member State (MS).

One of those minimum rights[2] is the right of a requested person who is arrested pursuant to an EAW "to be assisted by a legal counsel (…) in accordance with the national law of the executing [MS]" (Art. 11(2)) Directive 2013/48/EU on the right of access to a lawyer[3] aims at facilitating judicial cooperation on the basis of the principle of mutual recognition. Its legal basis is to be found in Art. 82(2) TFEU, which confers the power to harmonize certain aspects of criminal procedural law "(t)o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension". According to the preamble of the directive, the principle of mutual recognition presupposes mutual trust, but experience has shown that the mere fact that all MSs are party to the ECHR and the ICCPR does not always provide a sufficient degree of trust in the criminal justice systems of the MSs.[4] For that reason, mutual trust must be strengthened by providing detailed common *minimum* rules on, *inter alia*, the right of access to a lawyer in EAW proceedings.

That right does not derive from Art. 6(1) of the ECHR, because this provision does not apply to the EAW. "[E]xtradition proceedings, including the procedure for executing [an EAW]" do not involve the determi-

---

[1] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* L 190/1.

[2] ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, §30.

[3] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in 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, *OJ* L 294/1. Denmark and Ireland are not bound by this directive.

[4] Recitals (4)-(5).

nation of the requested person's civil rights or obligations or of a criminal charge against him[5]. Art. 47(2) of the Charter of Fundamental Rights of the European Union (Charter), however, has a wider scope: it is not limited to the determination of civil rights and obligations or the determination of a criminal charge. The preamble of Directive 2013/48/EU states that by laying down rules about, *inter alia*, access to a lawyer in EAW proceedings, the directive promotes the application of, *inter alia*, Art. 47 of the Charter[6]. In other words, the directive promotes the application of the right to fair EAW proceedings.

For the 25 MSs bound by Directive 2013/48/EU, the directive puts the requested person's right of access to a lawyer in the *executing* MS on a more secure footing. Whereas Art. 11(2) of FD 2002/584/JHA leaves unanswered what is to be understood by "assistance" and, moreover, refers to the national law of the executing MS, Art. 10(1) of Directive 2013/48/EU obliges the MSs "to ensure that a requested person has the right of access to a lawyer in the executing [MS] upon arrest pursuant to the [EAW]" without referring to the national law of the executing MS and Art. 10(2) sums up which rights are contained in the right of access to a lawyer in the executing MS.

But the directive goes further still and confers a right to "dual representation":[7] the requested person *also* has a right to appoint a lawyer in the *issuing* MS (Art. 10(4) of Directive 2013/48/EU).

The preamble to the directive does not make clear how facilitating the right to appoint a lawyer in the issuing MS could contribute to facilitating judicial cooperation. The *Explanatory Memorandum* to the Commission

---

[5] See ECtHR, decision of 25 June 2019, *West v. Hungary*, ECLI:CE:ECHR:2019:-0625DEC000538012, §65. See also ECtHR, decision of 7 October 2008, *Monedero Angora v. Spain*, ECLI:CE:ECHR:2008:1007DEC004113805 and ECtHR, decision of 24 March 2015, *Martuzevičius v. the United Kingdom*, ECLI:CE:ECHR:2015:0324DEC001356613, §32. The case-law on the non-applicability of Art. 6(1) of the ECHR to *extradition* proceedings is abundant. See, *e.g.*, ECtHR, judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey* [GC], ECLI:CE:ECHR:2005:0204JUD004682799, §82.

[6] Recital (12).

[7] EU Fundamental Rights Agency (FRA), *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, 64.

proposal for the directive is somewhat more enlightening. It gives two examples of assistance by a lawyer in the issuing MS: (1) such assistance can facilitate the effective exercise of the requested person's rights, in particular the possibility to invoke a ground for non-execution and (2) such assistance will result in speedier consent to surrender by requested persons (Art. 13(1) of FD 2002/584/JHA), because they will have fuller information on the proceedings in the issuing MS and on the consequences of their consent[8]. Apparently, the idea behind the first example is that the quality of any argument against the execution of the EAW will improve, because only valid and well-founded reasons for non-execution will be put forward. In other words, judicial cooperation will be enhanced because the number of unjustified refusals will be reduced and the quality of decisions to surrender will be improved. The second example is clear in and of itself: speedier consent to surrender means speedier surrender.

In other Commission documents, yet another example is given: assistance by a lawyer in the issuing MS by providing information about the legal situation and the case-file in the issuing Member State is likely to reduce the incidence of cases in which an EAW was executed which was later shown to have been issued wrongly[9], which, as it happens, is still an issue[10]. Obviously, this would foster mutual trust and, thus, contribute to facilitating judicial cooperation.

All of these examples presume that the lawyer in the issuing MS has the specialized knowledge and experience required to provide information and advice which is relevant to the exercise of the requested person's rights under FD 2002/584/JHA and also the means to provide such relevant information and advice (access to the criminal case-file).

---

[8] COM(2011) 326 final, 8-9.

[9] *Impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings*, SEC(2011) 686, 33; *Impact assessment accompanying the Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings*, SWD(2013) 476 final, 19-20.

[10] On the abuse or misuse of the EAW see Fair Trials, *Beyond Surrender. Putting human rights at the heart of the European Arrest Warrant*, 2018: 9-16. May 2nd, 2020, https://www.fairtrials.org/publication/beyond-surrender.

This article takes a closer look at the right to appoint a lawyer in the issuing MS and tries to establish whether – and, if so, to what extent – that right can contribute to achieving the directive's goal of facilitating judicial cooperation.[11] Unlike some of the other contributions to this special issue of the *Review of European and Comparative Law*, this article tackles its subject primarily from an EU law perspective.

To that end, first the relevant provisions of Directive 2013/48/EU are discussed (para. 2). Then the focus shifts to the role of lawyer in the issuing MS (paras. 3 and 4). By analysing his role and the limits to that role,

[11] There is abundant literature on the right of access to a lawyer and Directive 2013/48/EU. See, *e.g.*: Ilias Anagnostopoulos, "The Right of Access to a Lawyer in Europe: A Long Road Ahead?", European Criminal Law Review 1(2014), 3-18; Teresa Armenta Deu, Lisa Urban, "The Right of Access to a Lawyer under Directive 2013/48/EU", In: Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies, ed. Silvia Allegrezza, Valentina Covolo, Milano: Wolters Kluwer, 2018, 65-79; Lorena Bachmaier Winter, "The EU Directive on the Right to Access to a Lawyer: A Critical Assessment", In: Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, ed. Stefano Ruggeri, Cham: Springer 2015, 111-131; Steven Cras, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings", *eucrim* 1(2014): 32-44; Zlata Đurđević, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order", In: ed. Zlata Đurđević, Elizabeta Ivičević Karas, European Criminal Procedure Law in Service of the Protection of European Union Financial Interests: State of Play and Challenges, Zagreb: Croatian Association of European Criminal Law, 2016: 9-23; Mar Jimeno-Bulnes, "The Right of Access to a Lawyer in the European Union: Directive 2013/48/EU and Its Implementation in Spain", In: EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office, ed. Tommasso Rafaraci, Rosanna Belfiore, Cham: Springer, 2019, 57-70; Anneli Soo, "Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation", European Criminal Law Review 3(2016): 284-307; Anneli Soo, "Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel", European Journal of Crime, Criminal Law and Criminal Justice 1(2017): 31-51; Elisavet Symeonidou-Kastanidou, "The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation", European Criminal Law Review 5(2015): 68-85.

With some exceptions, the literature only makes a passing reference to the issue of "dual representation".

paragraph 3 establishes what "dual representation" is *not* intended to do. In order to determine what it *is* intended to do, paragraph 4 examines what is meant by the expression "rights of requested persons under [FD] 2002/584/JHA", because assistance by a lawyer in the issuing MS is aimed at the effective exercise of those rights. The same paragraph also discusses whether and to what extent that assistance is relevant to that purpose. Once the objective of "dual representation" and the extent of its potential to contribute to the effective exercise of the requested person's rights are established, two more issues need to be discussed which are relevant to the functioning of the right to appoint a lawyer in the issuing MS: the duty to observe the short time-limits for taking a decision on the execution of the EAW (para. 5) and the scope of the effective remedy against a breach of that right (para. 6). Finally, paragraph 7 draws conclusions and contains some final considerations.

2. THE RIGHT TO APPOINT A LAWYER IN THE ISSUING MS

The directive applies to requested persons from the time of their arrest in accordance with Art. 10 (Art. 2(2)).

Art. 10(1)-(3) concerns the right of access to a lawyer in the *executing* MS. Art. 10(4) provides for the right to appoint a lawyer in the *issuing* MS. That lawyer's role is "to assist the lawyer in the executing [MS] by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under [FD] 2002/584/JHA". To that end, the competent authority in the executing MS must inform the requested person "without undue delay after deprivation of liberty" that he has that right[12].

If a requested person who does not already have a lawyer in the issuing MS wishes to exercise the right to appoint a lawyer in the issuing MS, the competent authority in the executing MS must "promptly" contact its counterpart in the issuing MS and inform the latter of the requested person's wish (Art. 10(5)). Thereupon, the competent authority in the issuing

[12] On the genesis of Art. 10(4)-(6) of Directive 2013/48/EU see Cras (2014), *supra* footnote 11: 42-43.

MS is obliged to furnish the requested person, "without undue delay", with information to facilitate the requested person in appointing a lawyer in the issuing MS (Art. 10(5)). Recital (46) of the preamble states that such information could "include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in [EAW] cases".

Art. 10(6) declares that the right to appoint a lawyer in the issuing MS is without prejudice to both the time-limits set out in FD 2002/584/JHA and the executing judicial authority's duty "to decide, within those time-limits and the conditions defined under that [FD], whether the person is to be surrendered". Recital (47) explains that "while requested persons should be able to exercise fully their rights under this Directive in [EAW] proceedings, those time-limits should be respected", because observance of those time-limits is essential for the surrender procedure and the surrender procedure is crucial for cooperation in criminal matters between the MSs.

Before Directive 2013/48/EU, appointing a lawyer in the issuing MS was a matter of national law, in combination with Art. 6 of the ECHR. Because a person against whom a prosecution-EAW was issued, was, logically, *also* a suspect or an accused person in the issuing MS, he at least had the right to legal assistance in that State when he was charged with a criminal offence (Art. 6(3)(c) of the ECHR).

Art. 10(4) confirms that right and confers it on *all* requested persons from the time of their arrest pursuant to an EAW, whether they are sought for prosecution or for execution of a sentence.

Art. 10(4) speaks of "the right to appoint", not of the "right of access to" a lawyer in the issuing MS. Compared to the latter, the former right is much more limited. Art. 10(4)-(5) provides for the *minimum* obligations required to enable the requested person to exercise that right. Given the minimal degree of harmonization pursued, it was obviously not the aim to regulate that right – *viz.* the obligations to facilitate exercising that right – completely and exhaustively[13]. Other issues than those dealt with

[13] For a critical assessment see Bachmaier Winter, *supra* footnote 11: 123, according to whom the right to appoint a lawyer in the issuing MS might be insufficient to provide effective protection.

in Art. 10(4)-(5) are left to national law[14]. Consequently, once the competent authorities acquit themselves of the obligations mentioned in those provisions, the actual appointment of the lawyer in the issuing MS is the sole responsibility of the requested person.

For example, the directive does not give the competent authority in the executing MS any role in establishing contact with a lawyer in the issuing MS. Accordingly, in practice, apart from informing the requested person of his right, the competent authorities do not seem to provide any assistance in this regard[15]. The requested person can ask his lawyer in the executing MS or his relatives to contact a lawyer in the issuing MS[16]. Equally, there is no obligation to provide the lawyer in the issuing MS with the EAW. Again, the lawyer in the executing MS can play a role in this regard. The effectiveness of the defence mounted in the executing MS depends on the quality of the information and advice given by the lawyer in the issuing MS[17], but Directive 2013/48/EU does not contain any provision designed to guarantee that the assistance provided by that lawyer conforms to professional standards. In the communications between the lawyer in the issuing MS and the lawyer in the executing MS, language barriers may be a problem[18], but, again, the minimum provisions of the directive do not touch upon this topic.

Financial considerations present another practical challenge to "dual representation"[19]. The directive does not cover the right to legal aid (Art.

---

[14] Compare ECJ, judgment of 19 September 2018, *Milev*, C-310/18 PPU, ECLI:EU:C:2018:732, §47-48, concerning Art. 6 of Directive 2016/343/EU.

[15] FRA, *supra* footnote 7: 65-66.

[16] Compare ECtHR, decision of 7 July 2015, *Arapi v. Albania*, ECLI:CE:ECHR:2015:-0707DEC002765607, §72. The applicant was held in in custody in Belgium pending extradition proceedings. One of his complaints against the requesting State, Albania, was declared inadmissible for non-exhaustion of domestic remedies. It was not shown that the applicant was prevented from taking any steps "whether through the assistance of a Belgian lawyer, or through the assistance of his relatives or directly, to contact a lawyer in Albania" in order to challenge the Albanian detention order.

[17] Martha Bargis, "Personal Freedom and Surrender", In: Handbook of European Criminal Procedure, ed. Roberto E. Kostoris, Cham: Springer, 2018: 345. See also FRA, *supra* footnote 7:66.

[18] FRA, *supra* footnote 7: 66.

[19] Bachmaier Winter, *supra* footnote 11: 123; FRA, *supra* footnote 7: 66.

11), which is governed by Directive 2016/1919/EU[20]. A requested person who exercises his right to appoint a lawyer in the issuing MS and who is the subject of a *prosecution*-EAW has the right to legal aid in the issuing MS for the purpose of EAW proceedings in the executing MS, but only insofar as legal aid is necessary to ensure effective access to justice (Art. 5(2) of Directive 2016/1919/EU)[21]. The rationale of the limitation to prosecution-cases is that in execution-cases the requested person already had the benefit of access to a lawyer – and possibly to legal aid – in the trial which resulted in the conviction[22].

3. THE ROLE OF THE LAWYER IN THE ISSUING MS

The role of the lawyer in the issuing MS, as envisaged by Art. 10(4), is limited and oriented towards the *EAW proceedings* in the *executing* MS. He *assists* the lawyer in the *executing* MS by *providing information* and *advice* to the lawyer in the *executing* MS with a view to the effective exercise of the requested person's rights under FD 2002/584/JHA. The wording of the directive is more focused than the indeterminate terminology of the Commission proposal ("to carry out activities limited to what is needed to assist"). Although the Commission proposal explicitly referred to the exercise of rights *in the executing MS* and the directive does not, the same result is achieved by the reference to providing information to the lawyer *in that MS*, which is lacking in the proposal.

Given the scope of the lawyer's role, "dual representation" is *not* intended to enable the requested person to resist surrender at *both* ends. Clearly, assisting the lawyer in the executing MS by providing him with information and advice does not include *challenging* the EAW or the national judicial decision on which the EAW is based in the *issuing* MS.

[20] Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJ* L 297/1.

[21] See for criticisms about this provision Bargis, *supra* footnote 17: 346.

[22] Steven Cras, "The Directive on the Right to Legal Aid in Criminal and EAW Proceedings. Genesis and Description of the Sixth Instrument of the 2009 Roadmap", *eucrim* 1(2017): 41-42.

A fortiori, the same holds true for informal ways to "resolve" the EAW in the *issuing* MS, *e.g.*, by negotiating a voluntary return of the requested person to that MS. Besides, there is no right under FD 2002/584/JHA to challenge the national judicial decision or to "resolve" the EAW. The criminal proceedings or the enforcement proceedings in the issuing MS are not governed by EU law but by national fundamental rights and the ECHR[23].

However, when the EAW is issued by a public prosecutor who takes part in the administration of justice the decision to issue the EAW and the proportionality thereof "must be capable of being the subject, in the [issuing MS], of court proceedings which meet in full the requirements inherent in effective judicial protection"[24]. Providing for a separate appeal against the decision to issue the EAW is one of the ways in which a MS can discharge itself of the obligation to guarantee the required level of judicial protection[25].

Against this background, according to Advocate General Campos Sánchez-Bordona, Art. 10(5) obliges the issuing MS to facilitate the appointment of a lawyer in that MS "*with a view, obviously*, to making it easier for [the requested person] to exercise his right to effective judicial protection *before the courts of the issuing [MS]* without having to wait for his surrender"[26]. Clearly, this assertion flies in the face of the wording of Art. 10(4), which limits the assistance of the lawyer in the issuing MS to providing information and advice. Unlike the Advocate General, the Court of Justice did not link the right to appoint a lawyer in the issuing MS *directly* to the right to effective judicial protection in that MS under FD 2002/584/JHA. Instead, it remarked that FD 2002/584/JHA *accords well* with the general system of guarantees concerning effective judicial

[23] See, *e.g.*, ECJ, judgment of 25 May 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586, §57.

[24] ECJ, judgment of 27 May 2019, *Minister for Justice and Equality v. OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, §75.

[25] ECJ, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie v. JR and YC,* C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, §64-65.

[26] Opinion of 26 November 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie v. JR and YC,* C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1012, §89 (emphasis added).

protection provided for by other EU instruments on judicial cooperation in criminal matters – such as provided for by Art. 10(4) – which, together, aim at facilitating the requested person in exercising his rights even before he is surrendered to the issuing MS[27].

Of course, because the directive sets *minimum* rules (Art. 1), it does not preclude the national law of the issuing MS from assigning the lawyer in the issuing MS rights in the criminal proceedings against the requested person pending the EAW proceedings. Thus, although not envisaged by Art. 10(4), once the lawyer in the issuing MS is appointed he could *also* be employed to exercise the right to effective judicial protection in the issuing MS. Precisely for this reason, defence lawyers seem to consider the right to appoint a lawyer in the issuing MS as an important and beneficial tool for the requested person[28].

"Dual representation" is also *not* intended to enable the lawyer in the issuing MS to *prepare a defence* in the *criminal proceedings* even before the requested person is surrendered, *e.g.*, by obtaining a copy of the case-file in advance. Again, the limited "job description" does not include such activities.

Furthermore, Directive 2013/48/EU does not accord the lawyer in the issuing MS a right of access to the case-file. That right is the province of Directive 2012/13/EU on the right of information[29]. This directive applies from the time that persons "are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence (…)" (Art. 2(1)). If the requested person was not yet made aware of this prior to his arrest pursuant to a prosecution-EAW, one could argue that he is notified of the suspicion or accusation when the executing judicial authority (JA) informs him of the EAW and its content (Art. 11(1) of FD 2002/584/JHA). After all, the EAW must contain a reference to a national judicial decision, such as an arrest warrant, and information about the offence (Art. 8(1)(c)-(d) of FD 2002/584/JHA).

---

[27] ECJ, *supra* footnote 25: §72-73.

[28] FRA, *supra* footnote 7: 64-65.

[29] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ* L 142/1. Denmark is not bound by this directive.

Consequently, Directive 2012/13/EU would apply from then on[30]. But Art. 7(3) of Directive 2012/13/EU does not give the lawyer an automatic right to access to the case-file: depending on the particular circumstances and the type of proceedings, disclosure can be given prior to, contemporaneous with or after the court is seized[31]. If, on the other hand, the expression "competent authorities of a [MS]" exclusively refers to the authorities of the MS in which the criminal proceedings are pending, then, practically speaking, the directive will only apply *after* surrender to that MS. In *execution*-cases, access to the case-file is even more problematic: Directive 2012/13/EU ceases to apply once the charge and the sentence are *finally* determined (Art. 2(1)). The issue of the applicability of Directive 2012/13/EU to an accused person against whom a prosecution-EAW was issued is currently before the Court of Justice[32].

To sum up: "dual representation" is not intended to facilitate challenging the EAW or the national judicial decision in the issuing MS, neither is it intended to facilitate preparing the defence in the criminal proceedings in that MS. Additionally, "dual representation" does not confer an automatic right of access to the case-file.

4. THE REQUESTED PERSON'S RIGHTS UNDER FD 2002/584/JHA

Now that it is clear what "dual representation" is *not* intended to do, it remains to be seen what *is* its objective. The answer depends on the meaning of the expression "the rights of requested persons under [FD] 2002/584/JHA". After all, the assistance provided by the lawyer in the issuing MS is "with a view to" the effective exercise of those rights (Art. 10(4) of Directive 2013/48/EU).

---

[30] Compare ECJ, judgment of 12 March 2020, *VW* (*Droit d'accès à un avocat en cas de non-comparution*), C-659/18, ECLI:EU:C:2020:201, §26, with regard to Art. 2 of Directive 2013/48/EU which to a large extent is identical with Art. 2(1) of Directive 2012/13/EU (but which also contains the words "by official notification or otherwise"): "(…) the means by which such information [*i.e.*, information that the person concerned is to be treated as a suspect or an accused person] reaches that person is irrelevant".

[31] ECJ, judgment of 5 June 2018, *Kolev and Others*, C-612/15, ECLI:EU:C:2018:392, §91.

[32] C-649/19 (*Spetsializirana prokuratura (Déclaration des droits)*).

As we have seen (para. 1), the Commission's *Explanatory Memorandum* refers to the right of requested persons to consent to surrender. In this respect, assistance by a lawyer in the issuing MS can have added value: information about pending criminal proceedings against the requested person in the issuing MS for *other* offences than those mentioned in the EAW is relevant for the decision whether or not to consent to surrender and, at the same time, to renounce entitlement to the "speciality rule" (Art. 13(1) of FD 2002/584/JHA)[33]. Presumably, that information could be found in the case-file, but, as we have seen (see para. 3), the lawyer in the issuing MS does not have access to the case-file automatically.

In addition, the *Explanatory Memorandum* mentions the possibility of invoking grounds for non-execution, in particular under Art. 3 and 4 of FD 2002/584/JHA (see para. 1).

The Court of Justice has repeatedly held that the grounds for non-execution and the conditions upon which the execution of an EAW may be made dependent, are exhaustively listed in Art. 3-5 of FD 2002/584/JHA. Can these mandatory and optional grounds and these conditions be considered as "rights of requested persons under [FD] 200/584/JHA", as the Commission apparently thinks? None of these grounds or conditions is explicitly designated as a right of the requested person. As regards the mandatory grounds (Art. 3), which impose a duty on the executing JA to refuse the execution of the EAW, one can argue that the other side of the coin of a duty of the executing JA is a corresponding right of the requested person. However, the Court of Justice seems to regard Art. 3 of FD 2002/584/JHA as a provision which leaves the MSs the *possibility* to implement the mandatory grounds for refusal[34]. In other words, the MSs seem to have the freedom to choose whether or not to implement these grounds for refusal. As regards the optional grounds (Art. 4-4a) and the conditions (Art. 5), it cannot be maintained that they are rights of requested persons under FD 2002/584/JHA. In the *Wolzenburg* case, it was argued by Advocate General Y. Bot that the MSs, when implementing FD 2002/584/JHA, *must*

[33] According to this rule, a person who has been surrendered may not be prosecuted, sentenced or otherwise deprived of his liberty for an offence committed prior to his surrender other than that for which he was surrendered (Art. 27(2) of FD 2002/584/JHA).

[34] ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, §64.

implement the optional grounds, but the Court of Justice did not follow him[35]. Accordingly, the MSs are free whether to implement the optional grounds[36] and the conditions or not[37]. Consequently, it depends on the national law of the executing MS whether or not the requested person can invoke those grounds or conditions. Moreover, if a MS chooses to implement an optional ground, it must leave a margin of discretion to the executing JA as to whether or not it is appropriate to refuse to execute the EAW[38]. Such a margin of discretion is difficult to reconcile with the concept of "rights of requested persons under [FD] 2002/584/JHA"[39].

In conclusion, and contrary to Commission's opinion, the grounds for non-execution and conditions enumerated in Art. 3-5 of FD 2002/584/JHA, strictly speaking, cannot be considered as "rights of requested persons under [FD] 2002/584/JHA". In the context of grounds for non-execution and conditions, the expression "rights of requested persons under [FD] 2002/584/JHA" can refer to, at most, the grounds and conditions which the executing MS *has chosen to implement* and only then to those grounds and conditions *which do not leave a margin of discretion* to the executing JA as to their application. However, in the final analysis it does not really matter whether the grounds for non-execution and the conditions can be considered as "rights of requested persons under [FD] 2002/584/

[35] ECJ, judgment of 6 October 2008, *Dominic Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, §58; see also ECJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, §21.

[36] Concerning Art. 4a, see recital (15) of Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, *OJ* L 81/24.

[37] ECJ, judgment of 21 October 2010, *I.B.*, C-306/09, ECLI:EU:C:2010:626, §51, concerning Art. 4(6) and 5(3).

[38] ECJ, *Popławski*, *supra* footnote 35: §21, concerning Art. 4(6).

[39] To be absolutely clear: at issue here is the meaning of the expression "rights of requested persons under [FD] 2002/584/JHA", not whether such rights have direct effect in the legal systems of the MSs. Unlike provisions of directives, provisions of FDs cannot have direct effect, regardless of whether a FD provision is sufficiently precise and unconditional. See, *e.g.*, ECJ, judgment of 8 November 2016, *Ognyanov*, C-554/14, ECLI:EU:C:2016:835, §56-57.

JHA". After all, when exercising the right to be heard by the executing JA (Art. 14 of FD 2002/584/JHA), the requested person and his lawyer in the executing MS (Art. 10(2)(c) of Directive 2013/48/EU) can point to the grounds for non-execution and conditions *as implemented by the executing MS*. Therefore, we have to examine whether and to what extent the assistance of a lawyer in the issuing MS can have added value for invoking them.

The overwhelming majority of the grounds for non-execution and conditions mentioned in Art. 3-5 of FD 2002/584/JHA cover factual and legal situations which are particular to the *executing* MS or to a *third* State. It is difficult to see what added value, if any, information and advice provided by the lawyer in the *issuing* MS could have for invoking *these* grounds or conditions. Besides, if the executing JA applies a ground for non-execution belonging to this category, this does not mean that the EAW was wrongly issued (compare para. 1). After all, the cause of non-execution does not relate to the issuing MS.

The few remaining grounds for non-execution and conditions concern factual and legal situations which are particular to or which may occur in the *issuing* MS, *e.g.* the mandatory ground for non-execution based on the *ne bis in idem*-principle (Art. 3(2)), the optional ground for non-execution concerning *in absentia* judgments (Art. 4a) and the condition concerning the possibility to reduce a life sentence (Art. 5(2))[40]. The lawyer in the issuing MS can try to produce evidence that the EAW relates to offences for which the requested person was already finally sentenced – evidence which would probably be contained in the case-file –[41], can provide legal information showing that a certain way of serving a summons on a defendant in the issuing MS does not fulfill the requirements of Art. 4a(1)(a) of FD 2002/584/JHA[42] or can refer to judgments of the ECtHR showing that a life sentence imposed in the issuing MS is not *de jure* or *de facto* reduci-

[40] See also Art. 4(3): a final judgment in a MS with regard to the same act which prevents further proceedings.

[41] For a – somewhat atypical – case see: ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

[42] See ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346.

ble[43]. In these situations, information provided by the lawyer in the issuing MS can have added value, although the possibility to provide information from the case-file may be limited (see para. 3).

Assistance by a lawyer in the issuing MS also is relevant for invoking the fundamental rights-based grounds for non-execution developed in the Court of Justice's case-law. Because those grounds for non-execution are based on the Court of Justice's interpretation of Art. 1(3) of FD 2002/584/JHA – which, in essence, refers to the duty to respect the Charter – in conjunction with rights which the Charter confers on anyone when MSs are implementing Union law (Art. 51(1) of the Charter), *e.g.* when their judicial authorities apply the national provisions adopted to transpose FD 2002/584/JHA[44], there is no difficulty in recognizing those grounds as "rights of requested persons under [FD] 2002/584/JHA". If, on the basis of a two prong test, the executing JA concludes that executing the EAW would expose the requested person to a real risk of a violation of Art. 4 of the Charter on account of deficiencies with regard to detention conditions in the issuing MS[45] or to a real risk of a violation of the right to an independent court and therefore of the right to a fair trial as guaranteed by Art. 47(2) of the Charter on account of deficiencies with regard to the independence of the judiciary in the issuing MS, it must not execute the EAW[46]. The lawyer in the issuing MS is probably better placed than the lawyer in the executing MS to adduce evidence based on "judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing [MS], and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN"[47] that there is a general real risk of a violation in the issuing MS (first prong of the test). In the same vein, the lawyer in the issuing MS may have easier access to information showing that the requested person runs an individual real risk of a violation (second prong of the test).

---

[43] See, *e.g.*, ECtHR, judgment of 23 May 2017, *Matiošaitis e.a. v. Lithuania*, ECLI:CE:ECHR:2017:0523JUD002266213.

[44] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, §84.

[45] ECJ, *supra* footnote 44: §104.

[46] ECJ, *supra* footnote 23: §79.

[47] ECJ, *supra* footnote 44: §89.

If the EAW is not executed because of a ground for non-execution belonging to one of the previous two categories, it could be said that the EAW was issued wrongly. Therefore, information and advice regarding these grounds for non-execution could contribute to the prevention of incorrectly issued EAWs and, thereby, could facilitate judicial cooperation (see para. 1).

At this junction, we should touch upon a relevant side-issue. Given the limitation of legal aid to *prosecution*-cases (see para. 2), it should be stressed that both categories contain grounds for non-execution which relate or can relate to *execution*-cases. The rationale for that limitation – in execution-cases, the requested person already had the benefit of access to a lawyer in the criminal proceedings resulting in the final conviction (see para. 2) – does not take into account that even in execution-cases, some grounds for non-execution relate to possible events in the future. In an execution-case, the requested person could argue, *e.g.*, that in case of surrender he would be subjected to inhuman or degrading conditions of detention in the issuing MS. In this respect, the fact that the requested person had the benefit of access to a lawyer in the criminal proceedings leading to his conviction is completely irrelevant, whereas assistance by a lawyer in the issuing MS could be very pertinent to this defence against surrender (see above). Therefore, the rationale does not support a *blanket* exclusion of execution-cases.

Turning once again to the meaning of the expression "rights of requested persons under [FD] 2002/584/JHA", it remains to be determined whether that expression can have any relation to the substance of the criminal case in the issuing MS. In accordance with the principle of mutual recognition none of the grounds for non-execution or the conditions explicitly provided for in FD 2002/584/JHA, as well as none of the obstacles to execution of the EAW developed in the Court of Justice's case-law allow for a review of the merits of the case by the executing JA[48]. EAW proceedings do not involve the determination of a criminal

[48] Recital (22) of the Commission proposal for Directive 2013/48/EU stated – quite redundantly – that, because of the principle of mutual recognition, assisting the lawyer in the issuing MS should not entail a right to question the merits of the case. One could also point to the principle of mutual trust as a foundation of the prohibition to review the merits of the case: ECJ, judgment of 9 September 2015, *Bohez*, C-4/14, ECLI:EU:C:2015:563, §43-44.

charge[49]. That determination will take place or has already taken place in the issuing MS. Accordingly, the EAW form, which is intended to provide "the minimum official information required to enable [the executing JAs] to give effect to the [EAW] swiftly by adopting their decision on the surrender as a matter of urgency"[50], does not refer to evidence that the requested person committed the offence nor to facts or information which would support a reasonable suspicion of his having committed the offence. Under Art. 6 of the Charter, which in the context of EAW proceedings corresponds to Art. 5(1)(f) of the ECHR (see Art. 52(3) of the Charter)[51], a reasonable suspicion is not necessary for arrest and detention on the basis of an EAW.[52] It follows that the merits of the case should not be the subject of information and advice provided by the lawyer in the issuing MS.

To recapitulate: the assistance of a lawyer in the issuing MS can have added value for the effective exercise of the right to consent to surrender and to renounce entitlement to the speciality rule, for invoking a small number of grounds for non-execution and conditions explicitly mentioned in FD 2002/584/JHA and for invoking the fundamental rights-based grounds for non-execution developed by the Court of Justice. For those three – limited – categories, information and advice provided by a lawyer in the issuing MS can facilitate judicial cooperation by promoting "informed" consent to surrender, by improving the quality of the decision on the execution of the EAW and by reducing the incidence of EAWs which were issued wrongly.

---

[49] ECtHR, *supra* footnote 5.

[50] ECJ, judgment of 6 December 2018, *IK*, C-551/18 PPU, ECLI:EU:C:2018:991, §50.

[51] ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, §56-58.

[52] It is settled case-law that Art. 5(1)(c) of the ECHR – referring to a reasonable suspicion of having committed an offence – does not apply to detention with a view to extradition: see, *e.g.*, ECtHR, decision of 26 May 2005, *Parlanti v. Germany*, ECLI:CE:ECHR:2005:0526DEC004509704 and ECtHR, judgment of 24 July 2014, *Čalovskis v. Latvia,* ECLI:CE:ECHR:2014:0724JUD002220513, §180. Art. 5(1)(f) does not require a *prima facie* case before a requested person can be detained with a view to extradition: ECtHR, decision of 6 July 2010, *Babar Ahmad and Others v. the United Kingdom*, ECLI:CE:ECHR:2010:0706DEC002402707, §180.

5. THE DUTY TO OBSERVE THE TIME-LIMITS

Art. 10(6) of Directive 2013/48/EU takes great pains to stress the importance of the time-limits set out in FD 2002/584/JHA, by referring to the duty to observe these time-limits twice (the right to appoint a lawyer in the issuing MS "is without prejudice to the time-limits set out in [FD] 2002/584/JHA or the obligation on the executing [JA] to decide, within those time-limits and the conditions defined under that [FD] (…)").

Art. 17 of FD 2002/584/JHA sets out the time-limits for the decision to execute the EAW. They express the object of FD 2002/584/JHA of accelerating judicial cooperation in criminal matters[53]. If the requested person does not consent to his surrender, the final decision on the execution of the EAW must be taken within 60 days from the time of his arrest (Art. 17(3)). In "specific cases" where the EAW cannot be executed within that time-limit, it may be extended with a further 30 days (Art. 17(4)). Only in "exceptional circumstances" is it allowed to exceed those 90 days (Art. 17(7)). To date, the Court of Justice has only recognized that such exceptional circumstances are present when the executing JA must assess whether the requested person, if surrendered, will suffer inhuman or degrading treatment (Art. 4 of the Charter) or a breach of his right to an independent tribunal (Art. 47(2) of the Charter) in the issuing MS, or when the executing JA decides to make a reference to the Court of Justice for a preliminary ruling[54].

The references to the time-limits convey a double message. Exercising the right to appoint a lawyer in the issuing MS must not prolong the EAW proceedings[55]. In other words, exercising that right does not justify exceeding either the limit of 60 days or that of 90 days. Furthermore, exercising that right, in itself, cannot be a reason not to execute the EAW, because the grounds for non-execution are exhaustive and, beyond these, limitations on the principles of mutual trust and mutual recognition may be only be

[53] ECJ, judgment of 30 May 2013, *Jeremy F.*, C-168/13 PPU, ECLI:EU:C:2013:358, §58.

[54] ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, §43.

[55] That, at least, is the opinion of four MSs: Austria: *1300 der Beilagen XXV. GP - Regierungsvorlage – Erläuterungen*, 17; Belgium: 54 2030/001, 26; Germany: *Bundestag Drucksache* 18/9534, 19; the Netherlands: *Kamerstukken II* 2014/15, 34157, 3, 57.

made in "exceptional circumstances"[56]. The obligation of the competent authorities to inform and to provide information *without undue delay*/*promptly*, together with the limited scope of review by the executing JA and the limited role of the lawyer in the issuing MS (see paras. 3 and 4), should ensure that the right to appoint a lawyer in the issuing MS can be exercised without exceeding the time-limits.

In this respect it is worrying that five MSs do not clearly provide for the obligation to provide information about that right without undue delay, that the legislation of seven MSs fails to reflect the requirement that the competent authority in the executing MS promptly informs the competent authority in the issuing MS of the requested person's wish to appoint a lawyer and that ten MSs did not transpose the latter authority's obligation to provide without undue delay the requested person with information to facilitate the appointment of a lawyer[57].

Moreover, in some MSs the competent authorities do not seem to provide information about the right to appoint a lawyer in the issuing MS at all[58]. This brings us to the issue of remedies in the event of a breach of the right to appoint a lawyer in the issuing MS.

6. THE RIGHT TO AN EFFECTIVE REMEDY

A breach of the right to appoint a lawyer in the issuing MS occurs when the competent authorities of either MS fail to live up to their obligations. According to Art. 12(1) of Directive 2013/48/EU, MSs must ensure that not only "suspects or accused persons in criminal proceedings" but also "requested persons in [EAW] proceedings" have an effective remedy

[56] ECJ, *supra* footnote 23: §41-43.

[57] *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, COM(2019) 560 final, 18.

[58] FRA, *supra* footnote 7: 65 (three out of the eight MSs involved in the research). However, one of those three MSs is Denmark, which is not bound by the directive.

under national law in the event of a breach of the rights under the directive. The interpretation of this provision presents quite a challenge as to the where and when of that remedy and as to its scope.

The most obvious and effective remedy would be to enable the competent authorities to live up to their obligations in order that the requested person can still exercise his right. In other words, to restore the requested person to the situation existing before his right was breached[59]. This would require a remedy in the *executing* MS *before he is surrendered*.

The wording of Art. 12(1) seems to indicate that the effective remedy for a breach of the right to appoint a lawyer in the issuing MS must indeed be available in the *executing* MS *during the EAW proceedings*. After all, once the requested person is surrendered to the issuing MS, he no longer is a requested person in EAW proceedings. One could also cite Art. 2(2) in support of this reading: according to this provision, the directive applies to "persons subject to [EAW] proceedings (requested persons) from the time of their arrest in the executing [MS] in accordance with Article 10"[60].

If this interpretation is correct, does it follow that the remedy must respect the time-limits? That is the opinion of both legislator and executing JA in at least one MS, the Netherlands: because of the duty to observe the time-limits, the directive does not attach any consequence to a failure to act by the competent authority in the issuing MS and such a failure does not justify exceeding the time-limits[61]. However, in itself the wording of Art. 12(1) is unconditional (in that it does not refer to the time-limits), clear and precise. Consequently, it seems that the provision should be interpreted as *precluding* any national measure which *impedes* the exercise of the effective remedy[62]. This interpretation would not leave any room for the time-limits as obstacles to a remedy.

---

[59] Compare Anneli Soo (2017), *supra* footnote 11: 31-51, with respect to suspects or accused persons.

[60] Compare Anneli Soo (2016), *supra* footnote 11: 297, concerning suspects or accused persons.

[61] *Kamerstukken II* 2015/16, 34157, 6, 37; (*e.g.*) District Court of Amsterdam, judgment of 8 August 2017, ECLI:NL:RBAMS:2017:5781.

[62] ECJ, judgment of 19 September 2019, *Rayonna Prokuratura Lom*, C-467/18, ECLI:EU:C:2019:765, §57-58, with regard to *suspects and accused persons*.

On the other hand, one could argue that when it comes to *requested persons*, Art. 12(1) should not be interpreted in isolation from the EAW regime established by FD 2002/584/JHA. Because the "entire surrender procedure between [MSs] provided for by [FD] 2002/584/JHA is (…), in accordance with that decision, carried out under judicial supervision", the provisions of FD 2002/584/JHA already provide for an effective remedy as required by Art. 47(1) of the Charter[63]. It would follow that the requested person can complain to the executing JA about a breach of his rights[64]. As we have seen, the proceedings before that authority must comply with the time-limits. If the executing MS provides for a *separate* effective remedy with suspensive effect against the decision to execute the EAW, then that remedy must equally respect those time-limits[65]. It would seem inconsistent if an effective remedy for a breach of the right to appoint a lawyer in the issuing MS would not have to respect them.

If we accept that interpretation of Art. 12(1), we still have to square the impediment to providing appropriate redress where this would entail non-observance of the time-limits with the right to an effective remedy as guaranteed by Art. 47(1) of the Charter. This impediment is a limitation on that right. Arguably, this limitation is justified because it fulfills the requirements of Art. 52(1) of the Charter. Concerning, in particular, the proportionality of the limitation, in general the disadvantages for the requested person do not seem disproportionate to the objective pursued, given the limited role of the lawyer in the issuing MS, the limited scope of review by the executing JA which does not extend to the merits of the case and the fact that the requested person has the right of access to a lawyer executing MS anyway. Moreover, because of the limited scope of review by the executing JA, its decision on the execution of the EAW can have no influence on the fairness of the criminal proceedings in the issuing MS[66].

---

[63] ECJ, *supra* footnote 53: §46-47.

[64] For this reason, the Dutch legislator and the German legislator were of the opinion that Art. 12(1) did not need transposition into national law: *Kamerstukken II* 2014/15, 3, 57; *Bundestag Drucksache* 18/9534, 19.

[65] ECJ, *supra* footnote 53: §65.

[66] To the contrary: Anagnostopoulos, *supra* footnote 11: 17-18, who refers to ECtHR, judgment of 27 October 2011, *Stojkovic v. France and Belgium*, ECLI:CE:ECHR:2011:-1027JUD002530308. In the context of EAW proceedings, the reference to that judgment

But a ban on affording redress even in cases where this would be possible without exceeding the maximum limit of 90 days or in cases where there are "exceptional circumstances" justifying non-observance of the time-limits anyway, would seem to be disproportionate.

These somewhat tentative conclusions on the meaning of Art. 12(1) are prompted by the fact that the Court of Justice emphasizes the *primary* responsibility of the *issuing* MS for observing the rights of the requested person and the opportunity to challenge the validity of his detention within the legal system of *that* MS *after* surrender[67]. Furthermore, the Court of Justice accepts that effective judicial protection against the decision to issue an EAW may *also* be given *after* surrender[68]. Therefore, notwithstanding the wording of Art. 12(1), another possible reading of Art. 12(1) is that it allows for a remedy for a breach of the right to appoint a lawyer in the issuing MS – or, at least, for a breach originating in a failure on the issuing MS's part – to be given in the issuing MS after surrender.

7. CONCLUSIONS AND FINAL CONSIDERATIONS

According to the Commission, overall the directive has provided the EU added value[69]. With respect to the right to appoint a lawyer in the issuing MS, this statement should be qualified. Although the literature has hailed the introduction of that right as a major development[70], it can only contribute to its objective of facilitating judicial cooperation to a rather limited extent, because of the limited role of the lawyer, the limited scope of review in the executing MS and the duty to observe the time-limits (see paras. 3-5). This potential added value, such as it is, partly depends on

is somewhat puzzling, because, unlike in mutual assistance proceedings such as those at issue in the *Stojkovic* judgment, in EAW proceedings the requested person is not *questioned* by the executing JA *as to the merits of the case*.

[67] ECJ, *supra* footnote 50: §66-67.

[68] ECJ, order of 21 January 2020, *MN*, C-813/19 PPU, ECLI:EU:C:2020:31, §52.

[69] Commission, *supra* footnote 57: 20.

[70] Bachmaier Winter, *supra* footnote 11: 123 ("an important progress"); Bargis, *supra* footnote 17: 345 ("innovating"); Jimeno-Bulnes, *supra* footnote 11: 66 ("an important novelty").

having access to the case-file in the issuing MS which in prosecution-cases, at best, is not automatic and, at worst, is only possible after surrender (see para. 3). Moreover, the competent authorities of both MSs are only required to do the bare minimum to help the requested person to exercise his right (see para. 2). A major practical impediment is the limited right to legal aid. Although the rationale for not providing legal aid in execution-cases (see para. 2) certainly fits in with the Court of Justice's case-law that the executing JA may assume that a *convicted* requested person already benefitted from all the guarantees appropriate for a trial, in particular fundamental rights[71], it does not apply when the requested person wants to argue a *future* violation of a fundamental right. In such cases, at least, the distinction between prosecution and execution-EAWs does not seem justified (see para. 4).

To be sure, as recital (12) of the preamble to Directive 2013/48/EU reminds us, conferring the right to appoint a lawyer in the issuing MS on the requested person promotes the application of his fundamental right to fair EAW proceedings under Art. 47(2) of the Charter (see para. 1). No one would deny that promoting the fairness of EAW proceedings is an important goal in itself. However, the relevant provisions of Directive 2013/48/EU have a strong utilitarian approach: their aim is to facilitate judicial cooperation. By linking the right to appoint a lawyer in the issuing MS exclusively to the effective exercise of the "rights of requested persons under [FD] 2002/584/JHA", Directive 2013/48/EU rather overestimates the relevance of assistance by a lawyer in the issuing MS for reaching that aim.

Of course, as limited as it may be, the effectiveness of the right to appoint a lawyer in the issuing MS in facilitating judicial cooperation should not be compounded even further – as it is now – by non-implementation of the relevant provisions and non-application of the national implementing legislating (see para. 5). Uncertainty concerning the scope of the right to an effective remedy can have an additional negative effect (see para. 6).

In practice, the right to appoint a lawyer in the issuing MS seems more relevant because of its *unintended* corollary: through the lawyer in the issuing MS the requested person can challenge the EAW and the national

[71] ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, §36.

judicial decision before the courts of that MS or try to resolve the EAW in a more informal way, while he is still in the executing MS (see para. 3).

This important conclusion leads us to some final considerations. A decision not to execute the EAW does not invalidate the national judicial decision on which the EAW is based, does not bar further proceedings in the issuing MS and, in principle, does not preclude maintaining the EAW[72] or issuing a new EAW for the same acts against the same requested person[73]. From his perspective, it makes perfect sense to invest equal, if not more energy in challenging the EAW and the national judicial decision in the issuing MS before the decision on the execution of the EAW is taken.

Should Directive 2013/48/EU be brought into line with practice by extending the role of the lawyer in the issuing MS to exercising legal avenues in the issuing MS before the requested person is surrendered? Arguably, this could have a positive effect on mutual trust and thus facilitate judicial cooperation. An unsuccessful challenge would all the more assure the executing JA of the soundness of the EAW, a successful challenge would accentuate the effectiveness of judicial protection in the issuing MS and would obviate the need to decide on the execution of an EAW which should not have been issued. This would also be in keeping with the Court of Justice's case-law which stresses the requested person's entitlement to effective judicial protection in the issuing MS. The problem, however, would be squaring an extension of the role with the duty to observe the time-limits.

In the end, the best way to avoid the execution of EAWs which should not have been issued is to see that such EAWs are not issued at all, but that would require legal and practical measures which lay outside the scope of this article.

[72] Commission, *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017 C 335/41.

[73] ECJ, judgment of 25 July 2018, *AY (Arrest warrant – witness)*, C-268/17, ECLI:EU:C:2018:602, §36. But it cannot be excluded that the duty to respect fundamental rights requires the issuing JA to withdraw an EAW: §28-29.

REFERENCES

Anagnostopoulos, Ilias, 2014, "The Right of Access to a Lawyer in Europe: A Long Road Ahead?", European Criminal Law Review, 1: 3-18.

Armenta Deu, Teresa, Urban, Lisa, 2018, "The Right of Access to a Lawyer under Directive 2013/48/EU", In: Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies, ed. Silvia Allegrezza, Valentina Covolo, 65-79, Milano: Wolters Kluwer.

Bachmaier Winter, Lorena, 2015, "The EU Directive on the Right to Access to a Lawyer: A Critical Assessment", In: Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, ed. Stefano Ruggeri, 111-131, Cham: Springer.

Bargis, Martha, 2018, "Personal Freedom and Surrender", In: Handbook of European Criminal Procedure, ed. Roberto E. Kostoris, 297-352, Cham: Springer.

Commission, 2017, Handbook on how to issue and execute a European arrest warrant, *OJ* 2017 C 335/1.

Commission, 2019, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, COM(2019) 560 final.

Cras, Steven, 2014, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings", *eucrim* 1: 32-44.

Cras, Steven, 2017, "The Directive on the Right to Legal Aid in Criminal and EAW Proceedings. Genesis and Description of the Sixth Instrument of the 2009 Roadmap", *eucrim* 1: 34-45.

Đurđević, Zlata, 2016, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order", In: ed. Zlata Đurđević, Elizabeta Ivičević Karas, European Criminal Procedure Law in Service of the Protection of European Union Financial Interests: State of Play and Challenges, 9-23, Zagreb: Croatian Association of European Criminal Law.

EU Fundamental Rights Agency, 2019, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, Luxembourg: Publications Office of the European Union.

Fair Trials, 2018, Beyond Surrender. Putting human rights at the heart of the European Arrest Warrant. 2nd May, 2020, https://www.fairtrials.org/publication/beyond-surrender.

Jimeno-Bulnes, Mar, 2019, "The Right of Access to a Lawyer in the European Union: Directive 2013/48/EU and Its Implementation in Spain", In: EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office, ed. Tommasso Rafaraci, Rosanna Belfiore, 57-70, Cham: Springer.

Soo, Anneli, 2016, "Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October2013) and its Output in National Legislation", European Criminal Law Review, 3: 284-307.

Soo, Anneli, 2017, "Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel", European Journal of Crime, Criminal Law and Criminal Justice, 1: 31-51.

Symeonidou-Kastanidou, Elisavet, 2015, "The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation", European Criminal Law Review 5: 68-85.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 35-54
DOI: https://doi.org/10.31743/recl.8673

"DUAL LEGAL REPRESENTATION" OF A REQUESTED PERSON IN EUROPEAN ARREST WARRANT PROCEEDINGS – REMARKS FROM THE POLISH PERSPECTIVE

*Małgorzata Wąsek-Wiaderek**

ABSTRACT

This paper focuses on the question whether Polish law offers an adequate legal framework for dual representation, as required by Article 10 of the EU Directive 2013/48 and Article 5 of EU Directive 2016/1919. It explores both perspectives: dual legal representation in proceedings concerning execution of EAW conducted by Polish authorities as well as the right to appoint a lawyer in Poland by the requested person in a case where the EAW is issued by the Polish authorities. The scope of the ensuing analysis is confined to EAWs issued for prosecution of the requested person. Although both above mentioned provisions of EU Directives have not been transposed into Polish national law, their direct application may ensure full exercise of the requested person's right to dual representation. Thanks to the fact that, in Poland, the requested person is treated as a quasi-defendant in criminal proceedings, the Code of Criminal Procedure offers a legal framework allowing for appointment of a defence lawyer in Poland as the executing state.

Key words: European arrest warrant, right to defence, "dual representation", Directive 2013/48

* Professor at the John Paul II Catholic University of Lublin, Chair of Department of Criminal Procedure, Al. Racławickie 14, Lublin, Poland; e-mail: malgorzata.wasek-wiaderek@kul.pl; https://orcid.org/0000-0001-9761-3177.

1. INTRODUCTION

In accordance with Article 10 para. 1 of the Directive 2013/48/EU of the European Parliament and the Council[1], the requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European Arrest Warrant. Further on, the same Article (in its para. 4) provides for the right of the requested person to appoint a lawyer in the issuing Member State. Thus, although with great resistance of the Member States[2], the EU Directive instituted the right to "dual legal representation" of the requested person, meaning representation in both interested states, in the proceedings concerning execution of the European Arrest Warrant.

This paper focuses on the question whether Polish law offers an adequate legal framework for dual representation, as required by Article 10 of Directive 2013/48 and Article 5 of Directive 2016/1919[3]. It explores both perspectives: dual representation in proceedings concerning execution of EAW, i.e. in the course of proceedings conducted by Polish authorities as executing judicial authorities (section 2 of the paper), as well as the right to appoint a lawyer in Poland by the requested person in a case where the EAW is issued by the Polish authorities (section 3 of the article). The scope of the ensuing analysis is confined to EAWs issued for prosecution of the requested person.

[1] Directive of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1-12, hereinafter referred to as "Directive 2013/48" or "the Directive on access to a lawyer".

[2] On negotiations concerning dual representation: Steven Cras, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings" Eucrim 1(2014): 42-43.

[3] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings, OJ L 297, 4.11.2016, 1-8.

2. DUAL REPRESENTATION OF THE REQUESTED PERSON IN THE PROCEEDINGS CONCERNING EXECUTION OF EAW IN POLAND

In the opinion of the Polish legislator, implementation of the Directive 2013/48 does not require amendments of the Polish Code of Criminal Procedure (hereinafter referred to as "the CCP") since the existing legal framework correctly reflects standards stemming from the Directive[4]. As will be argued in further considerations, this assumption is valid only in part.

Under Polish law, the requested person in the proceedings concerning execution of an EAW issued for the purpose of prosecution is treated in the same way as a defendant in ordinary criminal proceedings[5]. Regulations on these proceedings are incorporated into Part XIII of the CCP. Thus, the general part of the CCP (including its Article 6 on access to a lawyer) as well as rules on appointment of defence counsel to a defendant (Articles 78-81a) apply to proceedings conduced before the Polish procedural authorities acting as the executing judicial authorities. In order to implement Article 5 para. 1 of the Directive 2012/13/EU[6], a new provision was added to Article 607l of the CCP, providing a statutory basis for the Minister of Justice to promulgate the Ordinance on Letter of Rights in European Arrest Warrant Proceedings[7]. The instruction on rights given to the requested person includes the information on the right to contact a lawyer (an advocate or attorney – *adwokat* or *radca prawny* in the Polish legal professions nomenclature) and to hold a direct conversation with him without undue delay. It also provides for the right to assistance of a defence counsel chosen

[4] See footnote no. 1 to the CCP introduced by the Act of 10 January 2018; Journal of Laws od 2018, item 201.

[5] In the Polish literature, the requested person is referred to as the "quasi-defendant", i.e. "quasi-accused" (see: Piotr Hofmański, Elżbieta Sadzik, Kazimierz Zgryzek, Kodeks postępowania karnego. Komentarz, ed. Piotr Hofmański, vol. III, Warszawa: C.H. Beck, 2007, 630. It is common ground that he has the status of the party in the proceedings concerning execution of EAW.

[6] Directive of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, 1-10.

[7] Full name: Ordinance of the Minister of Justice of 11 June 2015 regulating the form of instruction on the rights of a person arrested upon the European Arrest Warrant, Journal of Laws of 2015, item 874, thereafter referred to as "the instruction" or "the letter of rights".

by the requested person and, if he proves lack of financial means to bear the costs of defence, the right to apply for publicly paid defence counsel appointed by a court. The letter of rights should be served on the requested person in a language understood by him. Although such a requirement is not expressly laid down in the CCP, the general rule of Article 72 § 1 of the CCP should apply respectively. Unfortunately, application of this requirement in practice is not fully satisfactory[8].

Article 607l of the CCP does not regulate when the letter of rights should be served on the requested person. However, the very title of the instruction referring to "a person arrested upon the European Arrest Warrant" clearly indicates that it should be formally presented to the requested person immediately upon arrest. Such interpretation is also consistent with Article 10 para. 1 of the Directive 2013/48. Thus, although the statutory basis for issuing the letter of rights is provided in Article 607l of the CCP concerning court proceedings, in practice the requested person shall receive the letter of rights from the police authorities, once he is arrested under a European Arrest Warrant[9].

As follows from Article 607k § 2 of the CCP, the requested person is first questioned by the relevant regional public prosecutor who is competent to receive EAWs issued in other Member States. This is not a "hearing by the executing judicial authority" within the meaning of Article 10 para. 2 (c) of the Directive 2013/48, because, in Poland, only regional courts are competent to act as executing judicial authorities[10]. However, since the right of access to a lawyer should be granted in such a time, and in

[8] Please see interviews with defendants arrested in Poland on the basis of the EAW: Fundamental Right Agency. Report "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings", September 2019; available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf, 61; hereinafter referred to as "the FRA Report".

[9] Please see: Tomasz Ostropolski, „Wystąpienie państwa członkowskiego Unii Europejskiej o przekazanie osoby ściganej na podstawie europejskiego nakazu aresztowania". In: Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK, Warszawa: C.H. Beck, 2016, 796; Sławomir Steinborn, Komentarz do art. 607l kodeksu postępowania karnego, Lex/el., 2015, point 18.

[10] See: Notification of Poland concerning the European arrest warrant, Document DG H III no. 9328/04, https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.

such a manner, as to enable the requested person to exercise his right effectively and, in any event, without undue delay following his deprivation of liberty (Article 10 para. 2 (b) of the Directive 2013/48), the requested person should have a real opportunity to appoint a defence counsel prior to appearing before the regional public prosecutor. In this connection, some thought should be given to the objective of this questioning. Already at this stage of the proceedings, the public prosecutor should inform the requested person of the content of the EAW and of the possibility of consenting to surrender or consenting to waiver of protection stemming from the "speciality" principle. The prosecutor will also be choosing the interim preventive measures to be applied to the requested person. Thus, this, as it were, initial questioning of the requested person by the public prosecutor may result in the latter's decision not to apply to the court for remand pending surrender and to impose less severe non-isolatory preventive measures. Bearing in mind the significance of this questioning for the further course of the proceedings, the opportunity to consult with a lawyer prior to it as well as a lawyer's participation in the questioning itself is of crucial importance for the requested person. Alas, in practice, the instruction in writing is sometimes served on the requested person only during the hearing by the regional court concerning his detention upon execution of the EAW, i.e. after the first interrogation by the public prosecutor[11].

The Polish law on early access to a lawyer for a suspect upon his arrest has been analysed from the perspective of its convergence with Directive 2013/48 in several publications[12]. The conclusions reached therein should

aspx?Id=328, [date of access: 18.052020]. It clearly states that "The executing judicial authority is the circuit court having territorial jurisdiction".

[11] FRA Report, 61.

[12] Please see: *inter alia*, Sławomir Steinborn, Małgorzata Wąsek-Wiaderek, "Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej", In: Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego, eds. Maria Rogacka-Rzewnicka, Hanna Gajewska-Kraczkowska, Beata Teresa Bieńkowska, Warsaw: Wolters Kluwer, 2015, 442-452; Alicja Klamczyńska, Tomasz Ostropolski, „Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy", Białostockie Studia Prawnicze 15(2014): 143-162; Kazimierz W. Ujazdowski, „Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka", Forum Prawnicze 4(2015): 41–58; Tomasz Tadeusz Koncewicz, Anna

be applied *mutatis mutandis* to the requested person. As is underlined in most of the above cited publications, in general, the legal framework regulating access to a lawyer for the arrested person at the police station seems to be adequate and consistent with the requirements of Directives 2013/48 and 2016/1919. What should be assessed as problematic, meanwhile, is the status of the lawyer providing assistance to the arrested person (a suspected person – please see footnote 24) who is not "a defence counsel" under Polish law. Moreover, there are no adequate regulations which would secure effective exercise of the suspect's right to a confidential consultation with defence counsel prior to the first interrogation. The former problem does not concern the requested person who, as mentioned above, has the same status as a defendant from the moment of his arrest in Poland under the EAW.

As already pointed out, the requested person is informed of his right to access to a lawyer and to legal aid. However, in-depth analysis of how this actually plays out provides grounds for arguing that, in practice, this access strongly depends on the good will of the procedural authorities and their readiness to act efficiently; this is especially true for requested persons who are unable to afford legal defence. In accordance with Article 245 § 1 of the CCP, an arrested person shall be granted access to a lawyer "without delay" (*niezwłocznie*). In order to exercise this right, the processing authority should present the requested person with a list of on-duty lawyers[13]. However, in accordance with the Ordinance on on-call duties of lawyers,

Podolska, „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9(2017): 13–14; Sławomir Steinborn, „Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", Europejski Przegląd Sądowy 1(2019): 38-45; Małgorzata Wąsek-Wiaderek, „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", Europejski Przegląd Sądowy 1(2019): 17-22; Barbara Grabowska-Moroz, „Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów", Przegląd Sądowy 3(2019): 45-57.

[13] Please see: § 8 of the Ordinance of the Minister of Justice issued on the basis of Article 517j § 2 of the CCP on the manner of ensuring assistance of a defence counsel to the defendant and the possibility of appointing one in accelerated proceedings, including the organization of on-call duties of lawyers (the Ordinance of 23 June 2015, Journal of Laws of 2015, item 920, hereinafter referred to as "the Ordinance on on-call duties of lawyers"). Pursuant to Article 245 § 2 of the CCP, this Ordinance as well as Article 517j § 1 of the CCP on access to a lawyer in accelerated proceedings shall apply *mutatis mutandis* to arrested persons.

such counsels are obligated to remain on standby not at the police station, but on the premises of the local district court; on an exceptional basis, they may be allowed to be on-duty in another location, in practice usually at their own office (§ 7 of the Ordinance). Seeing as the requested person should be questioned by the public prosecutor within 48 hours from the moment of his arrest, the chances for appointment of a defence counsel from the list of lawyers prior to this hearing are slim. This remains true even if one takes into account the opportunity offered by Polish law for defence counsel for a detainee to be appointed by another person (Article 83 § 1 of the CCP). It should be underlined that in general, under Polish law the requested person is not covered by mandatory defence exclusively due his participation in the EAW proceedings. Thus, unless the EAW is issued with reference to a child (a person under 18) or other specific grounds for mandatory defence occur[14], representation of a requested person by a defence counsel is not mandatory[15]. This means that the executing authorities are not obliged to arrange *ex officio* defence counsel for a requested person unless specific grounds for mandatory defence are revealed.

The situation of a requested person who is not able to afford costs of defence is even worse. Despite the latest amendments to Article 81a of the CCP providing for speedy consideration of a request for legal aid, the

[14] Article 79 of the CCP provides that a defendant must be assisted by defence counsel if: 1) he is under 18; 2) he is deaf, mute or blind; 3) there are reasons to doubt his sanity; 4) there is justified doubt whether the condition of his mental health allows him to participate in the proceedings or to conduct his defence in an independent and reasonable manner. In addition, the court may decide that services of a defence counsel are mandatory also due to other circumstances impeding the defence.

[15] The information on Polish law presented in the FRA Report on this issue is currently incorrect. FRA Report, 63 states "Across all Member States, legal representation is mandatory in EAW cases and is arranged by executing authorities unless defendants want to contact their own lawyer." Article 80 of the CCP which provided for mandatory defence of a detained accused in the proceedings conducted before a regional court was amended in 2015. This provision was seen as a legal basis for mandatory defence of a requested person, if he was deprived of liberty (see: Anna Demenko, Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej, Lex/el. 2013, para. 3.1.3. However, since 1 July 2015, the fact that the accused is deprived of liberty is not any more a ground for mandatory defence in the proceedings conducted before a regional court. Thus, currently Article 80 of the CCP does provide for mandatory defence of the requested person.

procedure of appointment of publicly funded defence counsel, which is based on verification of financial means (a means test), typically lasts a few days rather than a few hours. That said, it would be difficult to assess the current legal framework as being contrary to the requirements of Directive 2016/1919. Its Article 6 does not guarantee to the requested person a right to have publicly funded defence counsel appointed immediately after arrest. Under Article 6 para. 1 of this Directive, a decision whether to grant legal aid and on the assignment of a lawyer shall be made "without undue delay". By using such an vague term, the Directive leaves ample flexibility for the implementing Member States.

Although Article 10 para. 2 (b) of Directive 2013/48 grants the requested person a right to meet and to communicate with a lawyer, and such communication should be confidential, Polish law does not follow this requirement[16]. Confidentiality of communications between a defendant and a defence counsel is a rule. However, it may be subject to the following exceptions. Firstly, in exceptional cases justified by their particular circumstances, the arresting authority may decide that its representative / officer will be present during such a conversation (Article 245 § 1 of the CCP). Furthermore, also in exceptional circumstances, during the first 14 days of detention the public prosecutor may decide that he (or a person authorized by him) will be present during the meeting of a defendant and his defence counsel. Both regulations apply to the requested person and concern also communication by correspondence. In EAW proceed-

[16] Please see critical remarks on this issue: Alicja Klamczyńska, Tomasz Ostropolski, „Prawo…," 158–159; Andrzej Sakowicz, „Prawo podejrzanego tymczasowo aresztowanego do kontaktu z obrońcą (wybrane aspekty konstytucyjne i prawnomiędzynarodowe)", In: Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej, eds. Piotr Hofmański, Piotr Kardas, Paweł Wiliński, Warszawa: Wolters Kluwer, 2014, 494–499; Kazimierz W. Ujazdowski, „Dyrektywa...," 54. However, some authors argue that, since the Directive allows for temporal limitation of access to a lawyer, the exceptions to confidentiality of communications between a defendant and his defence counsel, which are also limited temporally, should be accepted by application of argumentation *a fortiori*. Please see Małgorzata Wąsek-Wiaderek, „Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka" In: System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego. Tom VI, ed. Cezary Kulesza, Warszawa: Wolters Kluwer, 2016, 592; Sławomir Steinborn, „Dostęp...," 44.

ings, unlike in an ordinary criminal case, it is difficult to find reasonable grounds for interference in the confidentiality of communications between the requested person and his defence counsel. Hence, in practice, requested persons more often complain about language barriers as obstacles to communication with lawyers than about imposition of statutory limits on confidentiality of such communications[17].

In accordance with Article 607l §§ 1 and 2 of the CCP, defence counsel and the public prosecutor have the right to participate in the hearing before the local regional court acting as executing judicial authority. Thus, the rights of the requested person indicated in Article 10 para. 2 (c) of the Directive 2013/48 are preserved by the CCP.

Polish law has not been amended in order to implement Article 10 paras. 4 and 5 of Directive 2013/48[18]. There is no specific statutory obligation to inform the requested person of his right to appoint a lawyer in the issuing Member State, neither does the law provide for a duty of the executing judicial authorities in Poland to promptly inform the competent authority in the issuing Member State of the requested person's wish to exercise this right[19]. This failure to implement Article 10 paras. 4 and 5 of the Directive is surprising – and incomprehensible. Implementation could be achieved simply by supplementing the Ordinance on Letter of Rights in European Arrest Warrant Proceedings. Despite this failure, executing judicial authorities in Poland are not free to neglect the obligation stemming from the Directive. Since the deadline for its transposition expired on 27 November 2016, from this day on Article 10 paras. 4 and 5 of the Directive on access to a lawyer shall be applied directly by Polish courts

[17] FRA Report, 64.

[18] As transpires form the Report of the Commission on transposition of the Directive 2013/48, Article 10 paras. 4 and 5 has not been implemented by many Member States. Please see Document COM(2019) 560 final of 26 September 2019, p. 18; also: TRAINAC final report. Assessment, good practices and recommendations on the right to interpretation and translation, the right o information and the right to access to a lawyer in criminal proceedings, 2016, 338-340.

[19] Barbara Grabowska-Moroz (ed.), *Prawo dostępu do obrońcy w świetle prawa europejskiego,* Warszawa, 2018, 44; http://www.hfhr.pl/wp-content/uploads/2018/05/Prawo--dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf.

and public prosecutors[20]. Thus, at least oral information should be provided to every requested person on his right to dual representation "without undue delay", i.e. not later than before the hearing concerning the execution of the EAW. This duty should be incumbent upon the public prosecutor interrogating the requested person before taking the case concerning execution of EAW before the local regional court. Information in writing could be provided immediately before the hearing of the requested person by judicial authorities. Article 607l § 1a of the CCP institutes the duty to notify the requested person on the date of this hearing and to serve on him the EAW along with its translation into a language understandable for him. Written information on the right to appoint a lawyer in the issuing Member State as well on the right to assistance stemming from Article 10 para. 5 of Directive 2013/48 may be served on the requested person together with the EAW.

Moreover, the obligation to provide such information in due time may also be inferred from the principle of loyalty defined in Article 16 § 1 of the CCP. Pursuant to this provision, procedural organs are obligated to instruct the parties to the proceedings of their rights, and any lack or inaccuracy of such instruction may not result in any adverse consequences to these parties. Article 10 para. 4 and 5 of the Directive indubitably institutes a clear and unequivocal duty to inform the requested person of his right to dual representation. Accordingly, this provision of the Directive may be treated as a substantive source of the right to dual representation, while Article 16 § 1 of the CCP – as a provision imposing a formal obligation to inform the requested person of his rights. At the same time, it merits emphasis that both provisions are imperfect in that neither the Directive nor the Code of Criminal Procedure offers an effective remedy for the requested person in case of failure to inform him about the right to appoint a lawyer in the issuing state[21]. This circumstance cannot be taken

[20] On direct application of directives, please see: judgment of the Court of Justice of 15 January 2014, C-176/12, Association de médiation sociale v. Union locale des syndicats CGT and others., EU:C:2014:2, para. 31; judgment of the Court of Justice of 15 May 2014, C-337/13, Almos Agrárkülkereskedelmi Kft v. Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága, EU:C:2014:328, para. 31.

[21] Article 12 of the Directive does not provide for a concrete and precise "remedy" for a violation of the right of access to a lawyer. It is drafted in quite general terms. See critically

as grounds for refusal to execute the EAW, since the Framework Decision on EAW sets out an exhaustive list of circumstances justifying mandatory or optional obstacles to surrender. As transpires from the FRA Report, persons arrested in Poland on the basis of an EAW are not informed about their right to appoint a defence counsel in the issuing Member State. Also, no assistance is granted in this regard.[22]

3. DUAL REPRESENTATION OF A REQUESTED PERSON IN POLAND AS THE ISSUING MEMBER STATE

Article 10 para. 4 of Directive 2013/48 defines the role of a lawyer appointed in the issuing Member State as very narrow. His task is "to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested person under Framework Decision 2002/584/JHA". Leaving aside all practical problems entailed in dual representation, such as language barriers or financial aspects of appointment of the defence counsel[23], further analysis will focus on the legal framework for conducting effective defence by a lawyer appointed in Poland as the issuing Member State.

Where the requested person wishes to have a lawyer in the issuing state, the judicial authorities of the executing Member State shall inform the competent authority in the issuing Member State. In reply, the Polish judicial authorities must, without delay, provide the requested person with information facilitating his appointment of a lawyer in Poland. Article 10 para. 5 of the Directive has not been implemented into Polish law. No provision imposing a duty to offer such information has been introduced into the CCP. Accordingly, Article 10 para. 5 of Directive 2013/48 shall be applied directly by the Polish judicial authorities. However, defining the scope of information which should be provided, and likewise the means

on this issue: Anneli Soo, "Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)", European Journal of Crime, Criminal Law and Criminal Justice 25(2017): 337–341.

[22] FRA Report, 65.

[23] FRA Report, 66.

of its transmission to the requested person, may cause some difficulties. If an EAW was issued for the purpose of prosecution at the pre-trial stage of criminal proceedings in Poland with respect to a person who has not yet been interrogated as a suspect[24], it seems justified to provide him with exactly the same information on the right to appoint a defence counsel as is given to a suspected person prior to his first interrogation as a suspect, in accordance with Article 300 § 1 of the CCP. Thus, the instruction forwarded to the requested person should contain information on the right to appoint a lawyer of his own choosing in Poland and, in a case of proven lack of financial means, also on the right to apply for appointment of publicly funded defence counsel. In the case of an EAW issued at the trial stage of the proceedings, a requested person who has the status of a defendant in Poland as the issuing state, is already aware of his rights provided by the CCP. Despite this fact, it is justified to provide such requested persons with the same information as is given to those who have not yet been interrogated as suspects in Poland before issuing the EAW.

Since the information provided should "facilitate" the requested person's appointment of a lawyer in the issuing state, it should also contain the list of lawyers offering advice in the region in which the criminal proceedings are conducted.

As already mentioned above, a defence counsel for a defendant being held in custody may be appointed also by "another person", of which he should be notified immediately. This opportunity could easily be used to safeguard the right of the requested person to appoint a lawyer in the issuing Member State. However, this could be done only "until a defendant who is deprived of liberty appoints a defence counsel" (Article 83 § 1 of the CCP). Thus, the crucial question is whether appointment of a defence counsel in the executing Member State shall be treated as an obstacle impeding application of Article 83 § 1 of the CCP in Poland as the issuing Member State. There are strong arguments supporting a negative answer

[24] With reference to a suspected person who is in hiding or absent from the country, drawing up a written decision to charge him with a criminal offence results in change of his status from "a suspected person" ("*osoba podejrzana*") to "a suspect" ("*podejrzany*" – Article 313 § 1 of the CCP). A decision on detention on remand and the EAW may be issued against such "suspect". For obvious reasons, such a suspect will not be instructed of his procedural rights in that he has not been interrogated prior to issue of the EAW.

to this question. The crucial point is appointment of a defence counsel by the requested person in Poland. In interpreting Article 83 § 1 of the CCP, one should take as a point of reference only the legal status and legal situation of the requested person in Poland. A different approach would bring unacceptable results: for example, a requested person represented in the executing Member State by three defence counsels would not be able to appoint one in Poland as the issuing Member State, since Article 77 of the CCP limits the number of lawyers to three. To summarize, it should be argued that "another person" – which, in practice, means "everybody" – may appoint a defence counsel for a requested person remaining in custody until he makes his own arrangements in this regard in Poland. Since Article 83 § 1 of the CCP considerably facilitates appointment of a defence counsel in Poland as the issuing Member State, the requested person should also be informed of the contents of this provision. Unfortunately, interviews with Polish lawyers conducted by the European Union Agency for Fundamental Rights indicate that no assistance facilitating appointment of a defence counsel in Poland as the issuing state is provided by the competent Polish authorities[25].

As already mentioned, the Directive provides for a very narrow role of the lawyer appointed in the issuing Member State, limited to providing a lawyer in the executing Member State with "information and advice". It is obvious that the term "information" should be understood widely as covering all circumstances which may be relevant for deciding on surrender. Thus, a lawyer may plead that the requested person will be exposed to a risk of inhuman or degrading treatment if surrendered[26] or cite other circumstances justifying refusal of surrender, whether rooted in the necessity of safeguarding the requested person's fundamental rights[27] or in inadmissibility of criminal proceedings against the requested person. In order to perform his duties, the defence counsel in the issuing state should have

[25] FRA Report, 65.

[26] For judicial authority to this effect, please see judgment of the Court of Justice of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, Araynosi and Căldăraru, ECLI:EU:C:2016:198; judgment of the Court of Justice of 15 October 2019, C-128/18, Dumitru-Tudor Dorobantu, ECLI:EU:C:2019:857.

[27] For judicial authority to this effect, please see judgment of the Court of Justice of 25 July 2018, C-216/18PPU, LM, ECLI:EU:C:2018:586.

access to the case file. If the defence counsel's powers of attorney are not restricted, he is authorized to act in the entire proceedings and is entitled to exercise all the rights provided in the CCP for counsel to a defendant in ordinary criminal proceedings[28]. Thus, a defence counsel appointed in Poland as the issuing state has the right to access the case file in accordance with Article 156 of the CCP. At the pre-trial stage of criminal proceedings, such access may be limited as warranted for ensuring the correct course of proceedings or protecting an important state interest.

Some doubts, however, may arise as to whether defence counsel appointed for the requested person in Poland as the issuing state is entitled to access to the case file under the special regime applicable in proceedings concerning requests for detention on remand. Article 156 § 5a of the CCP states that if, in the course of preparatory proceedings, the request for applying or extending detention on remand has been filed, the suspect and his defence counsel shall immediately receive access to the part of the case file containing the evidence attached to such request (except testimony of witnesses granted special protection under Article 250 § 2b of the CCP). Under this special regime, access to the case file cannot be refused due to the need of ensuring the correct course of proceedings or protecting an important state interest. Moreover, as transpires from Article 249a of the CCP, a decision on detention may rely on the circumstances established on the basis of evidence accessible to the defendant and to his defence counsel and on testimony of witnesses protected under Article 250 § 2b of the CCP. Without doubt, such evidence as should be accessible to the defence at the moment of issuing the detention order should have the same status also later on, during application of detention on remand. If a suspect does not have a defence counsel at the moment of imposing detention on remand, counsel appointed at a later stage of the preliminary proceedings should have unlimited access to the part of the case file which was taken

[28] This view seems to be supported by the latest judgement of the Court of Justice of 12 March 2020, C-659/18, VW, ECLI:EU:C:2020:201. The Court said that the exercise by a suspect or accused person of the right of access to a lawyer laid down by Directive 2013/48, does not depend on the person concerned appearing. Moreover, the fact that a suspect or accused person has failed to appear is not one of the reasons for derogating from the right of access to a lawyer set out exhaustively in that directive.

as the basis for the decision on detention on remand[29]. It could be argued that, because of absence of the requested person in Poland, this special regime should not be applied since detention on remand, once imposed and once it becomes a basis for issuing the EAW, is not prolonged or executed anymore in Poland until surrender. This argument, however, must be rejected. The request for applying detention on remand was submitted to the court and was accepted. Although the decision on detention on remand is not executed in Poland, the objective fact is that the suspect is taken into custody in the executing Member State because the EAW was issued by the Polish authorities. Thus, in the case of an EAW issued at the investigative stage of the proceedings, defence counsel appointed in Poland as the issuing Member State within a "dual representation" framework should have access to the case file as provided for in Article 156 § 5a of the CCP.

Some doubts have been raised in the literature as to whether access to evidence in accordance with Article 156 § 5a of the CCP extends also to a right to make copies or photocopies of the case files. An affirmative answer to this question would be of crucial importance for effective dual representation. Since Article 156 § 5a of the CCP does not regulate this issue at all, the general rule of Article 156 § 5 of the CCP should apply, which would mean that the defence lawyer should request from the public prosecutor an order authorizing him to make copies of the case file. The aim of such authorization is not only to record access to, and use of, the case file, but also to supervise the scope of access to the case file. Some authors argue that the public prosecutor may not refuse a request for copying the part of the case file which is accessible in accordance with Article 156 § 5a of the CCP[30], but this view is not commonly shared in the doctrine. The prevailing opinion is that the public prosecutor may deny authorization for copying also this part of the case file on the basis of the general provisions of Article 156 § 5 of the CCP[31]. As defence lawyers observe in

[29] Please see Sławomir Steinborn, Komentarz do art. 156 Kodeksu postępowania karnego, LEX/el., 2016, point 31; Andrzej Mucha Joanna Kogut, "Udostępnienie akt postępowania przygotowawczego na podstawie art. 156 § 5a k.p.k. a obowiązek wyrażenia zgody na sporządzenie odpisów, kopii lub fotokopii akt", Palestra 10(2016): 48.

[30] See: Andrzej Mucha Joanna Kogut, „Udostępnianie akt...," 48.

[31] Please see, for instance, Andrzej Sakowicz, „Komentarz do art. 156 kodeksu postepowania karnego". In: Kodeks postępowania karnego. Komentarz, ed. Andrzej Sakowicz,

their work, such an interpretation is also applied in practice. However, a case of refusal of authorization by the public prosecutor may be subject to judicial control in that, under Article 159 of the CCP, parties who were denied access to the files of preparatory proceedings may appeal this decision before the court. It is quite correctly emphasised that, for the purpose of judicial control, the concept of "access to the files" should include also the right to make copies or photocopies of such files[32].

A separate problem which would require in-depth reflection is the question of legal aid for the requested person in Poland as the issuing Member State. It seems that there are no formal obstacles for appointing publicly funded defence counsel for the requested person upon his duly justified motion transmitted to the Polish judicial authorities by the judicial authorities of the executing Member State. In accordance with Article 5 para. 2 of Directive 2016/1919, the issuing Member State shall ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State "have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice". Since this provision has not been transposed into Polish law, it may cause some doubts whether an *ex officio* defence counsel should be appointed in Poland to a requested person who exercises his right to legal assistance in another (executing) state. However, failure to transpose the Directive in this regard cannot deprive a requested person of the rights guaranteed therein. Thus, Article 5 para. 2 of Directive 2016/1919 should be applied directly by the Polish judicial authorities. Moreover, a requested person may rely directly on this provision in his request for legal aid in Poland as the issuing state.

Warszawa: C.H. Beck, 2018, 455; Michał Kurowski, „Komentarz do art. 156 Kodeksu postępowania karnego", In: Kodeks postepowania karnego. Komentarz, ed. Dariusz Świecki, Lex/el. 2019, point 23.

[32] See: Jerzy Skorupka, „Komentarz do art. 159 Kodeksu postępowania karnego", In: Kodeks postępowania karnego. Tom I. Komentarz do art. 1-166, ed. Ryszard A. Stefański, Stanisław Zabłocki, Warszawa: Wolters Kluwer 2017, 1254; See also contrary view: Tomasz Grzegorczyk, Kodeks postępowania karnego. Komentarz, Warsaw: Lex, 2014, 545-546.

Request for appointment of publicly funded defence counsel should include evidence attesting to the lack of financial means to cover costs of defence counsel by the requested person. Moreover, the scope of authorization given by the court in Poland as the issuing state may be limited to "providing information and advice" to the defence counsel acting in the executing state. Such an application for aid shall be considered by the judicial authority indicated in accordance with the general rules. So, if the application concerns a requested person who has the status of a suspect in Poland, it should be examined by the president of the court competent to hear the case or by a court official (*referendarz*) of such court (Article 81 § 1 of the CCP).

4. CONCLUSIONS

Since Article 10 paras. 4 and 5 of Directive 2013/48 and Article 5 para. 2 of Directive 2016/1919 have not been transposed into Polish national law, only direct application of these provisions may ensure full exercise of the requested person's right to dual legal representation. On the other hand, thanks to the fact that, in Poland, the requested person is treated as a species of quasi-defendant in criminal proceedings, the Code of Criminal Procedure, in particular Articles 6 and 78-81a of the CCP, offer a legal framework allowing for appointment of defence lawyer in Poland as the executing state. Furthermore, the rules concerning access to the case file at the preparatory stage of the proceedings may be interpreted as allowing the defence lawyer acting in Poland as the issuing state to fulfil his obligation stemming from the need of dual representation. To summarize, it would not be an exaggeration to say that practical obstacles, such as the language barrier, may hinder the effective implementation of the concept of dual representation in practice more than the lack of appropriate legal regulations.

REFERENCES

Cras Steven. 2014. "The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings" Eucrim 1: 42-43.

Demenko Anna, Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej, Lex 2013.

Fundamental Right Agency. Report "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings", September 2019; https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf.

Grabowska-Moroz Barbara (ed.), Prawo dostępu do obrońcy w świetle prawa europejskiego, Warszawa 2018: http://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf.

Grabowska-Moroz Barbara. 2019. „Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów" Przegląd Sądowy 3: 45-57.

Grzegorczyk Tomasz, 2014. Kodeks postępowania karnego. Komentarz. 545=546, Warszawa: LEX.

Hofmański Piotr, Elżbieta Sadzik, Kazimierz Zgryzek, 2007. Kodeks postępowania karnego. Komentarz. ed. Piotr Hofmański, vol. III, Warszawa: C.H. Beck.

Klamczyńska, Alicja, Tomasz Ostropolski. 2014. „Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy" Białostockie Studia Prawnicze 15: 143-162.

Koncewicz Tomasz, Tadeusz, Anna Podolska. 2017. „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9: 13–14.

Kurowski Michał. 2019. "Komentarz do art. 156 Kodeksu postępowania karnego". In: Kodeks postepowania karnego. Komentarz, ed. Dariusz Świecki, point 23. Lex/el.

Mucha, Andrzej, Joanna Kogut. 2016. „Udostępnienie akt postępowania przygotowawczego na podstawie art. 156 § 5a k.p.k. a obowiązek wyrażenia zgody na sporządzenie odpisów" Palestra 10: 42-48.

Ostropolski, Tomasz. 2016. „Wystąpienie państwa członkowskiego Unii Europejskiej o przekazanie osoby ściganej na podstawie europejskiego nakazu aresztowania". In: Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK, 796. Warszawa: C.H. Beck.

Report of the Commission on transposition of the Directive 2013/48, Document COM(2019) 560 final of 26 September 2019: https://ec.europa.eu/info/sites/info/files/implementation_report_on_the_eu_directive_on_access_to_a_lawyer.pdf.

Sakowicz Andrzej. 2018. „Komentarz do art. 156 kodeksu postepowania karnego". In: Kodeks postępowania karnego. Komentarz, ed. Andrzej Sakowicz, 455. Warszawa: C.H. Beck.

Sakowicz, Andrzej. 2014. „Prawo podejrzanego tymczasowo aresztowanego do kontaktu z obrońcą (wybrane aspekty konstytucyjne i prawnomiędzynarodowe)". In: Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej, eds. Piotr Hofmański, Piotr Kardas, Paweł Wiliński, 494-499. Warszawa: Wolters Kluwer.

Skorupka Jerzy. 2017. "Komentarz do art. 159 Kodeksu postępowania karnego", In: Kodeks postępowania karnego. Tom I. Komentarz do art. 1-166, ed. Ryszard A. Stefański, Stanisław Zabłocki, 1284. Warszawa: Wolters Kluwer Polska.

Soo Anneli. 2017, "Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)", European Journal of Crime, Criminal Law and Criminal Justice 25: 337–341.

Steinborn Sławomir. 2019, „Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda" Europejski Przegląd Sądowy 1: 38-45.

Steinborn, Sławomir, Małgorzata Wąsek-Wiaderek. 2015. "Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej". In: Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego, eds. Maria Rogacka-Rzewnicka, Hanna Gajewska-Kraczkowska, Beata Teresa Bieńkowska, 442-452. Warszawa: Wolters Kluwer.

Steinborn, Sławomir. 2015. Komentarz do art. 156 Kodeksu postępowania karnego, point 31, Lex/el.

Steinborn, Sławomir. 2015. Komentarz do art. 607l kodeksu postępowania karnego, point 18, Lex/el.

TRAINAC final report. Assessment, good practices and recommendations on the right to interpretation and translation, the right o information and the right to access to a lawyer in criminal proceedings, 2016, 338-340. http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf; https://ec.europa.eu/info/sites/info/files/implementation_report_on_the_eu_directive_on _access_to_a_lawyer.pdf.

Ujazdowski Kazimierz W. 2015. „Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka" Forum Prawnicze 4: 41–58.

Wąsek-Wiaderek Małgorzata. 2019. „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej" Europejski Przegląd Sądowy 1: 17-22.

Wąsek-Wiaderek, Małgorzata. 2016. „Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka" In: System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego. Tom VI, ed. Cezary Kulesza, 592. Warsaw: Wolters Kluwer.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 55-80
DOI: https://doi.org/10.31743/recl.6155

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 PROCEEDINGS[1]

*Andrzej Sakowicz**

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

* Andrzej Sakowicz, Professor, Department of Criminal Proceeding, Faculty of Law of the University of Biaystok; e-mail: sakowicz@uwb.edu.pl; ORCID ID: 0000-0001-6599-4876.

[1] The current article is financed by the National Science Center as a part of research project no. 2013/11/B/HS5/04119, entitled Standard of protection for the right to silence in the criminal process. Publikacja sfinansowana ze środków Narodowego Centrum Nauki w ramach projektu badawczego Nr 2013/11/B/HS5/04119, zatytułowanego "Standard ochrony prawa do milczenia w procesie karnym".

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 authorities[4].

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, January20, 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, January20, 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.

[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 proceedings[6]. 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 statements[7]. 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 silent[8]. 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 expression[9], 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 passivity[10], and serves to protect human dignity[11]. 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 guilty[12]. It is also beyond dispute that the right to silence is also closely linked to the principle of presumption of innocence[13]. 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 persons[14], 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+PDF+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 verdict[15]. 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 standard[16].

---

[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 Condron 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 right[17]. 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 sentencing[18].

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 Condron v the United Kingdom, § 56, January 20, 2020 http://hudoc.echr.coe.int/eng?i=001-58798; Judgment of the ECtHR delivered on8 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?", Eucrim 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 proceedings[20]. In this respect,

[19] Stijn Lamberigts, "The Directive on the Presumption of Innocence A Missed opportunity for Legal Persons?", Eucrim 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 do 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 disregarded[21]. 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 a 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-incrimination[23]. 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 silence[24].

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 Lópe, "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 defense[26]. 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 penalty[27]. 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 is[28].

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 true[30].

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 suspect[31], the accused[32], and the detained person in light of Article 244 (1) of the Code of Criminal Procedure. The problem is with the suspected person[33]: 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 person[34], 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 process[35]. Conse-

[34] Cf.: Włodzimierz Wróbel, Konstytucyjne prawo do obrony w perspektywie prawa karnego materialnego [Consitutional 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 offense. 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 her[36]. 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 explanation[38], and may not be used to put pressure on the defendant to admit to committing the offence or to provide an explanation[39].

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 1466/07, 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 matter[41]." 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 liability[42]." 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 residence[44]. 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 be 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 answers[45]. 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 Lugen in Strafverfahren", Juristische Schulung 1966, Heft 5, 176; Klaus Rogall, Der Beschuldigte als Beweismittel gegen sich selbst, Berlin, Duncker & Humbolt, 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 measures[46].

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 proces], 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. B 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.

REFERENCES

Aselmann Maike. 2004. Die Selbstbelastungs- und Verteidigungsfreiheitm, Frankfurt am Main, Peter Lang.

Berger Mark.2007. "Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence", European Human Rights Law Review 5:515-535.

Billing M.W. Fenella. 2016. The Right to Silence in Transnational Criminal Proceedings Comparative Law Perspectives, Springer.

Błoński Michał. 2011. Wyjaśnienia oskarżonego w polskim procesie karnym [Explanations of a defendant in the Polish criminal process], Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Chankowska Jolanta. 2005. „O prawie oskarżonego do milczenia słów kilka [A few words on the right of the defendant to remain silent]", Palestra 5–6:125-135.

Cras Steven, Erbežnik Anže. 2016. "The Directive on the Presumption of Innocence and the Right to Be Present at Trial", Eucrim 1:25-36.

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

Emmerson Ben, Ashworth Andrew, Macdonald Alison, L-T Choo Andrew, Summers Mark. 2012. Human Rights and Criminal Justice, London: Sweet & Maxwell.

Eser Albin. 1974. „Der Schulz vor Selbstbezeichnung im deutschen Strafprozessrecht". In: Deutsche strafrechtliche Landesreferate zum IX. Internationalem Kongreß für Rechtsvergleichung Teheran 1974, ed. Hans-Heinrich Jescheck, 136-171, Berlin: De Gruyter

Goss Ryan. 2016. Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights, Oxford, Portland, Oregon: Hart Publishing.

Harris David J., O'Boyle Michael, Bates P. Ed, Buckley Carla (ed.). 2014. Law of the European Convention on Human Rights, Oxford: Oxford University Press.

Hofmański Piotr, Wróbel Andrzej. 2010. 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, 405. Warszawa: C. H. Beck.

Nickl Rolf. 1978., Das Schweigen des Beschuldigten und seine Bedeutung für die Beweiswürdigung, München: *Universität Dissertation*.

Lamberigts Stijn. 2016. "The Directive on the Presumption of Innocence A Missed opportunity for Legal Persons?", Eucrim 1: 36-42.

Lópe Luisa Villamarín María. 2017. "The presumption of innocence in Directive 2016/343/EU of 9 March 2016", ERA Forum 18: 335-353.

Marszał Kazimierz, Stachowiak Stanisław, Zgryzek Kazimierz. 2002. Proces karny [Criminal process], Katowice: Volumen.

O'Boyle Michael. 2000. "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 a la mémoire de Rolv Ryssdal, eds. Paul Mahoney, Franz Matscher, Herbert Petzold, Luzius Wildhaber, 1021-1038. Köln-Berlin-Bonn-München: ,Carl Heymanns Verlag KG.

Rogall Klaus. 1977. Der Beschuldigte als Beweismittel gegen sich selbst, Berlin, Duncker & Humbolt.

Rüping Hinrich. 1974. „Zur Mitwirkungspflicht des Beschuldigten und Angeklagten", Juristische Rundschau 1974, 4:135-140.

Sakowicz, Andrzej. 2018. "The right to remain silent on the Court's case-law - European Court of Human Rights", Ius Novum 2:120-136. DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz.

Sakowicz Andrzej. 2019. Prawo do milczenia w polskim procesie karnym [The right to silence in the Polish criminal proces], Białystok: Temida 2, 2019.

Sakowicz Andrzej. 2014. "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, 195-208. Warszawa: C. H. Beck.

Seebode Manfred. 1970. „Schweigen des Beschuldigten zur Person", Monatsschrift für Deutsches Recht 3:185-189.

Schabas A., William. 2017. The European Convention on Human Rights. A commentary, Oxford: Oxford University Press.

Trechsel Stefan. 2002. Human Rights in Criminal Proceedings, Oxford: Oxford University Press.

Weigend Thomas. 2019. "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, 165-188. DOI: 10.1093/oxfordhb/9780190659837.013.35.

Wessels Johannes. 1966. „Schweigen und Lugen in Strafverfahren", Juristische Schulung 1966, Heft 5:169-176.

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

Wróbel Włodzimierz. 2010. „Konstytucyjne prawo do obrony w perspektywie prawa karnego materialnego" [Consitutional 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, 215-229. Warszaw: WoltersKluwer.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 81-107
DOI: https://doi.org/10.31743/recl.6127

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

*Marek Ryszard Smarzewski**

ABSTRACT

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

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

* PhD, Assistant Professor in the Department of Criminal Procedure at the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin; Attorney at the Bar Association in Lublin; e-mail: marek.smarzewski@kul.pl; https://orcid.org/0000-0003-0910-9128.

1. INTRODUCTION

In general, the right to defence, which covers the individual rights of the accused ensuring its global implementation, is one of the foundations of a fair criminal trial. Therefore, in a fair and honest trial, the passive party should have, first of all, a position, guaranteed *in abstracto* and defined by the granted rights including available legal instruments, which should enable substantive defence against the charge (right to defence in substantive terms). In addition, given that the defence of the accused is realized in formalized proceedings, and therefore in complex and often incomprehensible procedural circumstances, an important element of the right to defence also focuses in its formal aspect, including not only the right to be represented by defence counsel, but also their procedural activities[1].

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

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

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

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

which has been recognized in the European forum[2]. The manifestation of this was the adoption of the Council of the European Union Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[3]. The indicated document highlights, among others the importance of the right to defence in maintaining mutual trust among Member States and public confidence in the European Union. In the following years, steps were taken to strengthen the procedural rights of suspects and accused persons. The effect of the implementation of the roadmap was the adoption of the following directives, shaping the minimum standards and aimed at ensuring, *in genere*, the effectiveness of exercising the rights of the passive party during criminal proceedings[4]:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings[5];
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[6];
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in

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

[3] OJ C 2009 No. 295, 1.

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

[5] OJ L 2010 No. 280, p. 1.

[6] OJ L 2012 No. 142, p. 1.

criminal proceedings and in European warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[7];
- Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[8];
- Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[9];
- Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[10].

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

Already in this context it should be pointed out abstractly that, in particular against the background of changes made to Polish criminal procedural law in 2016-2019, a gradual decrease in the procedural status of the accused can be observed, including the standard of the right to defence in both material and formal terms, rather than striving to consolidate it at the minimum level postulated in EU directives. It is significant, therefore, that the legislator by the Act of 10 January 2018 amending the Act - Code of Criminal Procedure and some other acts[11] introduced reference No. 1 to

[7] OJ L 2013 No. 294, p. 1.
[8] OJ L 2016 No. 65, p. 1.
[9] OJ L 2016 No. 132, p. 1.
[10] OJ L 2016 No. 297, p. 1.
[11] Journal of Laws of 2018, item 201.

the title of the Act, recognizing that the provisions of the Code of Criminal Procedure implement the provisions of Directive 2013/48/EU of 22 October 2013. Then, pursuant to the amendment of 19 July 2019[12] the legislator changed the content of the specific reference, emphasizing the alleged standardization in the provisions of the Act of the norms stipulated in Directive 2016/343/EU of 9 March 2016. However, the changes introduced by the cited legal acts did not carry such elements that would allow for the declaration about strengthening the position of the accused, among others also in the *spectrum* of their right to defence.

Within the justifications of both acts, the former introducing the reference with the mention of implementation, and the latter extending its content to include a reference to another Directive, it is impossible to find any arguments, especially in the absence of any amendments, supporting the claim that the Code of Criminal Procedure implements the provisions of the aforementioned directives. In both cases, the legislator merely stated that the directives in question did not require implementation, as the provisions in force implemented their stipulations[13]. Unfortunately, such a *de lege lata* claim cannot be considered fully truthful. In fact, it is not holistically reflected in the current normative state, if one analyses the applicable regulations from the perspective of the provisions of EU directives and the basic assumptions of the above-mentioned directives[14]. However, before proceeding to the analysis of recent amendments to criminal procedural law in the light of the cited European acts, it is first necessary to discuss the main assumptions underlying their adoption. Finally, they also need to be considered against the concept of the right to defence.

---

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

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

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

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

This approach is undoubtedly dictated by the need to guarantee also to those persons who do not yet have the status of a party the effective exercise of their right to defence. As follows from recital 21 in the preamble to the Directive, such a person should be protected above all from self-accusation and has the right not to testify. At the same time, this person should be allowed to obtain legal assistance from a lawyer during questioning[16]. In this context – as underlined in recitals 22, 28 and 33 of the preamble, as well as in Article 4 of the Directive – attention should be paid to the significance of free communication with a lawyer, including ensuring the confidentiality of meetings, correspondence, telephone conversations and other forms of communication between the accused and their professional legal representative. Similarly, the right of access to a lawyer in a state executing the European arrest warrant has been standardized by the Directive in relation to the persons subject to the warrant, emphasizing the confi-

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

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

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

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

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

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

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

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

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

As it was already pointed out when presenting the general assumptions of Directive 2013/48/EU, it was to shape certain minimum standards to which the regulations functioning in the analysed scope in individual Member States of the European Union should be adapted. It should be noted that the stipulations of the said directive have already been implemented to some extent in the provisions of the Polish criminal procedure law in the legal system in force from 1 July 2015 to 14 April 2016[18]. It was related to the amendments introduced with the Act of 27 September 2013 amending the Act - Code of Criminal Procedure and some other acts, which was issued earlier than Directive 2013/48/EU[19].

Prima facie, it seems legitimate to argue that, under the said amendment, a model of ex officio defence was established to a certain extent, which allowed the accused to appoint a defence lawyer at the stage of court proceedings. In preparatory proceedings, however, the rule made it possible for a suspect to use the assistance of a lawyer ex officio, if the person proved the inability to bear the costs of appointment of a lawyer of choice without prejudice to the necessary support for themselves and the family. It should be emphasized that the legislator implemented the indicated solutions, at the same time entering them into the mode established by the provisions of Article 81a of the Code of Criminal Procedure and the Regulation of the Minister of Justice of 21 May 2015 on the manner of ensuring access to an ex officio lawyer by the accused[20]. This allowed not only for a broader, but also faster provision of access of the accused to the

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

[19] Journal of Laws of 2013, item 1247.

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

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

A systemic analysis of the discussed issues makes it legitimate to say that the aforementioned amendments meant that the Polish criminal procedure law was not far from complying with the standards set out in Directive 2013/48/EU in terms of regulations on access to a defence lawyer. Appointment of a defence lawyer pursuant to Article 80a § 1 of the Code of Criminal Procedure proceeded with the exclusion of verification as to whether the accused was able to bear the costs of appointing a lawyer without prejudice to the necessary maintenance of themselves and the family[21]. The determination of facts in this regard was to be made only as part of the decision on the costs of the trial, in the context of determining whether the person will bear the unpaid costs of legal aid granted ex officio according to prescribed standards. The legislator also provided for the possibility of appointing, on specific terms, a defence lawyer of choice to participate in a given act, pursuant to Article 80a § 2 of the Code of Criminal Procedure[22].

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

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

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

- before questioning by the Police or other law enforcement or judicial authority, in order to guarantee passive parties the right to presence and effective participation of their defence lawyer during the questioning;
- when investigative or other evidence-related acts are carried out by law enforcement or other competent authorities, including, in this context, ensuring for suspects or accused persons at least the right to the presence of a defence lawyer during investigative or evidence-related acts;
- immediately after deprivation of liberty;
- if they were summoned to appear before a competent court, at the right moment before they appeared before that court[23].

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

In the analysed scope, significant amendments, constituting largely a return to solutions functioning before 1 July 2015, were made by the Act of 11 March 2016 amending the Act - Code of Criminal Procedure and some other acts[24]. Pursuant to the amendment in relation to the right to defence in formal terms, attention should be paid above all to the repeal of Article 80a of the Code of Criminal Procedure and related modifications made in the content of Article 78 of the Code of Criminal Procedure. First of all, the assumption was restored that recognition of the legitimacy of ap-

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

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

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

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

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

possibility of immediate access to a lawyer under the free legal aid system. As the aforementioned author aptly claims in this context, such a model would be appropriate, as often it will be necessary in practice to swiftly appoint a defence lawyer ex officio for a suspect deprived of liberty[25].

Another important issue is ensuring the possibility of seeking the assistance of a lawyer on being questioned as a suspect in connection with the presentation of charges to a given person. Therefore, in the event that a given person wants to seek the assistance of a defence lawyer, it is necessary to set out statutory grounds for suspending the indicated act and setting the date in order to ensure the participation of a lawyer or legal adviser, be it one of choice or appointed ex officio. Of course, Article 300 § 1 of the Code of Criminal Procedure provides for informing the suspect before the first interrogation about the right to assistance of a defence lawyer, including the right to apply for appointment of an ex officio lawyer in the event referred to in Article 78 of the Code of Criminal Procedure. In turn, Article 301 of the Code of Criminal Procedure states that at the request of the suspect, the questioning should, as a rule, proceed with the participation of an appointed lawyer[26]. However, access to lawyers and the right to confidential contact with them is undoubtedly important even before the act in question occurs; sometimes the promptness of making such contact is crucial at an early stage of the proceedings and before the accusation of a given person, for example in connection with a potential earlier questioning as a witness. In such a case, the effectiveness of the realization of the right to defence may be strictly conditional on confidential consultation and undertaking key actions for defence with the help of a professional entity even before the focus of proceedings formally shifts towards a given person.

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

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

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

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

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

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

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

The possibility of limiting the confidentiality of contacts with a lawyer exists primarily at the pre-trial stage and, significantly, it follows already from the provisions of a general nature. While the rule is that persons remanded in custody may communicate with their defence lawyer in the absence of other persons and by correspondence, a prosecutor, when granting permission for communication between a suspect and a lawyer, may decide, in particularly justified cases and if it is in the interest of preparatory proceedings, that contacts should occur in his presence or a person authorized by him (Article 73 § 2 of the Code of Criminal Procedure). Moreover, in accordance with Article 73 § 3 of the Code of Criminal Procedure, the prosecutor may also decide, when it is in the interest of preparatory proceedings and in particularly justified cases, to control the correspondence of the suspect with the defence lawyer. It is significant at the same time that the indicated reservations may remain in force, pursuant to Article 73 § 4 of the Code of Criminal Procedure, for up to 14 days from the date the suspect was remanded[27]. Hence, even if one considers the possibility of limiting the principle of confidentiality in the suspect's contacts with their lawyer, it should be emphasized after Steinborn that the limitation should meet the requirements set out in Article 8 (2) of Directive 2013/48/EU. This means that in order to establish the legitimacy of such a limitation of the suspect's right which is essential for the effective implementation of the right to defence, it would be necessary for the legislator to provide a possibility of appealing against the prosecutor's decision regarding the reservation of his presence or the person authorized by him during the meeting of the suspect with a lawyer[28].

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

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

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

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

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

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

konsularnymi w czasie pozbawienia wolności", https://www.gov.pl/attachment/ba665e2a-9ea6-4c45-98d0-cbddfa034bbe: 11, [date of access: 11.02.2020].

was not limited to unresolvable doubts, but to all doubts. Furthermore, it was argued that the directive provided for the need to apply the *in dubio pro reo* rule not only to the accused, but also to the suspect[29]. It should be noted, however, that applying the interpretation of Article 5 § 2 of the Code of Criminal Procedure, set out by the provision of Article 71 § 3 of the Code of Criminal Procedure, the *in dubio pro reo* rule can also be applied to the suspect.

Another issue particularly important for the implementation of the right to defence in material terms is the right not to incriminate oneself, defined by the lack of an obligation to prove innocence or the obligation for the accused to provide evidence to his disadvantage, stemming from the principle *nemo se ipsum accusare tenetur*, which is expressed in Article 74 § 1 of the Code of Criminal Procedure. In Article 7 (1) of Directive 2016/343/EU, a requirement was introduced to provide suspects and accused persons with the right to remain silent in relation to the prohibited act that they are suspected or accused of having committed. It should be specified that the Directive in Article 2 determines the scope of its application at all stages of criminal proceedings from the moment when a given person becomes a suspect or is accused of having committed a prohibited act or an alleged prohibited act, until the decision on the final determination of whether that person has committed the prohibited act concerned has become definitive. When clarifying the personal scope in preparatory proceedings, reference should be made to recital 12 in the preamble to the Directive, which clearly indicates that it should also apply to a suspected person, since, as explained therein, it applies not only to the person who has the formal status of a suspect, but also before that person is informed by official notification or otherwise, i.e. in the case of the Polish legal system, essentially before presenting charges[30].

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

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

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

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

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

to answer individual questions during the phase of questions, after prior spontaneous testimony[31].

In this light, it seems legitimate to put forward the thesis that the indicated state of the law is *in contradiction* to Article 7 (1) and (2) in conjunction with Article 2 of Directive 2016/343/EU. Suspects questioned as witnesses are not guaranteed the right to remain silent in its entirety, in analogy to the possibility of refusing to provide explanations *in genere*. Providing such a solution, at least with regard to persons actually suspected, seems to remain necessary not only from the point of view of European law, but also from the perspective of Article 42 clause 2 of the Constitution[32] and Article 6 clause 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[33]. Limitation of the right to defence that can be observed against the background of the type of prohibited act under Article 233 § 1a of the Penal Code not only contradicts Directive 2016/343/EU, but also fails to meet the standard set out in Article 6 clause 1 of the ECHR. Finally, in a manner inconsistent with Article 42 clause 1 of the Constitution, it narrows the subjective scope of the right to defence designated in the indicated provision.

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

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

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

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

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

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

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

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

accused has duly justified their failure to appear. Importantly, the decision on the taking of evidence in the absence of the accused may be taken by the court, as Chojniak rightfully notes, regardless of the importance of the case or its complexity. The ability of the accused to carry out the defence independently and on their own, when the defence lawyer did not appear at the trial for justified reasons, is also of no importance[34].

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

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

[34] See: Łukasz Chojniak, „Postulat nowelizacji Kodeku postępowania karnego – krytycznie o niektórych proponowanych zmianach", Palestra 1-2(2019): 59.

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

An assessment against the background of Article 8 (2) of the Directive should not raise doubts that the contradiction of Article 378a of the Code of Criminal Procedure with the Directive occurs when the appointed defence lawyer does not appear at the trial date while duly justifying their failure to appear. Similarly, in the case of simultaneous and justified failure to appear of the accused person and their defence lawyer, it seems that the literal interpretation of the provision of Article 378a § 1 of the Code of Criminal Procedure leads to the conclusion that it is impossible to proceed in their absence. Therefore, the only doubt relates to the situation when the accused does not appear at the hearing while the person's defence lawyer does, and a motion for a break or adjournment has been submitted[35]. It should be borne in mind that the right to a personal participation in the hearing under European law is rather a fundamental right of the individual than an obligation imposed to ensure that the trial proceeds only in the interests of the judiciary, and not the accused[36].

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

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

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

were not notified. It seems right to say that this solution remains controversial due to the fact that the issues that may result in the motion being rejected may result from a substantive assessment by the court of the circumstances of the case in terms of premises for issuing a specific decision. In such a case, the position of the accused or the defence lawyer may be of key importance. The provision of Article 343b of the Code of Criminal Procedure can therefore, in principle, be considered compliant with Directive 2016/343/EU only to the extent that it provides for the possibility of issuing a decision not to consider the recalled motions at a session without the participation of the parties due to the withdrawal of one of the parties from the consensus[37].

5. CONCLUSIONS

To sum up, it should be emphasized that the indicated incompatibilities or discrepancies actually do occur between the Polish criminal procedure law and the European law not having been implemented within the set deadlines[38]. Nevertheless, it seems that often meeting the standard set out in the content of the Directives remains dependent on the correct application of the provisions (Article 87 § 2 of the Code of Criminal Procedure, providing for the institution of a representative for a non-party, and Article 88 § 1 of the Code of Criminal Procedure in conjunction with Article 78 of the Code of Criminal Procedure or with Article 78 § 1a of the Code of Criminal Procedure, enabling the appointment of such a representative for a suspected person for specific acts, e.g. for a witness or at an early stage of proceedings, even prior to obtaining the status of a party). Legislative deficiencies can be identified, including primarily those related to the continuous lack of a swift procedure for appointing an ex officio defence lawyer at an early stage of the proceedings or the lack of even

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

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

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

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

From the perspective of the current state of the law and assessment of the degree of implementation of the analysed EU Directives, in the light of important issues shaping the right to defence in Polish criminal proceedings, it is fully justified to claim that the constitution of strong normative foundations for the realization of defence is key to achieving procedural justice. The provision of appropriate legal instruments for the realization of defence is, in fact, one of the important elements allowing the suspected or accused person and their defence lawyer to build effective counter-argumentation in relation to arguments asserted by the prosecution. Hence, it is a factor conditioning the appropriate institutional balance in criminal proceedings[39].

[39] Cf. Anna Pivaty, „The role of a defence lawyer at the investigative stage", In: Anna Pivaty, Criminal Defence at Police Stations: A Comparative and Empirical Study, Abingdon: Routledge, 2019, https://books.google.pl/books?id=6dS8DwAAQBAJ&printsec=frontcover&dq=Criminal+Defence+at+Police+Stations:+A+Comparative+and+Empirical+Study&hl=pl&sa=X&ved=0ahUKEwj75cvVqsrnAhVNi1wKHZ1aDqMQ6AEIKDAA#v=onepage&q=Criminal%20Defence%20at%20Police%20Stations%3A%20A%20Comparative%20and%20Empirical%20Study&f=false [date of access: 11.02.2020].

REFERENCES

Ambos, Kai. 2018. „The Protection of Fundamental Rights by the EU", In: Kai Ambos, European Criminal Law, Cambridge: Cambridge University Press.

Antonio Balsamo. 2018. „The Content of Fundamental Rights", In: Handbook of European Criminal Procedure, ed. Roberto E. Kostorsis, 99-170. Cham: Springer.

Chojniak, Łukasz. 2019. „Postulat nowelizacji Kodeku postępowania karnego – krytycznie o niektórych proponowanych zmianach", Palestra 1-2: 56-69.

Czerniak, Dominika. 2018. „Prawo dostępu do adwokata w postępowaniu przygotowawczym. Uwagi na tle postanowienia Sądu Najwyższego z 27.06.2017 r., II KK 82/17". „Przegląd Sądowy" 11-12: 118-134.

Demenko, Anna. 2018. „Prawo oskarżonego do korzystania z pomocy obrońcy w świetle dyrektywy nr 2013/48/UE – wybrane zagadnienia". „Palestra" 12: 13-20.

Đurđević, Zlata. 2016. „The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order". In: European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges, ed. Zlata Đurđević, Elizabeta Karas Ivičević, 9-23. Zagreb: Croatian Association of European Criminal Law.

Fingas, Maciej. 2018. „O konieczności poszerzenia zakresu kontroli zażaleniowej nad niektórymi decyzjami dotyczącymi praw oskarżonego – wybrane problemy implementacji unijnych dyrektyw w polskim procesie karnym". „Białostockie Studia Prawnicze" vol. 23, 1: 47-62. DOI: 10.15290/bsp.2018.23.01.03.

Grabowska-Moroz, Barbara. 2018. „Wzmocnienie praw procesowych w postępowaniu karnym: skuteczne wdrożenie prawa do obrońcy i pomocy prawnej na podstawie Programu Sztokholmskiego. Raport krajowy: Polska", http://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Wzmocnienie-praw-procesowych-w-postepowaniu-karnym-29-03.pdf.

Kardas, Piotr. 2018. „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego. Kilka uwag w świetle Dyrektywy w sprawie prawa dostępu do adwokata, doktryny Salduz oraz doktryny Miranda", „Palestra Świętokrzyska" 43-44: 6-19.

Kardas, Piotr. 2019. „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata", „Europejski Przegląd Sądowy" 1: 4-10.

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

Klimek, Libor. 2017. „Strengthening Procedural Rights in Criminal Proceedings as a Consequence of Mutual Recognition", In: Libor Klimek, Mutual Recognition of Judical Decisions on European Criminal Law, Cham: Springer.

Lach, Arkadiusz. „Glosa do uchwały SN z dnia 20 września 2007 r., I KZP 26/07", LEX no. 83583.

Klamczyńska, Alicja, Ostropolski, Tomasz. 2014. „Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy". „Białostockie Studia Prawnicze" 15: 143-163.

Nagy, Anita. 2016. „The Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings in Directive (EU) 2016/343". „European Integration Studies" 1: 5-9.

Pollicino, Oreste, Bassini, Marco. 2017. „Personal Participation and Trials In Absentia. A Comparative Constitutional Law Perspective", In: Personal Participation in Criminal Proceedings: A Comparative Study on Participatory Safeguards and In Absentia Trials in Europe, eds. Serena Quattrocolo, Stefano Ruggeri, 527-558. Cham: Springer.

Pivaty, Anna. 2019. „The role of a defence lawyer at the investigative stage", In: Anna Pivaty, Criminal Defence at Police Stations: A Comparative and Empirical Study, Abingdon: Routledge.

Riehle, Cornelia, Clozel, Allison. 2020. „10 years after the roadmap: procedural rights in criminal proceedings in the EU today", „ERA Forum" 20: 321-325. DOI: https://doi.org/10.1007/s12027-019-00579-5.

Right to a Lawyer and to Legal Aid in Criminal Proceedings in Five European Jurisdictions. Comparative Report, Sofia 2018, https://www.hfhr.pl/wpcontent/uploads/2018/05/RIGHT-TO-A-LAWYER-final.pdf.

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

Smarzewski, Marek. 2016. „Granice efektywności prawa do korzystania z pomocy obrońcy w kontekście ostatnich nowelizacji KPK", „Monitor Prawniczy" 21: 1154-1159.

Steinborn, Sławomir. „Opinia w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie dostępu do adwokata w postępowaniu kar-

nym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności", https://www.gov.pl/attachment/ba665e2a-9ea6-4c45-98d0-cbddfa034bbe.

Villamarín López, María Luisa. 2017. „The presumption of innocence in Directive 2016/343/EU of 9 March 2016", „ERA Forum" 18: 335-353. DOI: 10.1007/s12027-017-0480-5.

Wąsek-Wiaderek, Małgorzata. 2019. „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", Europejski Przegląd Sądowy 1: 17-23.

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

Wystąpienie do Ministra Sprawiedliwości w sprawie wdrożenia dyrektywy niewinnościowej, znak: II.510.619.2018II.510.619.MM, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20wdro%C5%BCenia%20dyrektywy%20niewinno%C5%9Bciowej.pdf.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 109-127
DOI: https://doi.org/10.31743/recl.6153

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

*Joanna Dzierżanowska**

ABSTRACT

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

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

1. INTRODUCTION

Safeguarding access to a lawyer[1] for the person suspected of committing a criminal offence at early stage of preparatory proceedings is undoubted-

* PhD, Department of Criminal Procedure at the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin; e-mail: jdzier@kul.pl; https://orcid.org/000-0002-3453-5949.

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

ly one of the fundamental rights in criminal proceedings, leading to full implementation of the right of defence indicated in art. 42, section 2 of the Constitution of the Republic of Poland[2]. Obtaining professional legal assistance and communication with a lawyer prevents undertaking wrong decisions in the proceedings and minimises the risk of subjecting the suspected person to inhuman or degrading treatment. Effective defence during criminal proceedings allows for explanation of occurring inaccuracies or doubts, while observing reactions for asked questions and behaviours of persons participating in evidentiary activities of preparatory proceedings allows the defence counsel for own assessment of credibility of the interviewed persons (also persons being confronted) and possible opportunity of undermining their statements in judicial proceedings[3].

Apart from national law, minimal standards of protection of rights of suspects and accused persons have also been determined by directive of the European Parliament and Council 2013/48/EU dated 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings pertaining to the European arrest warrant and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty[4]. The purpose of this elaboration is an analysis of the scope of safeguards designated by the directive during evidentiary activities indicated in art. 3, section 3, letter c. This provision gives rise to a right for the suspect and accused person to have defence counsel present during identity parade, confrontation and reconstruction of the scene of a crime. In particular, considerations included applicable legal provisions of the Polish Code of

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

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

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

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

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

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

The scope of application of the directive is established in art. 2 thereto, according to which the rights to access to a lawyer shall be referred to the suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise [5], that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. Furthermore, the directive expands the scope of its application to persons who become suspects or accused persons in the course of questioning by the police or by another law enforcement authority (art. 2, section 3 of the directive). Considering point 21 of the recitals it must be emphasised that the status of the suspect and the right of access to a lawyer appertain to a witness who in the course of questioning provides self-incriminating information. In accordance with the directive, questioning must be immediately suspended to allow for implementation of rights stipulated by the directive.

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

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

tion of the questioning by the police or by another law enforcement or judicial authority, b) upon the carrying out by investigating or other competent authorities of an investigative or other evidentiary activities indicated in art. 3, section 3, letter c of the directive, c) without undue delay after deprivation of liberty, d) prior to appearing before the court. Therefore, it should be noted that indication of the aforementioned situations constitutes clarification of art. 2 and at the same time it expands its scope to circumstances with no formal notification of a person that he or she is suspected, but situations indicated in art. 3 of the directive[6] occurred.

The model of guaranteeing access to a lawyer adopted by the directive corresponds to the case law of the European Court of Human Rights (hereinafter referred to as ECtHR), according to which the protection arising from art. 6 ECHR[7] justifies the existence of substantive circumstance (the existence of a suspicion that a person has committed a prohibited act)[8] and formal circumstance (undertaking an activity directed to prosecute this person)[9]. As a result, ECHR indicates that the person acquires the status of a suspect not from the moment when it is formally given by the national authorities but from the moment when these authorities have reasonable grounds to suspect this person of committing a prohibited act

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

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

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

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

or if his or her legal situation is determined by actions of the authorities undertaken towards him or her as a result of such suspicion[10].

Art. 3, section 3, letter c of the directive determines the minimum standard as providing the suspect or accused person with access to a lawyer during identity parades, confrontation and reconstruction of the scene of a crime, if these activities are stipulated in the national law and if a given activity requires or permits the presence of the suspect or accused person. It seems that this indication shall be understood as an open catalogue, indicating at a minimum the procedural acts determined by the directive[11].

Due to the fact that in Polish criminal trials, confrontation constitutes a type of questioning, the instructions of the directive determined for questioning shall refer also to this evidentiary activity[12]. As a consequence, the right to a lawyer in connection with questioning (also confrontation) includes: the right to consult a lawyer in private before such activity (art. 3, section 3, letter a of the directive) and the right to have a lawyer attending during questioning (also confrontation) and the lawyer's effective participation in the action (art. 3, section 3, letter b of the directive). Point 22 of the recitals adds that consultation should take place in private, and it is up to the national legislator to introduce practical solutions pertaining to duration and frequency of such meetings to ensure also safety and protection of the lawyer and the suspect. It is important that national regulations

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

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

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

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

The directive states that access to a lawyer does not have to be absolute and introduces temporary exclusions. Safeguards including the right to meet prior to questioning (also prior to confrontation), the right for the lawyer to participate during identity parades, confrontation as well as reconstruction of the scene of a crime can be limited. In accordance with art. 3, section 6 of the directive, temporary exclusions can occur only at the stage of preparatory proceedings, in exceptional circumstances and to the extent that it is justified (in the light of specific circumstances of the case) for one of the following reasons: 1) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, 2) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings[13].

Temporarily derogation from a possibility to exercise the right of access to a lawyer may also occur in relation to depriving a person of liberty and is possible due to geographical remoteness of a suspect. Such derogation is permitted only in preparatory proceedings and in exceptional circumstances (art. 3, section 5 of the directive). The recitals indicate that in such circumstances judicial bodies should not carry out questioning and other evidentiary activities[14] and in the absence of direct access to

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

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

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

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

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

A necessity of transposition of the directive of the European Parliament and Council 2013/48/EU was frequently signalled in literature, opinions and pronouncements[15]. It was pointed out numerous areas which

[15] Wojciech Hermeliński, Barbara Nita-Światłowska, "Kilka uwag o prawie do obrony w związku z nowelizacją Kodeksu postępowania karnego z 2016 roku", Palestra 9(2016): 15; Tomasz Tadeusz Koncewicz, Anna Podolska, "Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9(2017): 9-23; Piotr Kardas, "Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata", Europejski Przegląd Sądowy 1(2019): 4-10; Pierwszy Prezes Sądu Najwyższego, "Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie", 2017: 85-88, [date of access: 10.02.2020] http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2017.pdf; Pierwszy Prezes Sądu Najwyższego, "Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie za rok 2018", 2019: 99-100, (access: 10.02.2020) www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki%20w%20prawie-2019.pdf; Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014, z 5.06.2017, [date of access: 10.02.2020] https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20 Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf; Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014.MM, z 4.07.2018, [date of access: 10.02.2020] https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20wprowadzenia%20dyrektywy%20gwarantuj%C4%85cej%20m.in_.%20prawo%20zatrzymanego%20do%20adwokata.pdf; Sławomir Steinborn, "Opinia w sprawie implementacji w prawie polskim dyrektywy Parla-

require normative changes indispensable in order to adjust criminal and procedural provisions to requirements of the directive. Amending the Code of Criminal Procedure[16] in 2019, the Polish legislator added to its title the following reference: "In the scope of its regulation, this Act implements provisions of the directive of the European Parliament and Council 2013/48/EU dated 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings pertaining to European arrest warrant and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Official Gazette of the EU L 294 dated 6 November 2013, page 1)". Justification of the indicated amendment emphasised that directive 2013/48/EU did not require to be implemented because the applicable provisions of the Code of Criminal Procedure implement provisions of the directive[17]. However, when it comes to the issues analysed in this elaboration, objections regarding the following areas can still be indicated.

Considering the scope of application of the directive indicated in this elaboration and autonomous meaning of the term suspect adopted therein, it must be concluded that in accordance with the Polish Code of Criminal Procedure, the right of access to a lawyer should also refer to a suspected person and limiting this right in preparatory proceedings solely to a suspect would be unreasonable[18]. The directive indicates that arrest, identity

mentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie dostępu do adwokata w postępowaniu karnym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności", 2014, [date of access: 10.02.2020] https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego.

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

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

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

parade, confrontation and reconstruction of the scene of a crime belong to activities which are directed at prosecution of a person and therefore, they determine the acquisition of the right of access to a lawyer[19]. Consequently, the implementation of the directive requires providing the suspected person with the possibility to consult with a lawyer who would have a status of a defence counsel[20].

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

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

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

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

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

recognises that the person's interest requires this in pending proceedings[22]. However, the provisions of the Code of Criminal Procedure (art. 315-318 of the Code of Criminal Procedure) do not stipulate a right for the suspected party's attorney to participate in evidentiary activities because they pertain to the parties to the trial and representatives thereof. In the scope indicated above, it is correct to state that the Code of Criminal Procedure does not fulfil the standard of the suspected person's access to a lawyer required under the directive[23].

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

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

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

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

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

There is no doubt that evidence conducted in preparatory proceedings have a significant impact on resolution of the case by the Criminal Court and that the nature of the indicated activities points to a need to have defence counsel participate in them[25]. Literature recognises that this participation should not be reduced only to the role of a person controlling the activity of law enforcement authorities but should also be understood as being included in the undertaken activities and influencing their shape, of course within the rights designated by the inquisitorial principle[26].

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

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

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

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

lead even to a judgment of conviction[27]. The basic sources of errors during identity parade include among others[28]: suggestive impact exercised by a person conducting the activity on an eyewitness (exerting pressure by the officers of law enforcement authorities but also non-verbal impact), inappropriate selection of persons to identity parade, not enough appointed persons (the more people, the greater diagnostic value of recognising the suspect[29]), carrying out the identity parade to several witnesses at the same time, errors on the part of eyewitnesses (permanency of remembering an object and possible distortions connected therewith). Choosing a form of conducting the identity parade (simultaneous, sequential) has also a huge practical meaning[30].

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

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

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

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

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

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

participation of defence counsels was not provided during this activity and the court adjudicating in the case failed to explain irregularities in the conducted identity parade[32]. In the case of Dzhulay vs Ukraine[33] despite the fact that the identity parade was conducted without participation of the designated defence counsel, the Court did not identify infringement of art. 6 of the European Convention on Human Rights. The Court emphasised that the accused person did not apply for conducting the identity parade in the presence of a defence counsel and evidence from the identity parade was not the only one or decisive evidence leading to conviction. However, in the case of Mehmet Şerif Öner[34], an infringement of art. 6 of ECHR was ascertained. The applicant did not plead guilty in preparatory proceedings but participated in the identity parade. The court stated that the impossibility to seek assistance of defence counsel had a lasting impact on the proceedings, in particular because the result of the identity parade was significant evidence in the case[35].

In view of the above, it must be noted that directive 2013/48/EU corresponds in the discussed scope to the case law of the Court. Literature also highlights that the content of art. 3 of the directive shall be associated with a standard designated by the ECHR[36]. Participation of defence counsel during identity parade plays a significant and important role. The effective presence of a defence counsel allows the defence to influence the course and scope of activities, thereby safeguarding criminal proceedings against possible omission of circumstances that are relevant

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

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

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

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

[36] Jacek Barcik, Tomasz Srogosz, "Prawo dostępu do adwokata w Polsce w świetle dyrektywy 2013/48/UE", Palestra 7-8(2015): 245. Similarly: Piotr Kardas, "Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata", Europejski Przegląd Sądowy 1(2019): 4-10.

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

4. SUMMARY

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

prosecution of a person[37]. As a consequence, eliminating a division into a suspect and a suspected person will allow for realisation of the right of access to defence counsel's assistance regardless of whether a given person has been presented with charges. It seems that introduction of the proposed changes is indispensable for realisation of safeguards arising from directive 2013/48/EU.

REFERENCES

Barcik, Jacek, Tomasz Srogosz. 2015. "Prawo dostępu do adwokata w Polsce w świetle dyrektywy 2013/48/UE". Palestra 7-8: 243-254.

Girdwoyń, Piotr. 2004. Zarys kryminalistycznej taktyki obrony. Kraków: Zakamycze.

Grabowska-Moroz, Barbara (ed.). 2018. "Prawo dostępu do obrońcy w świetle prawa europejskiego", http:// www:hfhr.pl.

Grabowska-Moroz, Barbara. 2019. "Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów". Przegląd Sądowy 3: 45-59.

Gruza, Ewa. 2011. „Zostałem rozpoznany, bo byłem przystojny – czyli o okazaniu osoby". Edukacja Prawnicza 5: 31-35.

Hermeliński, Wojciech, Barbara Nita-Światłowska. 2016. "Kilka uwag o prawie do obrony w związku z nowelizacją Kodeksu postępowania karnego z 2016 roku". Palestra 9: 12-25.

Jasiński, Wojciech. 2019. "Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski". Europejski Przegląd Sądowy 1: 24-30.

Jasiński, Wojciech. 2019. "Prawo dowodowe w orzecznictwie Europejskiego Trybunału Praw Człowieka". In: System Prawa Karnego Procesowego. Dowody. Tom VIII cz. 2, ed. Jerzy Skorupka, 1752-1901. Warszawa: Wolters Kluwer.

[37] Sławomir Steinborn, "Opinia w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie dostępu do adwokata w postępowaniu karnym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności", 2014, [date of access: 10.02.2020] https:// www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego.

Juszka, Kazimiera. 2007. Jakość czynności kryminalistycznych. Lublin: Oficyna Wydawnicza Verba.

Kardas, Piotr. 2019. "Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata". Europejski Przegląd Sądowy 1: 4-10.

Koncewicz, Tomasz Tadeusz, Anna Podolska. 2017. "Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim". Palestra 9: 9-23.

Kulesza, Cezary. 2016. "Udział obrońcy w postępowaniu przygotowawczym". In: System Prawa Karnego Procesowego. Postępowanie przygotowawcze. Tom X, ed. Ryszard A. Stefański, 926-1011. Warszawa: Wolters Kluwer.

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

Lach, Arkadiusz. 2018. Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego. Warszawa: Wolters Kluwer.

Levi, Avraham M. 2006. "An analysis of multiple choices in MSL lineups, and a comparison with simultaneous and sequential ones". Psychology, Crime & Law 12: 273-285.

Meisters, Julia, Birk Diedenhofen, Jochen Musch. 2018. "Eyewitness identification in simultaneous and sequential lineups: an investigation of position effects using receiver operating characteristics". Memory 26(9): 1297-1309.

Pierwszy Prezes Sądu Najwyższego. 2017. "Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie"., http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/ luki-w-prawie-2017.pdf.

Pierwszy Prezes Sądu Najwyższego. 2019. "Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie za rok 2018", www.sn.pl/osadzienajwyzszym/Uwagi_ PPSN_luki_w_prawie/luki%20w%20prawie-2019.pdf.

Posnow, Włodzimierz. 2009. "Udział obrońcy w przygotowawczym stadium procesu – aspekty realizacji niektórych uprawnień". In: Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy, ed. Jerzy Skorupka. LEX/el.

Posnow, Włodzimierz. 2020. „Komentarz do art. 74 k.p.k.". In: Kodeks postępowania karnego. Komentarz, ed. Jerzy Skorupka, 231-236. Warszawa: Wydawnictwo C.H. Beck.

Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014, z 5.06.2017, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie

%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf.

Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014. MM, z 4.07.2018,https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20wprowadzenia%20dyrektywy%20gwarantuj%C4%85cej%20m.in_.%20prawo%20zatrzymanego%20do%20adwokata.pdf.

Spineey, Laura. 2008. „Eyewitnnes identification: Line-ups on trial". Nature 453: 442-444.

Starzyński, Piotr. 2016. "Ochrona praw oskarżonego na podstawie przepisów prawa unijnego". In: System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego. T. VI, ed. Cezary Kulesza, 613-662. Warszawa: Wolters Kluwer.

Steinborn, Sławomir. 2012. "Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de lege ferenda)". In: Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla, tom II, ed. Piotr Kardas, Tomasz Sroka, Włodzimierz Wróbel. Warszawa: Wolters Kluwer. LEX/el.

Steinborn, Sławomir. 2019. "Dostęp do obrońcy na wczesnym etapie postepowania karnego. Uwagi *de lege lata* i *de lege ferenda*". Europejski Przegląd Sądowy 1: 38-46.

Steinborn, Sławomir. 2014. "Opinia w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie dostępu do adwokata w postępowaniu karnym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności", https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego.

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

Ujazdowski, Kazimierz W. 2015. "Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka". Forum Prawnicze 4: 41-58.

Wąsek-Wiaderek, Małgorzata. 2016. „Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka". In: System Prawa Kar-

nego Procesowego. Strony i inni uczestnicy postępowania karnego. T. VI, ed. Cezary Kulesza, 524-612. Warszawa: Wolters Kluwer, 2016, 534.

Wąsek-Wiaderek, Małgorzata. 2019. "Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej". Europejski Przegląd Sądowy 1: 17-23.

Wójcikiewicz, Józef. 2009. Temida nad mikroskopem, Toruń: Wydawnictwo Dom Organizatora.

Zagrodnik, Jarosław. 2016. Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych. Warszawa: Wolters Kluwer.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 129-151
DOI: https://doi.org/10.31743/recl.7079

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

*Tymon Markiewicz**

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

* Department of Criminal Procedure, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; email: markiewicz.tymon@gmail.com; https://orcid.org/0000-0001-8362-5898.

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.

---

[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

---

[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.

---

[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].

---

[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.

---

[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.

REFERENCES

Baj Agnieszka. 2016. Czy osoba podejrzana jest stroną postępowania przygotowawczego, Prok. i Pr., no. 10.

Dudek Dariusz. 1999. Konstytucyjna wolność człowieka a tymczasowe aresztowanie, Lublin.

[60] S. Steinborn, M. Wąsek-Wiaderek, Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej, In: Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego, eds. M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B. T. Bieńkowska, Warsaw 2015, 447-448.

[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.

Dudka Katarzyna, ed. 2018. Kodeks postępowania karnego. Komentarz, LEX/el.
Eichstaedt Krzysztof. 2008. Czynności sądu w postępowaniu przygotowawczym, Warsaw.
Gajowniczek-Pruszyńska Katarzyna, Zwierz Marta. 2017. Gwarancje sprawiedliwości proceduralnej wobec zatrzymanych a elementarne standardy demokratycznego państwa prawa, Palestra, no. 10.
Grabowska-Moroz Barbara, ed. 2018. Prawo dostępu do obrońcy w świetle prawa europejskiego, Warsaw.
Hermeliński Wojciech, Nita-Światłowska Barbara. 2016. Kilka uwag o prawie do obrony w związku z nowelizacją Kodeksu postępowania karnego z 2016 roku, Palestra, no. 9.
Jezusek Andrzej. 2018. 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, no. 4.
Kardas Piotr. 2019. 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, no. 1.
Klamczyńska Alicja, Ostropolski Tomasz. 2015. Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy, BSP, Vol. 14.
Klepczyński Adam, Kładoczny Piotr, Wiśniewska Katarzyna. 2017. O (nie)dostępnym dostępie do adwokata, Warsaw.
Koncewicz Tomasz Tadeusz, Podolska Anna. 2017. Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim, Palestra, no. 9.
Krzyżanowski Piotr. 2018. Zakres ochrony tajemnicy adwokackiej w postępowaniu karnym – zagadnienia wybrane, Roczniki Nauk Prawnych KUL, no. 2.
Kulesza Cezary. 2007. Refleksje na temat obrony formalnej w postępowaniu przyspieszonym, In: Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi, Nowikowski Ireneusz, ed., Lublin, 356-366.
Kulesza Cezary, ed. 2016. System Prawa Karnego Procesowego, Vol. 6, Strony i inni uczestnicy postępowania karnego, Warsaw.
Lisińska Justyna. 2014. Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym, Palestra, no. 7-8.
Małolepszy Amadeusz, Zbrojewska Monika. 2014. Obiektywna podatność oskarżonego na pokrzywdzenie w procesie karnym, PS, no. 5.
Pivaty Anna. 2020. Criminal Defence at Police Stations: A Comparative and Empirical Study, Routledge.

Safjan Marian, Bosek Leszek, eds. 2016. Konstytucja RP. Tom I. Komentarz do art. 1-86, Legalis.

Skorupka Jerzy, ed. 2020. Kodeks postępowania karnego. Komentarz, Legalis.

Smarzewski Marek, Banach Małgorzata. 2017. Ochrona tajemnicy adwokackiej w procesie karnym w związku z czynnościami przesłuchania i przeszukania, Palestra, no. 3.

Soo Anneli. 2017. How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?, NJECL, vol. 8.

Steinborn Sławomir. 2019. Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda, EPS, no. 1.

Steinborn Sławomir, ed. 2016. Kodeks postępowania karnego. Komentarz do wybranych przepisów, LEX/el.

Steinborn Sławomir, Wąsek-Wiaderek Małgorzata. 2015. Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej, In: Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego, Rogacka-Rzewnicka Maria, Gajewska-Kraczkowska Hanna, Bieńkowska Beata Teresa, eds., Warsaw, 429-455.

Śliwa Michał. 2015. 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.

Świecki Dariusz, ed. 2019. Kodeks postępowania karnego. Volume II. Komentarz aktualizowany, LEX/el.

Stefański Ryszard Andrzej, Zabłocki Stanisław, eds. 2019. Kodeks postępowania karnego. Volume II. Komentarz do art. 167-296, LEX/el.

Symeonidou – Kastanidou Elisavet. 2015. 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, vol. 5.

Ujazdowski Kazimierz Wojciech. 2015. Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka, FP, no. 4.

Wahl Thomas. 2017. Die EU-Richtlinien zur Stärkung der Strafverfahrensrechte im Spiegel der EMRK, ERA Forum, no. 3.

Waltoś Stanisław, Hofmański Piotr. 2016. Proces karny. Zarys systemu, Warsaw.

Wąsek-Wiaderek Małgorzata. 2019. Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej, EPS, no. 1.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 153-174
DOI: https://doi.org/10.31743/recl.6429

EFFECTIVE ACCESS TO DEFENCE COUNSEL IN THE JUDICIAL STAGE OF POLISH CRIMINAL PROCEEDINGS IN THE SCOPE OF DIRECTIVES 2013/48/EU AND 2016/1919/EU

*Adrian Zbiciak**

ABSTRACT

The article analyses certain regulations of the Polish Code of Criminal Procedure regarding the right of the accused to access a defence counsel, limited to the stage of proceedings before a court, in the context of the provisions of the two European Union's legal acts regarding this issue: Directive 2013/48/EU and Directive 2016/1919/EU. The provisions of the Polish CCP give the opportunity to maintain the standard of Directive 2013/48. However, the problem may occur when there is an ex officio defence counsel appointed and the court would decide to proceed in his/her absence. As for the standard arising from Directive 2016/1919, Polish provisions regarding the stage of judicial proceedings meet the European standard to a level even higher than the minimum. The only significant problem may arise from the obligation to submit an application for the appointment of an *ex officio* defence counsel within a specified period, but still due to specific solutions provided in Polish CCP, the standard of 2016 Directive is implemented.

Key words: access to a defence counsel; *ex officio* lawyer; court proceedings; EU directive; implementation in the Polish law

* MA, Department of Criminal Procedure, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: adrian.zbiciak@kul.pl; https://orcid.org/0000-0002-9501-8611.

1. INTRODUCTORY REMARKS

The article analyses certain regulations of the Polish Code of Criminal Procedure[1] regarding the right of the accused to access a defence counsel, limited to the stage of proceedings before a court, in the context of the provisions of the European Union's two legal acts regarding this issue: Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013[2] (hereinafter: "Directive 2013/48" or "Directive of 2013") and Directive of the European Parliament and of the Council 2016/1919 of 26 October 2016[3] (hereinafter: "Directive 2016/1919" or "Directive of 2016"). The first Directive sets a minimum standard for EU Member States regarding access to a lawyer in general, while the second concerns the guarantee of minimum standards for the Member States to provide *ex officio* lawyer.

The "stage of proceedings before a court" in the article is understood as the time from the public prosecutor's indictment (and other "complaints" initiating court proceedings) to the final decision, including the appeal hearing. The term "lawyer", used in the Directive and sometimes in the article, should be read as a "defence counsel" within the meaning of Article 82 of the CCP.

Analysis of the provisions of the Polish CCP as regards the access to a lawyer in the jurisdictional stage of criminal proceedings should be preceded by a key remark that depending on the understanding of the term used in the Directive, "the obligation to ensure the right to access a counsel defence", there may be different assessments of whether the provisions of the Polish CCP meet the minimum standard resulting from the Directive of 2013. It should be noted at the outset that neither Directive

[1] Act of 6 June 1997, Official Journal 2020, item 30, hereinafter: "CCP" or "the Polish CCP".

[2] Official Journal EU L.2013.294.1. The full title: "Directive 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".

[3] Official Journal EU L.2016.297.1. The full title: "Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings".

2013/48 nor Directive 2016/1919 contain an unequivocal rule that would imply an absolute obligation to provide each accused with the assistance of a defence counsel paid by the State.

The statement of the Polish authorities, which indicates that there is no need to further adapt the Polish law to implement the Directive, indicates that the provisions of the Directive should be understood within the meaning that the Member States must guarantee the possibility of having the assistance of a defence counsel to the accused, unless the accused has one[4].

This article only analyses the provisions regarding the stage of judicial proceedings, passing over the issues of the access to a lawyer in pre-trial proceedings, including the stage of court proceedings in the pre-trial stage (for instance when the court sitting is to decide on detention on remand, or hearing of witnesses by court, etc.).

2. ACCESS TO A LAWYER WITHIN THE MEANING OF DIRECTIVE 2013/48

The key to answer the question on whether the Polish provisions regarding the participation of a defence counsel (at the stage of court proceedings) meet the minimum standard set out in the Directive of 2013, is to define what should be understood as "the obligation to ensure the right of access to a lawyer". Article 3 § 1 of the Directive states, that Member States shall ensure accused persons the right to access a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. The most important for the discussed problem is, however, the content of Article 3 § 3 of the Directive 2013/48, where the scope of the term "right to a lawyer" has been specifically defined. This right therefore includes the obligation to ensure:

[4] Reply of the Minister of Justice to the Ombudsman's pronouncement of 18 October 2018, available at: https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2018.10.2018_0.pdf. Pronouncement of Ombudsman of 4 July 2018 to the Minister of Justice: https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf – [both date of access: 15.02.2020]. It is worth mentioning that the Polish Ombudsman's doubts relate to the pre-trial proceedings.

1) the right to meet in private and to communicate with the representing lawyer, also before being questioned by the police or another law enforcement or judicial authority;
2) the right to the presence and effective participation of a lawyer during the questioning of the accused;
3) the right to the presence of a lawyer during the following evidence-gathering acts: identity parades (presentation for recognition), confrontation, reconstruction of the scene of a crime (trial experiment).

After even a cursory analysis of this provision, the conclusion can be drawn that the EU legislator does not require that in any case the accused be represented by a lawyer in a criminal court. The Directive of 2013, therefore, as regards the stage of judicial proceedings, sets a minimum standard to be provided by EU Member States in terms of access to a defence counsel, but it refers to the lawyer, whom the accused already has. In this case, national provisions are to guarantee that the accused's lawyer will be able to effectively perform his/her duties and thus the accused will have a real right of defence guaranteed.

The Directive of 2013 in this respect provides three groups of guarantees: the first concerns the possibility of meeting and communicating with a lawyer, the second is to guarantee the participation of the lawyer in the interrogation of the accused, and the third – the participation of the lawyer in three other specific evidence-gathering acts.

Therefore, first of all, it is necessary to analyse, in terms of the abovementioned three areas, the provisions of the Polish CCP, which apply in the event that the accused has a lawyer (both by choice and *ex officio*). Next, it is necessary to look separately at the question of appointing a state-paid defence counsel.

3. ACCESS OF THE ACCUSED TO THE LAWYER WHOM HE/SHE ALREADY HAS

In a situation where there are no grounds to appoint a defence counsel *ex officio*, the lawyer is appointed by the accused himself/herself, but if the accused is deprived of liberty, the defence counsel may also be appointed

for him/her by relatives (Article 83 § 1 of the CCP). If the accused is a minor or incapacitated, defence counsel may also be appointed by his/her legal representative or the person under the care of whom the accused remains (Article 76 of the CCP). The accused may have a maximum of three lawyers at the same time (Article 77 of the CCP).

At the stage of court proceedings, the first area of guarantee, i.e. the right to meet with a lawyer in private and to communicate with him/her, does not in fact have any legal or actual limitations when the accused remains at liberty. It is worth pointing out that in the Polish CCP there are no rules on this issue, and the only restriction may be that the order shall be maintained in the courtroom during the trial. Communication of the accused with the defence counsel during the trial may take place even on an ongoing basis, e.g. during the interrogation of a witness – there is no prohibition here, provided that it does not interfere with the course of activities. There is also no obstacle for a defence counsel or for the accused to request a break in order to allow them to consult outside the courtroom. Insofar as such the request would not be overused (which the chairman of the panel would assess in each case in the realities of a particular situation), the institution of a break in the hearing (Article 401 § 1 of the CCP) could be used to execute the right of communication of the accused with his/her lawyer in private[5].

The problem of a possible restriction of the accused's access to defence counsel could be revealed when the accused is deprived of liberty. However, it should be emphasized that at the stage of court proceedings, the Polish CCP does not allow any restrictions regarding the contact of the accused deprived of liberty with the defence counsel, in contrast to the pre-trial stage, where pursuant to Article 73 § 2 and § 4 of the CCP the prosecutor may exceptionally stipulate that he/she will be present when

[5] In Article 401 § 1 CCP it is directly mentioned, that the break in the hearing can be decided in order to allow for the preparation of motions concerning evidence, which sometimes requires direct contact and discussion between the lawyer and the accused. The literature indicates that a break in the hearing may be ordered due to the state of health of the lawyer who appeared at the hearing but is not able to fully perform his duties – Ryszard Ponikowski, Jarosław Zagrodnik, "Commentary on the Article 401 CCP", In: Code of Criminal Procedure. Comment, ed. Jerzy Skorupka, Warszawa: C. H. Beck, 2018, 1028.

the suspect contacts the lawyer, which can only take place during the first 14 days from the start-date of detention[6].

The Polish legislator reasonably recognized that at the stage of court proceedings such a limitation in the accused's contacts with his/her lawyer could not be justified. In fact, the only restriction on the access to a lawyer may result from the very fact of the penitentiary isolation of the accused, but this is a matter of factual, not legal problem and is a natural consequence of imprisonment. The accused person, deprived of liberty, has the right to contact his/her lawyer, also during personal visits. CCP provisions do not contain any restrictions on the communication of the accused with the defence counsel so there are no obstacles at the stage of the court proceedings with the implementation of the Directive 2013/48 in the first guarantee[7].

At the stage of court proceedings, the threat to the guarantees regarding the other two groups of situations explicitly mentioned in the Directive, i.e. the participation of the defence counsel in the interrogation of the accused and in the three specific evidence-gathering acts is also much less significant than in the pre-trial proceedings, which does not mean, however, that it is completely unreal.

It is worth starting this issue with the fact that an important guarantee of the accused's access to the lawyer at the stage of court proceedings are the provisions regarding the obligation to notify the lawyer about the date and place of each procedural act, including in principle also the dates of the hearing (Article 117 § 1 CCP). With this guarantee corresponds the

[6] A similar solution applies to the detained person (Article 245 § 1 CCP). In literature doubts are raised as to the compliance of these provisions with the Directive: Anna Demenko, „Prawo oskarżonego do korzystania z pomocy obrońcy w świetle dyrektywy nr 2013/48/UE – wybrane zagadnienia", Palestra 12(2018): 18-19; Barbara Grabowska-Moroz, „Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów", Przegląd Sądowy 3(2019): 50; Tomasz Koncewicz, Anna Podolska, „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9(2017): 18-19.

[7] On this aspect of the right to defence more broadly: Mar Jimeno-Bulnes, "The Right of Access to a Lawyer in the European Union: Directive 2013/48/EU", In: ed. Tommaso Rafaraci, Rosanna Belfiore, EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office, Cham: Springer Nature Switzerland, 2019, 63-64.

content of Article 396 § 1 CCP, which provides the accused with the right to participate in any evidence-gathering act. There is an obligation to notify the lawyer properly about the date and place of all acts, in which the accused has the right to participate. Such obligation is crucial to guarantee the accused to exercise his/her rights of defence practically and effectively especially for acts in which the accused cannot participate. This is for example acts: 1) interrogation of a minor victim under Article 185a CCP, where, in addition, the accused must have a lawyer and if he/she does not have one, a defence counsel is appointed to him/her *ex officio* (Article 185a § 2 CCP); 2) conducting an interrogation at the hearing without the accused because his/her presence would have an embarrassing effect on the witness (Article 390 § 2 CCP), 3) conducting some evidence-gathering act by another court (Article 396 § 1 and § 2 CCP).

The rule is that if the defence counsel fails to appear and there is no proof of delivery of the notice of the date of the action and when there is a justified supposition that the failure of appearance resulted from natural obstacles or other exceptional reasons, or finally when the defence counsel justifies his/her absence and requests for not carrying out an act in his absence – this activity is not carried out (Article 117 § 2 CCP). If the presence of a defence counsel is obligatory (and it is in "cases of obligatory defence", which will be further discussed), the actions are not carried out regardless of the reasons for not appearing, i.e. even in case of an unexcused absence (Article 117 § 3 CCP), unless the Act provides otherwise, which will be discussed later. In accordance with Article 117 § 2a CCP, if the lawyer's failure to appear was due to an illness, in order to effectively apply for a change in the date of the procedural act, the absence must be justified by a certificate issued by a court physician (Article 117 § 2a CCP). It should be pointed out at once that such requirement does not seem to be excessive, it was introduced in order to avoid overusing the requests for changing a date of trial with reference to health problems.

At the stage of judicial proceedings discussed in the article, there is a rule that the vast majority of evidence-gathering acts take place at the hearing, with the exception of activities the specifics of which makes it impossible (e.g. inspection of the place of the crime or questioning of a witness at the place of his/her residence when his/her appearance in court is not possible due to health reasons). Among the evidence-gathering acts

listed in the Directive, at the stage of judicial proceedings, in practice, two of them could occur quite often: the interrogation of the accused and confrontation[8]. Both of these activities will take place at the trial (during the hearing). Therefore, it is necessary to analyse how the provisions of the Polish CCP regulate the lawyer's participation at the hearing.

Already quoted rules from Article 117 CCP create an obligation to notify of any procedural acts in which the defence counsel is entitled to take part, including the date of the hearing. However, it should be noted here that a significant change of CCP has entered into force on 5 October 2019 and it may, at first glance, raise some doubts as to the compliance with the minimum standard set out in Directive 2013/48. According to Article 378a § 1 CCP, if the accused or defence counsel did not appear at the hearing, having been notified of its date, the court, in particularly justified cases, may conduct evidence-gathering acts in their absence (even if it would be justified properly in the meaning of Article 117 § 2a CCP), and in particular hear witnesses who appeared at the hearing, even if the accused has not provided any explanations yet. In a situation where the absence was justified, the defence counsel may request to repeat taking the evidence which has been taken during his/her absence. This request must be submitted at the latest at the next hearing date, of which the lawyer was duly notified, with no procedural obstacles to his/her appearance, otherwise this entitlement expires (Article 378a § 3 and § 4 CCP). It is also worth noting that for the application of the supplement of the evidentiary proceedings to be granted, the lawyer would have to show that the taking of evidence in his absence violated the procedural guarantees, including, in particular, the right to defence (which, however, does not seem difficult to prove – it would be enough to refer to being unable to ask specific questions).

This solution should be assessed in the context of Article 3 § 1 of the Directive 2013/48, which requires that the Member States shall ensure that suspects and accused persons have the right of access to a lawyer in

[8] The doctrine rightly emphasizes that confrontation is a type of interrogation, and therefore the rules of the Directive regarding the interrogation and the active participation of the defence counsel in the interrogation apply. – Małgorzata Wąsek-Wiaderek, "Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", Europejski Przegląd Sądowy 1(2019): 19.

such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. These two aspects should be understood that the essence of the right of access to a lawyer means to provide the accused person with competent and necessary assistance in effectively exercising his rights where the knowledge and skills of the accused person are not sufficient[9].

It is worth mentioning here that from the judgment of the Court of Justice of the European Union of 5 June 2018, reference number C/612/15, arises that the particular national provisions can be examined in compliance with Article 3 § 1 of the Directive 2013/48[10]. It is therefore possible to test whether a specific solution violates the obligation to provide effective and practical assistance to a lawyer.

However, it seems that Article 378a § 1 CCP can also be assessed in terms of compliance with Article 3 § 1 of the Directive 2013/48. It should be noted that the Directive did not formulate a prohibition on conducting any evidence-gathering acts in the absence of a lawyer, so the court decision based on the Article 378a § 1 CCP will not automatically lead to a breach of the EU standard. Nevertheless, it should be emphasized that every polish judge has an obligation to use this provision in such a way as to ensure that the right of defence is exercised practically and effectively.

The possibility of proceeding in the justified absence of a lawyer of choice does not violate the standard of the directive. Polish CCP provisions do not prevent a defence counsel of choice from substituting for another lawyer who will appear in court on his behalf. The actual obstacles

[9] Paweł Wiliński, „Zasada prawa do obrony w polskim procesie karnym", Kraków: Kantor Wydawniczy Zakamycze, 2007, 296. See also: Lorena Bachmaier Winter, "The EU Directive on the Right to Access to a Lawyer: A Critical Assessment", In: Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, ed. Steffano Ruggeri, Cham: Springer International Publishing Switzerland, 2015, 121-122.

[10] This judgement concerns the compliance of the Bulgarian law provisions that entitle the court to exclude the defence counsel from participation in the proceedings (against the will of the accused) due to a conflict of interest found if the lawyer defends two or more accused persons. The CJEU pointed out that such a solution is not against the Article 3 § 1 of the Directive 2013/48. The judgement available on the website: curia.europe.eu and Lex/el. No. 1004947.

on the side of the lawyer are not relevant for the assessment of EU standards. Some doubts may arise only if the proceedings in the absence of the defence counsel would concern the *ex officio* lawyer, where the accused has no financial means to appoint another defence counsel and the *ex officio* lawyer does not appoint a substitute.

However, as for the guarantee of interviewing the accused in the presence of a lawyer, it seems that in practice, at the stage of court proceedings, there will be no threat to this standard. In fact, the right to refuse to give explanations is the first instruction given to the accused by the court. This instruction precedes the hearing of the accused (Article 386 § 1 CCP). Therefore, if the accused would not want to give an explanation in the absence of his/her lawyer and the court would like to hear a case, the accused would exercise his/her right to refuse to give an explanation. What is more, the possibility of requesting the repetition of evidence-gathering acts (taken in the absence of the defence counsel, as referred to in Article 378a § 3 CCP), in the above circumstances means that it is not the end of the proceedings at the first date of the hearing. Therefore, if the court decided to exceptionally conduct evidence proceedings in the absence of the accused's defence counsel, due to the necessity of providing the right to repeat for instance the interrogation of a witness with the participation of the lawyer, the court would have to set another date for the hearing in order to enable the exercise of the right under Article 378a § 3 CCP[11].

It is worth additionally pointing out here that pursuant to Article 9 § 1 and § 2 of the 2013 Directive, the accused has the right to waive "in a voluntary and unequivocal manner" the right to use the assistance of a lawyer, which should be noted in the report of the hearing. In such a case, so long as the accused agrees to carry out certain activities in

[11] Contradiction of Article 378a with the EU standard is noticed by Łukasz Chojniak, „Postulat nowelizacji Kodeksu postępowania karnego – krytycznie o niektórych proponowanych zmianach", Palestra 1-2(2019): 60-61; see also: Justyna Łacny, „Ocena rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw w świetle wymogów prawa Unii Europejskiej", Zeszyty Prawnicze Biura Analiz Sejmowych, 3(2019): 74-76.

the absence of his/her defence counsel, the problem of compliance with the EU standard does not appear at all[12].

As a summary of this part of the article, it is worth emphasizing that at the stage of judicial proceedings, a legal problem regarding the standard of the access to a defence counsel, which the accused already has, in practice may concern only the situation referred to in Article 378a § 1 CCP in case of *ex officio* lawyer and in the context of using the assistance of a lawyer in a real and effective way.

However, as long as the regulations of Polish CCP only allow for exceptional conduct of the hearing in conditions of Article 378a § 1 CCP, not imposing such an obligation, the court will proceed in accordance with the EU standard. Therefore, since the current provisions of the Polish CCP concerning the jurisdictional stage of proceedings can be applied in accordance with the 2013 Directive, the conclusion is that the transposition of the Directive 2013/48 in relation to the mentioned stage of proceedings is fully correct. In the Polish CCP there is no provision concerning the stage of court proceedings that would prevent the defence counsel from participating in the interrogation of the accused or would prohibit taking part in evidence-gathering acts directly provided for in the Directive.

An important guarantee is also the possibility of repetition of evidence taking place in the absence of the defence counsel, although it is worth noting that in the Polish CCP there are no provisions regulating the admissibility of using evidence that was carried out in the absence of the defence counsel, e.g. incorrectly notified of the date of the hearing[13]. The problem of using the explanations of the accused given in the absence of the defence counsel, in practice concerns primarily the pre-trial pro-

[12] It is worth mentioning the interesting issue of verifying the waiver of the right to a defence counsel. In the literature it is indicated that by referring to the interests of the judiciary, one can limit the freedom of the accused in deciding on this issue – Marek Zubik, "Konstytucyjne aspekty prawa wyboru obrony i obrońcy w sprawach karnych w perspektywie orzecznictwa Trybunału Konstytucyjnego", Europejski Przegląd Sądowy 1(2019): 15.

[13] Widely on the issue of the admissibility of using suspect's explanations given in the absence of a lawyer on the basis of the Polish CCP: Andrzej Sakowicz, "Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy", Europejski Przegląd Sądowy 1(2019): 50-53.

ceedings[14]. There is an extensive case law on this issue, ECHR's above all, ranging from the Salduz v. Turkey judgment or the fairly recent Beuze v. Belgium judgment[15].

Despite some doubts about the proceedings in the absence of an *ex officio* lawyer in the context of Article 3 § 1 of the Directive 2013/48, it can be stated that the provisions of the Polish CCP regarding the stage of court proceedings meet the EU standard[16]. The abovementioned remarks concerned access to the defence lawyer that the accused has. Now the provisions of the Polish CCP regarding the accused's access to a state-paid defence counsel at the stage of court proceedings should be analysed in the context of the Directive 2016/1919.

[14] Widely about this issue: Barbara Nita, „Dostęp osoby zatrzymanej do pomocy obrońcy. Uwagi w związku z wyrokiem Europejskiego Trybunału Praw Człowieka z 10 marca 2009 r. w sprawie Płonka przeciwko Polsce", Palestra 11-12(2011): 49 and next.

[15] Case of Beuze vs Belgium, Application no. 71409/10, the judgement available at: http://hudoc.echr.coe.int/eng?i=001-187802 [date of access: 20.02.2020]. The most significant judgment of the ECHR regarding this issue: the judgment of the Grand Chamber of 27 November 2008 in the case Salduz vs Turkey, Apllication no. 36391/02, available at: http://hudoc.echr.coe.int/eng?i=001-89893 [date of access: 20.02.2020]. About the Salduz doctrine see among others: Wojciech Jasiński, „Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski", Europejski Przegląd Sądowy 1(2019), 26-28; Piotr Kardas, „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata", Europejski Przegląd Sądowy 1(2019): 6-8.

[16] The extensive report of the Helsinki Foundation for Human Rights on the implementation of the Directive 2013/48 also indicates that there are no major doubts as to the solutions of the Polish CCP regarding the stage of the court proceedings and problems with proper implementation related to the pre-trial proceedings – Adam Klepczyński, Piotr Kładoczny, Katarzyna Wiśniewska, "O (nie)dostępnym dostępie do adwokata. Raport na temat wdrożenia Dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE", Warszawa, 2017: 27-36, http://www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf, [date of access: 20.02.2020].

4. ACCESS OF THE ACCUSED TO THE DEFENCE COUNSEL PAID BY THE STATE

There are two groups of situations in the Polish criminal trial in which an *ex officio* lawyer is appointed for the accused. The first group is cases of "obligatory defence", where the defence counsel is appointed even without the accused's request and regardless of his/her financial status – of course, as far as the accused has no lawyer of his/her own choice. The second group is the institution of a lawyer *ex officio* for the accused, who proves that the difficult financial situation prevents him/her from paying the lawyer of his/her choice.

It should be recalled that the Directive of 2016 does not contain a standard which would impose an obligation on the Member States to provide each accused with the assistance of a professional lawyer paid by the state. Furthermore, it is worth pointing out that the standard of the Polish CCP relating to the appointment of an *ex officio* defence counsel gives more guarantees in this respect than the standard specified in the Directive of 2016.

According to Article 4 § 1 of the 2016 Directive, the Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice requires so. Two criteria that can be applied to national law (as a condition for determining whether the legal aid paid by the state should be granted) are provided for in Article 4 § 2 of the 2016 Directive. Therefore, it is possible to examine the financial situation of the accused ("a means test"), but also the necessity of granting *ex officio* the legal aid in a specific case ("a merits test") or both.

It is worth noting that the Polish legislator has not decided to introduce a criterion of necessity – "a merits test" that should be related to seriousness of the criminal offence, the complexity of the case and the severity of the sanction (these auxiliary criteria are listed in Article 4 § 1 of the 2016 Directive), or possibly also in connection with the assessment of the resourcefulness of the accused. The abovementioned factors are not relevant in the Polish CCP. Therefore, the only criterion for assessing whether the accused should be granted an *ex officio* defence counsel is that the accused has duly proved that he/she is not able to bear the costs of defence

without prejudice to the necessary maintenance of himself and the family (Article 78 § 1 CCP), i.e. the criterion of financial standing ("means test").

Moreover, as indicated above, there are also cases in which the Polish legislator decided to guarantee the assistance of a lawyer paid by the state regardless of the financial status of the accused. These are the cases of "obligatory defence". It is not the purpose of this article to discuss this issue in detail, so it is sufficient to point out, for example, that obligatory defence applies to the accused in a particularly difficult situation related to their mental health (doubts regarding sanity), physical disabilities (deaf, dumb or blind accused), or age (accused under 18 years old) – Article 79 § 1 CCP. The accused must also have a defence counsel in cases of felonies (Article 80 of the CCP – in this case the Polish legislator applied the criterion of the importance of the case), and whenever the court decides so or when it deems it necessary due to other circumstances impeding the defence (Article 79 § 2 CCP). In accordance with Article 79 § 3 CCP the defence counsel's participation is obligatory in the hearings and the sittings, in which the participation of the accused is obligatory.

It is important to pay attention to the issue of deprivation of liberty as a circumstance justifying the granting of an *ex officio* lawyer. The Directive 2016/1919 contains an important requirement for such a case. In Article 4 § 4, it was therefore indicated that the criteria of necessity ("merits test"), if they are used by the Member States to assess the necessity of appointing an *ex officio* lawyer, will be met whenever the accused is brought before a competent court or judge to make a decision on imprisonment or when he/she is already deprived of liberty. It should be pointed out that the above criterion for the assessment of the Polish solutions is in fact irrelevant because the Polish legislator has not decided to introduce the "merits test".

If the accused is deprived of liberty and his/her financial situation does not allow him/her to pay the lawyer of his/her own choice (and therefore he/she has no savings or close family that could help the accused), then the court will appoint a defence counsel *ex officio* to such an accused – even in the simplest case. The aforementioned content of Article 4 § 4 of the Directive 2016/2019 should, however, provide the courts with a kind of "hint" when examining applications for the appointment of an *ex officio* lawyer for an accused deprived of liberty, while refusal decisions should

always be well-thought-out and motivated. The court may always withdraw the appointment of a defence counsel if it turns out that there are no circumstances on the basis of which he/she was appointed (Article 78 § 2 CCP), and the costs of the appointment may finally be charged to the accused, if a conviction was made (Article 627 CCP and Article 618 § 1 point 11 CCP).

The abovementioned solution adopted in the Polish CCP regarding the juridical stage meets the standard of the Directive of 2016[17]. Proper execution of the guarantees provided for by the law depends on the specific court decision, which, moreover, if negative (refusal to appoint a lawyer *ex officio*), is subject to interlocutory appeal (Article 81 § 1a CCP).

Another issue worth mentioning here is the time in which the Member States should ensure *ex officio* legal aid. In accordance with Article 4 § 5 of the Directive 2016/1919, the Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or specific evidence-gathering acts. In the Polish CCP there is no regulation which sets a deadline for granting an *ex officio* lawyer, what is more, there is no requirement that it should be done immediately. So, it all depends on the court's practice, although it seems that it would be worth regulating this issue at least as modelled on the solution of Article 254 § 1 CCP, in which the legislator has provided for a 3-day period for examining the application for repealing or changing the preventive measure. Such period could be provided for examining the request for appointment of defence counsel[18].

[17] Doubts regarding the defence *ex officio* in the doctrine relate to the pre-trial stage only: Barbara Grabowska-Moroz, "Prawo dostępu do obrońcy w świetle prawa europejskiego", Warszawa: HFHR, 2018, 40-42, DOI: https://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf

[18] The doctrine postulates that the decision on the appointment of an *ex officio* lawyer upon a request should be made on the basis of the statement of the accused that there are grounds for this, regarding his/her financial situation, and that the examination of this financial situation would take place after the appointment of a defence counsel – Sławomir Steinborn, "Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", Europejski Przegląd Sądowy 1(2019): 40-41.

At the stage of judicial proceedings, in practice, the problem of the time of examining such an application is revealed in a situation, in which the accused's application for the appointment of a defence counsel *ex officio* arrives before the designated date of the hearing. It is worth noting that in the Act that entered into force on 5 October 2019, the legislator explicitly indicated that it implements Directive 2013/48 and the Directive of the European Parliament and of the Council (EU) 2016/343 of 9 March 2016 on strengthening certain aspects of the presumption of innocence and law to attend the trial in criminal proceedings[19]. It could be argued that this Act introduces some strengthening of the EU standard in the field of access to a lawyer at the stage of court proceedings. The Polish legislator has removed from Article 353 § 5 CCP some uncertainty about the effect of submitting an application for appointment of a lawyer after the deadline. Before changing this provision, an application for the appointment of an *ex officio* defence counsel should be submitted within 7 days from the date of the delivery of the summons on the hearing or the notice of its date. The application submitted after the deadline would be examined, only if it did not necessitate a change in the date of the hearing. Therefore, if the 7-days term was exceeded, even if the court set further dates for the hearing, the application to appoint a defence counsel was left without consideration[20].

Currently, this issue is regulated by a new provision – Article 338b CCP. Pursuant to this rule, the deadline for submitting an application for the appointment of a defence counsel is 7 days from the date of delivery of a copy of the indictment, and if submitting a request after the deadline would necessitate a change in the date of the hearing, the request shall be examined immediately after the date of the hearing. Therefore, the legislator resolved the doubt as to whether the application should be considered after the hearing – in favour of the accused.

It should be considered whether, despite the changes, such a restriction still contradicts the EU standard. It should be borne in mind that in the analysed situation, the premises for appointing an *ex officio* lawyer may be fully valid, but only the accused has failed to meet the prescribed term.

[19] Official Journal EU L 65 of 11/03/2016.

[20] Krzysztof Eichstaedt, "Commentary on the Article 353 CCP", In: Code of Criminal Procedure. Comment, ed. Dariusz Świecki, Warszawa: Wolters Kluwer, 2018, 1314.

And if the court heard the accused who could not afford to pay the lawyer by choice and who submitted a too-late application for the appointment of an *ex officio* defence counsel, then the standard of the Directive 2016/1919 would not be met. It is worth noting that the Directive 2016/1919 also directly (in Article 2 § 1) and exactly as the Directive 2013/48 indicates the activities in which the accused should have an opportunity to have a lawyer paid by the state. There is the interrogation of the accused among them. It seems, therefore, that if the court would like to conduct a hearing, without examining the too-late application of the accused for appointing a lawyer, it should be eventually limited to the interrogation of witnesses – but not as part of the confrontation with the accused. It should be borne in mind, however, that without hearing the accused (except the situation where the court decides to hold a hearing in his/her absence), the judicial process cannot be opened at all.

It seems that in such a case, to meet the EU standard and to act in accordance with the provisions of the CCP as well, the court should act as follows. If the accused does not agree to be interviewed without a defence counsel (waiving the right of access to a lawyer within the meaning of Article 9 of the 2013 Directive in from § 9 of preamble to the Directive 2016/1919), the court should instruct the accused explicitly that he/she may declare the wish to refuse to give explanation. Moreover, the accused could even refuse to respond to the content of the complaint, which should be registered. In such a case, the court would limit the proceedings against him/her to those reading the explanations from the pre-trial proceedings (Article 389 § 1 CCP) and could carry out other planned evidence-gathering acts, not explicitly mentioned in the Directives.

However, in order to allow the substantive consideration of the application for the appointment of an *ex officio* lawyer, the court should not, in this case, end the proceedings, and should set a further date for the hearing. If the late motion was accepted despite the lack of an explicit provision for it, the court should consider the possibility of repeating the evidence taken, especially if the appointed defence counsel would request it, indicating e.g. the need to ask additional questions. In any case, however, the court should allow the hearing of the accused in the presence of an appointed lawyer, or carry out a confrontation again, since these activities were explicitly mentioned in the Directive – indicating the scope of its

validity. It is also worth mentioning that when it comes to the deadline for submitting an application for the appointment of an *ex officio* lawyer and the possible consequences of his/her failure to comply with it, the accused is instructed in providing him/her with a copy of the indictment (Article 338 § 1a CCP). So, if, despite a clear instruction, the accused does not meet the deadline, in fact he/she deprives himself/herself of the rights provided in the Polish CCP.

5. ACCESS TO A LAWYER IN APPEAL PROCEEDINGS

In accordance with Article 458 CCP the provisions on proceedings before the court of first instance shall apply *mutatis mutandis* to appeal proceedings, unless certain matters are clearly regulated differently. Focusing here only on differences from the proceedings at first instance, it is worth pointing out that the provisions on appeal proceedings may be considered as ensuring less guarantee as regards the access to a lawyer in the scope of the Directive 2013/48. Of course, it should be borne in mind that the nature of the appeal proceedings is different from that of proceedings before a court of the first instance, although it is worth noting that the model of the Polish proceedings at the second instance is a reformatory model. This means that before the court of the second instance it is possible to take evidence that was not carried out at the first instance.

Moving straight to the merits, it should be noted that defence counsel of the accused will be notified of the date of the appeal hearing on general principles. It is worth pointing out, however, that according to Article 450 § 3 CCP a failure to appear of parties or lawyers duly notified of the date of the hearing does not stop the examination of the case, unless their presence is obligatory. In principle, the presence is obligatory in cases of "obligatory defence" or always when the court decides so (Article 450 § 2 CCP). Reflecting on the relation of this provision to the norm discussed above, regarding the conduct of the trial at the first instance in the absence of a lawyer, it should be noted that Article 450 § 3 CCP is here a *lex specialis*. Firstly, this results in the principle that regardless of the reasons for the lawyer's failure to appear, the appeal hearing may take place (unless there is a case of obligatory defence). Secondly, it would probably have to be considered that the appeal

procedure does not apply to the provision enabling repetition of the action at the request of a lawyer who could not participate in the hearing.

If, despite the excused absence of the lawyer, the court of the second instance decides to interrogate the accused (or – which in practice is unusual, but is not excluded – will conduct a confrontation, presentation, or trial experiment) and does not take into account the request to postpone the hearing in order to enable the appearance of the defence counsel, this standard of the Directive 2013/48 will not be met. It therefore needs to be emphasized that the provision of Article 450 § 3 CCP only gives the opportunity to conduct a hearing, under no circumstances it obliges the appeal court to do so. Also, in the discussed situation, it depends on the decision of the court whether the standard of Directive 2013/48 in a specific case will be guaranteed, but it is possible to achieve without the interference of the legislator. The appeal court, wanting to additionally hear the accused (bearing in mind that there is no appeal against his decision), should not use the option of Article 450 § 3 CCP, and simply postpone the hearing. This would enable the interrogation of the accused in the presence of his/her lawyer.

Attention should also be paid to the specific solution functioning in the appeal proceedings regarding the presence of the accused himself/herself at the hearing. According to Article 451 CCP the appeal court has the option of refraining from bringing the accused person deprived of liberty to the hearing, if it is considered that the presence of a lawyer is sufficient. If there is no defence counsel appointed, the court appoints a lawyer *ex officio*. It is worth adding that in the first instance proceedings it is not possible to disregard the request to bring the accused to the hearing just because he/she has a defence counsel. When assessing this provision from the perspective of the European standard, it should be noted that the Directives of 2013 and of 2016 generally do not prevent such a solution. The only doubt concerns the right to direct contact with a lawyer, the necessity of which may, after all, be revealed depending on the course of the appeal hearing. In such a case, the appeal court should bear in mind that Article 451 CCP also gives only the option of refraining from bringing the accused to the hearing[21]. If the court considers that the right of the accused

[21] The doctrine indicates that if the accused submits a motion for bringing to court, it generally should be granted and the presence of a defence counsel can be considered

to have direct contact with the lawyer may be not guaranteed, the hearing should be postponed.

6. FINAL REMARKS

To sum it up, it should be pointed out that despite the controversial solutions regarding the possibility of proceeding in the absence of the accused's defence counsel, even justified by a court physician, the provisions of the Polish CCP give the opportunity to maintain the standard of Directive 2013/48. However, it will depend on the court's decisions in a particular case. As long as the provisions relating to the stage of proceedings before the court give only the opportunity to proceed in the absence of a lawyer, and do not oblige to it, it can be said that the Polish provisions meet the EU standard resulting from the Directive of 2013.

As for the standard arising from Directive 2016/1919, Polish provisions regarding the stage of judicial proceedings meet the European standard to a level even higher than the minimum. The only significant problem may arise from the obligation to submit an application for the appointment of an *ex officio* defence counsel within a specified period of time. However, since the accused is informed of this obligation, and the court must still consider the application brought after the deadline, the author does not see any breach of the standard resulting from the Directive. Although, it needs to be emphasized that courts should always use the above-mentioned provision of the CCP, which to some extent limits the accused's right of access to a lawyer, with particular attention and prudence. The provisions enabling the repetition of certain evidence-gathering acts should be applied in such a way that there are no grounds for challenging decisions taken due to violations of the rights of the defence, also to a certain extent arising from the EU Directives.

sufficient only exceptionally – Dariusz Świecki, "Commentary on the Article 451 CCP", In: Code of Criminal Procedure. Comment, ed. Jerzy Skorupka, Warszawa: C. H. Beck, 2018, 1142-1143.

REFERENCES

Bachmaier Winter, Lorena. "The EU Directive on the Right to Access to a Lawyer: A Critical Assessment", In: Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, ed. Steffano Ruggeri, Switzerland: Springer International Publishing, 2015, 121-122.

Chojniak, Łukasz. 2019. „Postulat nowelizacji Kodeksu postępowania karnego – krytycznie o niektórych proponowanych zmianach", Palestra 1-2: 56-68.

Demenko, Anna. 2018. „Prawo oskarżonego do korzystania z pomocy obrońcy w świetle dyrektywy nr 2013/48/UE – wybrane zagadnienia", Palestra 12: 13-20.

Eichstaedt, Krzysztof. "Commentary on the Art. 353 CCP", In: Code of Criminal Procedure. Comment, ed. Dariusz Świecki. 2018. Warszawa: Wolters Kluwer.

Grabowska-Moroz, Barbara. 2018. „Prawo dostępu do obrońcy w świetle prawa europejskiego", Warszawa: HFHR, https://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf, February 20, 2020.

Grabowska-Moroz, Barbara. 2019. „Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów", Przegląd Sądowy 3: 45-59.

Jasiński, Wojciech. 2019. „Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski", Europejski Przegląd Sądowy 1, 24-30.

Jimeno-Bulnes, Mar. "The Right of Access to a Lawyer in the European Union: Directive 2013/48/EU", In: ed. Tommaso Rafaraci, Rosanna Belfiore, EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office, Cham: Springer Nature Switzerland, 2019, 63-64.

Judgment of the Court of Justice of the European Union of 5 June 2018, reference number C/612/15, curia.europe.eu, February 15, 2020 and Lex/el. No. 1004947.

Judgment of the European Court of Human Rights of 27 November 2008 in the case Salduz vs Turkey, Apllication no. 36391/02, http://hudoc.echr.coe.int/eng?i=001-89893, February 20, 2020.

Judgment of the European Court of Human Rights of 9 November 2018 in the case of Beuze vs Belgium, Application no. 71409/10, http://hudoc.echr.coe.int/eng?i=001-187802, February 20, 2020.

Kardas, Piotr. 2019. „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Sal-

duz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata", Europejski Przegląd Sądowy 1: 4-10.

Klepczyński, Adam. Kładoczny, Piotr. Wiśniewska, Katarzyna. 2017. „O (nie) dostępnym dostępie do adwokata. Raport na temat wdrożenia Dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE", Warszawa: HFHR: http://www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf, February 20, 2020.

Koncewicz, Tomasz. Podolska, Anna. 2017. „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9: 9-23.

Łacny, Justyna. 2019. „Ocena rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw w świetle wymogów prawa Unii Europejskiej", Zeszyty Prawnicze Biura Analiz Sejmowych, 3: 70-78.

Ponikowski, Ryszard. Zagrodnik, Jarosław. 2018. „Commentary on the Art. 401 CCP". In: Code of Criminal Procedure. Comment, ed. Jerzy Skorupka, Warszawa: C. H. Beck. Pronouncement of Ombudsman of 4 July 2018 to the Minister of Justice: https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf February 15, 2020.

Reply of the Minister of Justice to the Ombudsman's request of 18 October 2018: https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2018.10.2018_0.pdf February 15, 2020.

Sakowicz, Andrzej. 2019, „Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy", Europejski Przegląd Sądowy 1: 47-54.

Steinborn, Sławomir. 2019. „Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", Europejski Przegląd Sądowy 1: 38-46.

Świecki, Dariusz. 2018. "Commentary on the Art. 451 CCP", In: Code of Criminal Procedure. Comment, ed. Jerzy Skorupka, Warszawa: C. H. Beck.

Wąsek-Wiaderek, Małgorzata. 2019. „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", Europejski Przegląd Sądowy 1: 17-23.

Wiliński, Paweł. „Zasada prawa do obrony w polskim procesie karnym", Kraków: Kantor Wydawniczy Zakamycze, 2007, 296.

Zubik, Marek. 2019. „Konstytucyjne aspekty prawa wyboru obrony i obrońcy w sprawach karnych w perspektywie orzecznictwa Trybunału Konstytucyjnego", Europejski Przegląd Sądowy 1: 11-16.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLI
YEAR 2020, ISSUE 2, pp. 175-196
DOI: https://doi.org/10.31743/recl.6157

ACCESS TO A LAWYER IN PROCEEDINGS FOR MINOR OFFENCES UNDER POLISH AND EUROPEAN UNION LAW

*Iwona Bień Węgłowska**

ABSTRACT

The Article deals with the opportunity for a suspected person and the passive party in the proceedings for offences to exercise the right of access to a lawyer and the right of legal counsel. The aim of the article is to provide a comparative legal analysis of the provisions of the Code of Procedure in Minor Offences against the background of the EU guarantees under Directives 2013/48/EU and 2016/1919/EU. Directive 2013/48/EU deals with one of the two aspects of the aforementioned right: namely the right of access to a lawyer for suspects and accused persons in criminal proceedings, while the right to legal aid and to state-guaranteed legal assistance in certain circumstances is regulated by Directive 2016/1919/EU.

Key words: access to a lawyer, right of defence, Directive 2013/48/EU, ex officio defence counsel, Directive 2016/1919/EU

1. INTRODUCTION

The right of defence is one of the most important guarantees of a modern criminal trial, the essence of which is to ensure that the accused is able to defend himself or herself and to use the assistance of a defence

* PhD, Iwona Bień-Węgłowska, Associate Professor at the Department of Criminal Procedure, Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin, Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: iweglowska@kul.pl; https://orcid.org/0000-0002-8575-8085.

counsel. In its formal aspect, the right of defence constitutes a prerequisite for the exercise of the right to a fair trial. In this context, the moment when the right to defence counsel is activated is important. The close link between access to defence counsel and the right of defence justifies why at the EU-level minimum standards on the rights of individuals in criminal proceedings were established, along with rules for their application in Member States, with an intention to contribute to effective judicial cooperation in this area.

The aim of this article is to explore how an accused person in proceedings for minor offences can benefit from his or her right of defence. This primarily concerns access to a lawyer during both the investigative and the procedural stage. This article aims to assess if the regulations contained in Poland's legislative framework, covering all the stages in proceedings for minor offences, are consistent with the standards regulating the right of defence under EU regulations.

2. ACCESS TO A LAWYER UNDER DIRECTIVE 2013/48/EU

European Union law guarantees access to a lawyer for suspects and the accused in criminal proceedings in Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to communicate with third parties and consular authorities when deprived of liberty[1]. Directive 2013/48/EU was adopted on 22 October[2].

[1] OJ L 294/1, 6.11. 2013.

[2] The deadline for transposition of Directive 2013/48/EU into national law passed on 27 November 2016. By then, Member States should have brought into force the laws, regulations and administrative provisions necessary to comply with this Directive (Article 15(1) of Directive 2013/48/EU). The Ministry of Foreign Affairs, which is responsible for providing the European Commission with information on the state of implementation of EU acts into Polish law, has confirmed the conformity of Polish law with the Directive. See: Document 32013L0048: National transposition measures communicated by the Member States concerning Directive 2013/48/UE - https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32013L0048.

The purpose of this Directive is to establish common minimum standards concerning the rights of individuals in criminal proceedings[3]. Member States may extend the rights set out in the Directive in order to ensure a higher level of protection for the individual. However, the level of protection should never be lower than the standards laid down in the Charter of Fundamental Rights of the European Union and in the European Charter of Human Rights, as interpreted by the rulings of the Court of Justice of the EU and the European Court of Human Rights[4]. The Directive requires Member States to ensure that suspects and the accused have the right of access to a lawyer "[...] in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and efficiently."[5].

2.1. Scope of the Directive

The Directive applies to criminal proceedings (except as indicated in Recital 13, i.e. it does not apply to proceedings for minor offences committed in prison or offences committed in the context of military service, dealt with by a relevant commander), as well as to the European arrest warrant proceedings.

The term "criminal proceedings" used in the Directive also includes proceedings before a court having jurisdiction in criminal matters with respect to minor offences. Where, under the law of a Member State, an authority other than a court having jurisdiction in criminal matters may impose a penalty for a "minor offence", but there is an appeal (Article 2(4)(a)) or it is not possible to impose a custodial sentence for it (Article 2(4)(b)), the Directive applies only at the stage of the proceedings before the court

[3] Recital 4 of Directive 2013/48/EU.

[4] Recital 7 of Directive 2013/48/EU.

[5] Article 3(1) of Directive 2013/48/EU. The Directive uses the term "lawyer" which, according to Recital 15, refers to any person who, in accordance with national law, is qualified and entitled (including by means of accreditation by an authorised body) to provide legal advice and assistance to suspects or accused persons. Under Polish law since 1 July 2015, analogical qualifications have also been bestowed on legal advisers and attorneys-at-law (barristers). However, for the purposes of this article the uniform concept of "lawyer" is used, which also includes legal advisers and attorneys-at-law (barristers, etc.).

having jurisdiction in criminal matters. The way in which the Directive refers to "minor offences" indicates the need to apply it under Polish law also to the general category of offences. In practice, this means that the compatibility of the procedural guarantees contained in the Directive can be assessed in the light of the applicable provisions of Poland's Code of Criminal Procedure[6] and the Code of Procedure for Minor Offences[7]. In view of the exemptions provided for in Article 2(4) of the Directive, the Directive should apply, either at the stage of legal proceedings only, in the case of offences for which a fine may be imposed by the police or other qualified authority by way of a criminal conviction (Article 2(4)(a)) or for which there is no penalty for detention (Article 2(4)(b)), or in the course of investigations, in other cases[8].

Recital 16 of the Directive makes it clear that, in the case of traffic offences committed on a large scale and detected following traffic control, the rights conferred by the Directive apply only to legal proceedings instituted by an appeal against a punishment imposed by a competent authority. Recital 17 states that the Directive should apply only to proceedings before a court having jurisdiction in criminal matters also in the case of offences involving violation of the general regulations issued by local authorities, as well as offences that involve violation of the public order for which deprivation of liberty cannot be adjudicated.

2.2. Subjective scope of the Directive

The Directive outlines the subjective scope of its application, i.e. who has the right of access to a lawyer and in what situations. In criminal proceedings, this right applies to suspects or the accused from the time when they are informed by the competent authorities by official notification, or otherwise, that they are suspected or accused of having committed a crim-

[6] Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2020, item 30

[7] Act of 24 August 2001, Code of Procedure in Minor Offences, Journal of Laws of 2019, item 1120

[8] See: A. Klamczyńska, T. Ostropolski, Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy, Białostockie Studia Prawnicze 15 (2014), 154.

inal offence, whether or not they are deprived of liberty[9]. The Directive also applies to persons who become suspects or are accused in the course of police or other law enforcement authority investigation[10]. It follows from Recital 21 of the Directive that the moment in the course of questioning when those persons are to be notified of a change in their status is when self-incrimination information occurs, since Recital 21 overtly refers to the right of protection against self-incrimination and the right to remain silent[11]. This situation may arise in the case of a witness whose status changes during the questioning, when he or she starts to provide self-incriminating information. A person acting as a witness may be questioned as a suspect but, in accordance with the guarantees of the Directive, this should only be done after having informed him or her of their rights, including the right of access to a lawyer[12].

The right of access to a lawyer is therefore activated from the moment when a suspect or the accused is informed (whether by means of a formal charge or otherwise) of his or her procedural status. This person can use its right of access to a lawyer until the end of the proceedings, including all forms and stages of appeal[13]. Certain doubts can occur in the interpretation of alternative ways of notifying suspicion of a criminal offence - other than an official charge - which conditions activating the rights provided by the Directive. Explanations in this regard may be sought in the jurisprudence of the European Court of Human Rights (ECtHR judgment of 18.02.2010 in Zaichenko v. Russia, Application no. 39660/02). This judgment indicates that "accusation" means a formal notification of the charges, but it also implies a significant change in a person's procedural situation, e.g. at the time of his or her arrest or initiation of proceedings against him or her. It should be noted that the judgment concerns the concept of "accusation" to which Article 6 of the ECHR refers. Worthy of a note is also that the guarantees contained in the Directive under analysis reach beyond Article 6 of the ECHR (since the Directive includes

[9] Article 2(1) of Directive 2013/48/EU.

[10] Article 2(3) of Directive 2013/48/EU.

[11] See: M. Wąsek-Wiaderek, Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej, Europejski Przegląd Sądowy 1 (2019), 18.

[12] Recital 21 of Directive 2013/48/EU.

[13] Article 2(1) of Directive 2013/48/EU.

notification of a third party, communication with consular authorities in the event of deprivation of liberty, and the European arrest warrant proceedings). It must therefore be assumed that under the Directive, both the right of access to a lawyer (covered by Article 6 ECHR) and the other rights under the Directive are also activated when other actions indicating suspicion are taken against the person concerned[14], i.e. questioning by the police and other relevant authorities[15], detention and provisional arrest[16], identity parade, confrontation and reconstruction of the course of the event on the basis of procedural experiments[17], as well as summons to appear before the court[18]. If a relevant authority takes any of these steps, the right of access to a lawyer is activated. However, it should be stressed that, according to Recital 20 of the Directive, its guarantees do not apply to so-called preliminary questioning by the police or other law enforcement authorities with the sole aim of establishing the identity of the person concerned or of clarifying safety issues, carrying out roadside checks and other random checks.

In proceedings for offences, activities related to establishing the identity of a given person undertaken by police officers concern identification of a person suspected of committing an offence, identification of witnesses of an event causing a violation of public safety or order, execution of an order issued by the court, prosecutor or government and local government administration bodies, as well as identification of persons indicated by wronged parties as perpetrators of offences. While verifying the identity of a given person in the course of procedural actions, police officers possess the right of constraining personal liberty to operate to the extent and for the time necessary to effectively establish the identity. Therefore, this type of action cannot be qualified as deprivation of liberty that would activate any kind of detention-related procedural regime. The legislator clearly distinguishes between the act of identity check and the act of police

[14] See: A. Klamczyńska, T. Ostropolski, Prawo do adwokata..., 150.
[15] Article 3(2)(a) of Directive 2013/48/EU.
[16] Recital 14 of Directive 2013/48/EU.
[17] Article 3(3)(c) of Directive 2013/48/EU.
[18] Article 3(2)(d) of Directive 2013/48/EU.

(e.g. in the case of public order violation) or other procedural detention[19]. Likewise, the provisions of Directive 2013/48/EU do not apply to activities aimed at establishing the identity of a person, as they treat these identification efforts only as measures analogical to questioning[20].

Under Polish law, the guarantees contained in the Directive should therefore apply to a suspect who has been charged or questioned as a suspect without a prior decision to charge him or her[21]. Also, it should therefore apply to the accused[22], but also to a person who is suspected of having committed a criminal offence - in other words, who is suspected of having committed it, but has not yet been charged[23]. Yet, this person can be lawfully involved in activities to confirm the suspicions of his or her having committed the act, or to exclude him or her from the list of potential perpetrators[24]. Referring to the provisions of the Directive, there should be no doubt that actions aimed at prosecuting a suspected person, which are outlined in the Directive, such as detention or identity parade (police line-up), result in the need to ensure his or her right of access to a lawyer, even if he or she has the procedural status of a suspected person rather than a suspect under Poland's national law[25].

Since the Directive also applies to offences, the rights provided for in the Directive should be exercised by: (a) a person suspected of having committed an offence, who is subject to investigative measures, and who

---

[19] See: Z. Gądzik, Komentarz do art. 15, In: Ustawa o Policji. Komentarz, Ł. Czebotar, Z. Gądzik, A. Łyżwa, A. Michałek, A. Świerczewska-Gąsiorowska, M. Tokarski, LEX/el. 2015, thesis 3.

[20] See: M. Wąsek-Wiaderek, Dostęp do adwokata…, 18.

[21] Article 71 par. 1, Article 325g of the Code of Criminal Procedure.

[22] Article 71 par. 2 of the Code of Criminal Procedure.

[23] The basic criteria distinguishing a suspected person are the lack of a formal element (presentation of charges) and the existence of a factual element, i.e. data at least justifying (to the degree of probability required to initiate proceedings *in rem* - Article 303 of the Code of Criminal Procedure), and at most sufficiently justifying the charges. In turn, the degree of probability of the factual element determines the nature of the action taken against a suspected person. See: K. Eichstaed, Komentarz do art. 71 k.p.k. In: Kodeks postępowania karnego, Tom I, Komentarz aktualizowany, ed. by D. Świecki, LEX/el. 2019, thesis 8.

[24] Article 74 par. 3 of the Code of Criminal Procedure. See: A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 155.

[25] See: M. Wąsek-Wiaderek, Dostęp do adwokata…, 18.

may be subject to certain evidentiary measures, as indicated in Article 74 par. 3 and 3a of the Code of Criminal Procedure, as well as Article 308 par. 1 of the Code of Criminal Procedure;[26] (b) a person who can reasonably be presented with a request of punishment, and who may be questioned after being informed of the content of the charges entered in the minutes of the questioning[27] - to the extent not covered by the exceptions specified in Article 2(4) of the Directive; and (c) the requested person - in practice a person against whom proceedings for offences are initiated and who has formally acquired the status of a party in the proceedings[28].

Analysing the subjective scope of the Directive and the degree to which they harmonise with the procedural guarantees outlined in Poland's Code of Procedure in Minor Offences, one needs to take into account first of all the procedural circumstances set out in the Directive, which determine the activation of the right of access to a lawyer, but not the terms and concepts that the Directive employs. It is important that the notion of a suspect used in Article 2(1) of the Directive has an autonomous meaning, independent of national legal systems. However, it is also legitimate to state that it must not deviate from the way in which the notion of a suspect is defined - also autonomously - in ECtHR case law, pursuant to Article 6 of the ECHR[29]. At this point, it should be stressed that Poland's Code of Procedure in Minor Offences does not use the term suspect at all. However, given the conditions which activate the right of access to a lawyer under the provisions of the Directive, the procedural guarantees bestowed on a suspect under the Directive should be addressed as the rights of a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences, as well as to a person suspected of committing an offence. Similarly, the guarantees for an accused person should be considered in the context of the rights of a requested person.

[26] Article 54 par. 5 of the Code of Procedure in Minor Offences.
[27] Article 54 par. 6 of the Code of Procedure in Minor Offences.
[28] Article 20 par. 1 of the Code of Procedure in Minor Offences.
[29] See: M. Wąsek-Wiaderek, Dostęp do adwokata…, 18.

3. NATIONAL PRACTICE AND APPLICATION OF EU LAW

Each authority engaged in proceedings for offences is obliged to interpret the legal provisions in accordance with the Constitution of the Republic of Poland, i.e. to reject such an interpretation of the relevant provisions that would be in conflict with the wording or purpose of the constitutional regulations. Similarly, it is the duty of each authority applying the provisions of the Code of Procedure in Minor Offences to reject such an understanding of these provisions which would be in conflict with the regulations of the European Convention on Human Rights and the legislation of the European Union[30]. As regards the right of access to a lawyer, the interpretation of the provisions of the Code of Procedure in Minor Offences should therefore not contradict the provisions of Directive 2013/48/EU and Directive 2016/1919/EU.

3.1. Suspect's right of access to a defence counsel

Directive 2013/48/EU applies to the investigation phase of the proceedings for offences, on condition that the punishment imposed by the proceedings may consist of deprivation of liberty. It equally applies in any case of deprivation of liberty (detention) of the person suspected of committing an offence[31].

The Directive guarantees access to a lawyer for the person suspected of committing an offence in connection with the procedural actions that may be carried out with his or her participation. Under these circumstances, the condition for the mandatory notification of the content of the charge does not apply, since the suspected person takes part in the proceedings for offences at its early stage, and it is only when certain evidentiary actions are carried out in his or her presence that the necessary grounds for the prosecution of the offence can be obtained and, consequently, a request of

[30] See: A. Światłowski, Dział I. Zasady ogólne, art. 1, In: Kodeks postępowania w sprawach o wykroczenia. Komentarz, ed. by Andrzej Sakowicz, Warsaw: Wydawnictwo C.H. Beck, 2018, 9.

[31] See: M. Wąsek-Wiaderek, Dział I. Zasady ogólne, art. 4, In: Kodeks postępowania w sprawach o wykroczenia…, 18.

punishment can be issued. In the absence of sufficient grounds to justify the fact that that person may have committed an offence, he or she should not be questioned as a person with respect to whom there are reasonable grounds for issuing a request of punishment[32].

Article 54 par. 5 of the Code of Procedure in Minor Offences indicates that the provisions of Article 74 par. 3 and 3a and Article 308 par. 1 of the Code of Criminal Procedure apply respectively to a person suspected of committing an offence. Pursuant to Article 74 par. 3 of the Code of Criminal Procedure, a suspected person may be subject to identity parade (police line-up). The person suspected of an offence must obligatorily be involved in this action. In this situation, the right of access to a lawyer during the identity parade, as layed down in Article 3(3)(c) of the Directive, is activated. This provision obliges Member States to ensure that suspects or accused persons can exercise their right to a lawyer and - at the minimum - to his presence during any investigative or evidence-gathering action provided for in national law. This provision also ensures presence of a lawyer if carrying out of a given procedural action requires or permits the participation of a person who is subject to the procedures of identity parade, confrontation and reconstruction of events[33]. At this point, it should be stressed that the provisions of the Code of Procedure in Minor Offences do not regulate at all the issue of the presence of a suspect's lawyer during the investigative actions with his or her participation.

A person detained under Article 46 of the Code of Procedure in Minor Offences should also enjoy the right of defence. This is because a detained person is *sui generis* accused of offence, who should enjoy his or her right of defence at the earliest stage of action against him or her[34]: it is not a formal presentation of a charge, but the initial actions of the procedural bodies aimed at prosecuting a person that makes that person subject of his or her

[32] See: T. Pączek, Pozycja prawna osoby podejrzanej o popełnienie wykroczenia w procesowym prawie wykroczeń, Policja 3 (2005), 45-46.

[33] Rulings by ECtHR indicate a legal obligation to ensure access to a lawyer at an early stage of the proceedings in relation to the actions carried out by the authorised bodies, for instance, in the case of identity parade. See Mehmet Serif Őner v Turkey, Judgment of 13.09.2011, application No 50356/08.

[34] See: J. Kosonoga, Dział VI, Środki przymusu, Rozdział 8, Zatrzymanie, Art. 46, In: Kodeks postępowania w sprawach o wykroczenia…, 275.

right of defence[35]. Detention of a person in proceedings for an offence is regulated by Article 46 of the Code of Procedure in Minor Offences. This provision is a guarantee, since, according to paragraph 1, a detained person must be informed immediately of the reasons for his or her detention and of his or her rights, and must be heard, which means that it is imperative to communicate that a law enforcement authority has a reasonable suspicion that he or she may have committed an offence. In this respect, the Code of Procedure in Minor Offences meets the condition for informing a suspicion of a criminal offence, as required by Article 2(1) of Directive 2013/48/EU.

The right of a detained person to communicate with a lawyer and to have a direct conversation with him or her is safeguarded by Article 46 par. 4, thus implementing the guarantees under Directive 2013/48/EU[36] as far as the very rule of access to a lawyer is concerned, whereas a lawyer with whom a detained person has the right to communicate may not exercise his or her defence functions until the actions under Article 54 par. 6 of the Code of Procedure in Minor Offences have been undertaken[37]. This latter provision is not in line with the requirements of the Directive, which, in Article 3(1), obliges Member States to ensure that suspects and accused persons have the right of access to a lawyer in such a way that they can effectively exercise their rights of defence. Also, under Article 3(2)(c), the right of access and defence should be activated immediately after deprivation of liberty[38]. Moreover, the way in which

[35] See: Ruling of the Supreme Court of Poland of 9 February 2004, V KK 194/03, LEX nr 102907.

[36] Under the provisions of the Directive, the moment when a lawyer is allowed to lawfully intervene comes, by principle, immediately after a person is informed of being suspected of committing a criminal offence. See: F. Gros, The EU directives on the rights of suspects. State of transposition by France, Eucrim. The European Criminal Law Associations 1 (2017), 29. February 3, 2020 - https://eucrim.eu/articles/state-transposition-france-eu-directives-rights-suspects.pdf.

[37] See: M. Wąsek-Wiaderek, Dział I. Zasady ogólne, art. 4 In: Kodeks postępowania w sprawach o wykroczenia…, 19.

[38] As rightly pointed out by S. Steinborn (Opinion of Poland's Criminal Law Codification Committee on the Transposition of EU Directive 2013/48/EU by Poland, issued 22 October 2013, p.6, online version accessed 29 December 2019 – https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego), "[…] it would be justified

a detained person can exercise his or her right of access to a lawyer - as regulated by the provisions of Poland's Code of Procedure in Minor Offences - is questionable. Although the legislator does not determine the form of contact between the detainee and his or her lawyer (usually by telephone or e-mail), and obliges the investigative authorities to provide the detainee, upon request, with an opportunity to speak with his or her lawyer directly, it empowers the relevant authority to demand presence during the conversation between a detainee and his or her lawyer. It should be stressed that this concise, general provision laid down in Article 46 par. 4 of the Code of Procedure in Minor Offences is too authoritarian in nature, as it does not provide for differentiation of circumstances under which the presence of representatives of law enforcement authorities during a conversation between a detainee and his or her lawyer could be justified, and hence is also inconsistent with the guarantees contained in the Directive. Recital 33 of Directive 2013/48/EU makes it clear that confidentiality of communication between suspects or the accused and their lawyers is essential to ensure the effective exercise of the right of defence, which is part of the right to a fair trial. Hence, all Member States need to respect the principle of confidentiality of meetings and other forms of communication between a detainee and his or her lawyer[39].

The provisions of Directive 2013/48/EU do not impose on Member States an obligation to provide free legal aid to materially deprived detainees. However, according to Recital 28 of the Directive, where suspects or the accused are deprived of their liberty, Member States should ensure that those persons are able to effectively exercise their right of access to a lawyer, including provision of due assistance of a lawyer for a person who does not have one. Recital 28 rules that under aforementioned circumstances, Member States are obliged to provide a detained person with a list of

– also in the context of the provisions of Directive 2013/48/EU - to postpone the moment of obtaining the procedural status of a suspect from the moment when the charges are presented to the moment when the procedural organ takes the first procedural step expressing its willingness to prosecute the person (e.g. detention) [...]".

[39] The aim of Directive 2013/48/EU is therefore not only to allow access to a lawyer at the right time for the defence, but also to ensure appropriate quality of contact between a lawyer and his or her client. See: T. Koncewicz, A. Podolska, Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim, Palestra 9 (2017), 12.

lawyers to choose from, or, if necessary, may apply solutions for ex officio legal assistance.

The obligation of Member States to ensure that a detained person has access to a lawyer for ex officio legal assistance is laid down in Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[40]. Under Directive 2016/1919/EU, suspects and accused persons who are deprived of their liberty in criminal proceedings[41] have the right to free legal assistance if they do not have sufficient resources to pay for the assistance of a lawyer[42]. This guarantee is not provided for by the provisions of Poland's Code of Procedure in Minor Offences. Article 4 of the Code fails to foresee the right of defence as defined under the Directive, which thwarts activation of the resulting effective application of the provisions regulating ex officio appointment of defence counsel[43]. The exclusion of a suspected person from the protection of the right of defence means that if he or she is detained, he or she has to bear the costs of a defence counsel.

3.2. The right of a requested person and of a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences of access to a defence counsel

Article 2(4) of Directive 2013/48/EU guarantees access to a lawyer for a requested person at the judicial stage of the proceedings for offences, as

[40] OJ L 297/1, 4.11.16. The Legal Aid Directive is an important complement to the Access to a Lawyer Directive, as it allows people who lack the financial means to benefit from a defence counsel. The proximity of the regulation of the Legal Aid Directive to the content of the standards contained in the ECHR, to which all Member States are parties, makes it possible for the majority of Member States to accept the content of the Legal Aid Directive. See: S. Cras, "The directive on the right to legal aid in criminal and EAW proceedings. Genesis and description of the sixth instrument of the 2009 roadmap", Eucrim. The European Criminal Law Associations 1 (2017), pp. 43-44. February 3, 2020 - https://eucrim.eu/articles/directive-right-legal-aid-criminal-and-eaw-proceedings/.pdf.

[41] Article 2(1)(a) of Directive 2016/1919/EU.

[42] Article 4(4)(b) of Directive 2016/1919/EU.

[43] Article 4 par. 2 sentence 3 of the Code of Procedure in Minor Offences reads: "Regulations of Article 21-24 shall apply accordingly."

well as for a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences at the stage of investigation. The provisions of this Directive, in so far as they correspond to rights guaranteed by the ECHR, should be implemented in a manner consistent with the provisions of the ECHR and in accordance with the judgments of the ECtHR (Recital 53). Therefore, the guarantees of a fair trial, including the right of self-defence or of a defence counsel, as expressed in Article 6(3) of the ECHR, apply to a requested person and to a person with respect to whom there are reasonable grounds for issuing a request of punishment. In assessing whether a case is a criminal matter, the ECtHR takes into account the criteria developed in its judgements: the classification of the charge in question under national law, the nature of the charge, and the severity of the sanction that can be adjudicated against the charged person[44].

The Directive guarantees access to a lawyer to a person with respect to whom issuing a request of punishment as a result of his or her questioning, detention, identity parade, confrontation or procedural experiment is deemed reasonable[45]. The right of access to a lawyer in connection with the questioning is reflected in Article 4 par. 2 of the Code of Procedure in Minor Offences, according to which the right of defence, including the right to be assisted by a single lawyer, is vested in the person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences and activated at the moment of his or her entering the questioning procedure, after being notified of the content of the charges, or when the person is summoned to submit a written explanation. The person needs to be informed of this right[46]. Article 4 par. 2 of the Code of Procedure in Minor Offences indicates the commencement of the questioning as the moment of activating an opportunity to exercise the right of defence. This means that a person with regard to whom there are justified grounds for drawing up a request of punishment may exercise his or her right of defence from the moment of notification of the content of the charge. This is because

[44] See: M. Wąsek-Wiaderek, Dział I. Zasady ogólne, art. 4 [in:] Kodeks postępowania w sprawach o wykroczenia…, 17.

[45] Ibid., 18.

[46] The second sentence of Article 54 par. 6 of the Code of Procedure in Minor Offences also requires that a specified person be instructed about the right to refuse to provide explanations and about the right to submit evidence.

Article 54 par. 6 of the Code of Procedure in Minor Offences rules that the notification of the content of the charge entered in the minutes of the questioning begins the very questioning procedure[47].

It should be stressed, however, that the content of the charge against the person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences may be modified at a later stage[48]. This is because proceedings for minor offences lack a regulation concerning the grounds for informing the aforementioned person about a change in the content of the charges or about their supplementation. Under such circumstances, a relevant regulation would enable undertaking the defence, as directly connected with the right to procedural information[49]. If the circumstances of the case prove that a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences committed an act whose formal specification differs from the original one, and the change is significant, as it concerns, e.g. the time or place of committing a prohibited act, or since it results from any other reason that affects the content of the charge, so that it may lead to a change in the manner of the defence, then the procedural authority should question that person again, after presenting the new content of the charge in order to enable him or her to defend effectively[50]. The doctrine

[47] See: M. Wąsek-Wiaderek, Dział I. Zasady ogólne, art. 4, In: Kodeks postępowania w sprawach o wykroczenia…, 19

[48] See: A. Sadło-Nowak, Dział VII. Czynności wyjaśniające, art. 54, In: Kodeks postępowania w sprawach o wykroczenia…., 310.

[49] See: M. Kurowski, Komentarz do art. 314 k.p.k., In: Kodeks postępowania karnego, Tom I, Komentarz aktualizowany, ed. by D. Świecki, LEX/el. 2019, theses 1 and 2. As regards criminal proceedings, a parallel regulation is expressed in Article 314 of the Code of Criminal Procedure, which determines the grounds for issuing a decision to modify or supplement the charges. See: S. Steinborn, Komentarz do art. 314 k.p.k., In: ed. by S. Steinborn, Kodeks postępowania karnego. Komentarz do wybranych przepisów, LEX/el. 2016, thesis 1.

[50] It should be emphasised that this practice of procedural authorities is provided for by the legislator in the Regulation by the Minister of Justice of 7 April 2016, Rules of Internal Procedure for the Prosecution Offices. Pursuant to par. 141(2) of the Regulation, a decision to modify the charges shall be issued if there is a need to significantly change the description of an act, or if the alleged act should be qualified as belonging under a more severe legal regulation; under a regulation of an analogical severity of punishment; or, finally, under a regulation of a reduced severity of punishment, if any of these choices are relevant for the suspect's defence. This procedure may be applicable in proceedings for offences

only contains postulates concerning the suggested manner of operation of the authorised bodies[51] in the absence of a specific regulation in the Code of Procedure in Minor Offences, which may lead to a situation in which the right of defence of a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences will not be properly guaranteed,[52] also from the perspective of the requirements of Directive 2013/48/EU. According to Article 3(3)(b) of the Directive, Member States are obliged to ensure that suspects or accused persons enjoy the right to the presence and effective participation of their lawyer during their questioning. The participation of a lawyer must comply with the procedures laid down in national law, provided that they are without prejudice to the relevant law and its substance. Undoubtedly, a person specified in Article 54 par. 6 the Code of Procedure in Minor Offences as well as his or her lawyer must be presented exact information about the charges if the lawyer is to undertake effective action during the questioning. Providing information about the charges underlies effective exercise of the right of defence and should therefore be guaranteed also in cases where - due to the change of factual or legal circumstances - the content of the charges needs modification.

Pursuant to the provisions of the Code of Procedure in Minor Offences, the requested person has the right of defence, including the right to be

when conducted by a prosecutor, who has a power to act at each stage of proceedings for offences, including the pre-trial stage. Article 56, par. 1 of the Code of Procedure in Minor Offences states that a prosecutor may carry out investigative actions specified in Article 54 of the Code of Procedure in Minor Offences. Whereas, pursuant to Article 18, par. 1 of the Code, a prosecutor can also submit a request of punishment in each offence, thus becoming a public prosecutor.

[51] See: A. Skowron, Kontrowersje wokół czynności wyjaśniających w sprawach o wykroczenia (part 2), Paragraf na Drodze 8 (2004), 32.

[52] Under the current legal regime in Poland, officers representing the authorities conducting the investigation are not obliged to repeat the questioning of a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences as a result of modifications of the charges. See: A. Sadło-Nowak, Dział VII. Czynności wyjaśniające, art. 54, In: Kodeks postępowania w sprawach o wykroczenia…, 312. It should also be noted that the authority most frequently intervening in offences is the Police, which, pursuant to Article 54 par. 1 of the Code of Procedure in Minor Offences, carries out investigative actions in order to determine whether there are grounds for requesting punishment and to effectively collect data necessary to draw up a relevant request.

assisted by a single lawyer. This person should be informed of this right[53]. The provisions concerning obligatory defence (Article 21 of the Code of Procedure in Minor Offences), the appointment of an ex officio defence counsel (Articles 22 and 23 of the Code of Procedure in Minor Offences), as well as the issue of establishing a defence relationship (specified in Article 24 of the Code of Procedure in Minor Offences) also apply to a requested person and a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences[54]. The right to obligatory defence is vested in the persons with sight, hearing and speech impediments or in cases where a justified doubt occurs as to the suspect's sanity, in cases when he or she does not have a lawyer of their choice[55].

54 par. 6 of the Code of Procedure in Minor Offences regulates an option to appoint a defence counsel ex officio in case of material depravation of the requested person. This requires the demonstration that persons having the right of defence are unable to bear the costs of the defence without a serious detriment to their own and their family subsistence, and that the participation of a lawyer in the case is necessary for the sake of a just trial. It is only when both conditions are met cumulatively that a lawyer can be appointed that is ex officio[56]. As regards the principle of access to ex officio legal aid, the provisions of the Code of Procedure in Minor Offences fulfil the guarantees of Directive 2016/1919/EU. Recital 13 of the Directive also gives Member States freedom to choose to provide free legal assistance to offenders, provided that the right to a fair trial is preserved, if the examination of legitimacy in their case would fail. Conversely, the criterion for assessing the justification for deprivation of liberty is applied differently. In this case, the criterion is always considered to be met under Article 4(4) of Directive 2016/1919/EU. The Directive does not require an examination of the severity of the offence, the complexity of the case, or the severity of the potential punishment in the case of deprivation of

[53] Article 4 par. 1 of the Code of Procedure in Minor Offences.

[54] The obligation of a proper application of Articles 21-24 of the Code of Procedure in Minor Offences results from Article 4 par. 2, sentence 3 of the Code of Procedure in Minor Offences.

[55] Article 21 par. 1 and 4 of the Code of Procedure in Minor Offences.

[56] See: post. SN (Supreme Court of Poland's Decision) of 16 November 2011; III KZ 77/11, OSNK 2012, no. 2, item 20.

liberty[57]. On the other hand, in the case of detention of a person specified in Article 54 par. 6. of the Code of Procedure in Minor Offences, the provisions of the Code conditions granting of a ex officio lawyer on the cumulative fulfilment of two criteria indicated in Article 22 of the Code. Thus, in this respect, they are not consistent with the requirements of Directive 2016/1919/EU.

When analysing the issue of effective access to an ex officio lawyer at the pre-trial stage in the procedure for offences, one should observe that the procedure currently in force may also raise doubts as to its compatibility with the guarantees under Directive 2013/48/EU. If a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences files an application for appointing a ex officio defence counsel, the body authorized for the investigation should request an investigative action on the part of the president of the court competent to hear the case or the relevant court registrar[58]. Pursuant to Art. 23 par. 2 of the Code of Procedure in Minor Offences, and in relation to Art. 81a par. 4 of the Code of Criminal Procedure, the procedure for appointing a defence counsel is regulated by the Regulation by the Minister of Justice of 27 May 2015 on the manner of ensuring that an accused person can use the assistance of a ex officio lawyer[59]. Pursuant to par. 11(3)(1) of this Regulation, if the circumstances indicate the necessity to immediately undertake the defence, the authority conducting the investigation is obliged to forward by fax an application for the appointment of a defence counsel funded by the public, along with the relevant documentation[60] to the court competent to hear the case, with an added proviso that this action should be taken immediately after such an application is filed. However, the prompt fulfilment of this requirement by the investigating authority does not mean that the application can be immediately examined. In a situation where presenting the charges takes place in the afternoon or on weekend days, a chance for timely assistance

[57] Article 4(4)(b) of Directive 2016/1919/EU.

[58] Article 23 par. 1 of the Code of Procedure in Minor Offences.

[59] Journal of Laws of 2017, item 53

[60] [57] These documents need to be filed in order to prove that a person specified in 54 par. 6 of the Code of Procedure in Minor Offences is not able to bear the costs of defence without serious detriment to the necessary subsistence of himself or herself and his or her family.

by an ex officio defence counsel is scarce. Moreover, the chance decreases when the proceedings are conducted outside the administrative area of the court competent to hear the case. The provisions regarding the appointment of a ex officio lawyer by the president of the court or the court registrar at the pre-trial stage of the proceedings constitutes a violation of the relevant legal guarantee, since it leads to the postponement of the moment of obtaining the assistance of a ex officio lawyer[61], and it *de facto* prevents the effective exercise of the right of access to a lawyer, as guaranteed by Directive 2013/48/EU. In such circumstances, the Code should provide for the appointment of a ex officio defence counsel by the body conducting direct investigative actions - the police or the prosecutor - while the verification of potential prerequisites for the ex officio defence should take place after certain activities have been carried out[62]. Even in case of their non-fulfilment, there is an option to charge a person specified in Article 54 par. 6 of the Code of Procedure in Minor Offences with the costs of the ex officio assistance in case of conviction[63].

4. CONCLUSIONS

The analysis of the possibility of exercising the right of access to a lawyer by the suspect and the passive party to the proceedings for offences unveils the fact that Poland's procedural regulations in force in this area do not always harmonise with the EU guarantees provided by Directives 2013/48/EU and 2016/1919/EU. The main idea in these regulations concerning the proceedings for offences is that they make it possible for the suspect to exercise his or her right of defence. The EU principle of access to a lawyer is only met when a suspect is detained, but with the exclusion made in the Code of Procedure in Minor Offences that under such circumstances a lawyer cannot perform as a defence counsel.

[61] See: S. Steiborn, Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda, Europejski Przegląd Sądowy 1 (2019), 40.

[62] Ibid., 40-41.

[63] Article 119 par. 1 of the Code of Procedure in Minor Offences.

This status quo results from discrepancies in how a suspect is defined for criminal proceedings under national and the EU law, which, consequently, leads to terminological discrepancies, stemming from divergent nomenclature use in Polish procedural law and in Directives 2013/48/EU and 2016/1919/EU. In Polish criminal trial, including proceedings for offences, presenting the charges is the moment when a suspected person is informed about a suspicion of his or her committing a prohibited act. No other action - even if it significantly affects the procedural situation of a suspected person - can be lawfully used to modify his or her status and, consequently, cannot activate the right of defence.

Therefore, the discrimination between a suspected person and a suspect in Polish criminal trial stands in the way of ensuring effective practical implementation of the guarantees laid out in Directive 2013/48/UE, as it leads to an implementation of EU guarantees with regard to a suspect, but to the prejudice of the rights of a suspected person. Consequently, the Code of Procedure in Minor Offences lacks a regulation which would guarantee a suspected person the right to a lawyer, despite the legal possibility to carry out specific procedural steps with his or her involvement, e.g. identity parade or detention. There is no doubt that a suspected person is in certain situations a subject of guarantees under both Directives. Therefore, it seems appropriate to introduce procedural changes, which would shift the activation of the right of access to a lawyer from the moment of the presentation of the charge to the moment when the procedural authority takes an action against a suspected person that constitutes an expression of the procedural authority's conviction that he or she has committed an offence.

An option to change the ex officio defence system so as to provide access to an ex officio defence counsel at the first stage of the criminal investigation, i.e. when a suspected person is detained or when he or she participates in identity parade, is also worth serious consideration. The EU requirement of effective access to an ex officio defence counsel encourages consideration of an appropriate statutory solution, whereby police and law enforcement authorities would have the power to grant temporary ex officio legal aid in cases where it is not possible to process an application for ex officio legal aid before an authorised body has heard the case, or before carrying out evidence examination, as indicated in Directive 2016/1919/

EU. Introducing of a procedure for a prompt appointment of an ex officio lawyer to a materially deprived detainee also calls for consideration, including the introduction of a system of on-call time for lawyers, on terms analogical to criminal procedure.

As for the confidentiality of contact of a client with a lawyer, as seen from the perspective of EU standards, an amendment is required in Article 46 par. 4 of the Code of Procedure in Minor Offences, which currently provides for the possibility of the procedural authority's presence during a conversation between a detainee and a lawyer, even though the aim of Directive 2013/48/EU is not only to ensure the detainee's effective access to a lawyer, but also to guarantee the appropriate quality of this contact. Introducing an appropriate mechanism to allow a detainee to obtain information about available lawyers that he or she could cooperate with is also a justified proposal. The practice of law enforcement authorities could consist in providing a detainee with an appropriate list of lawyers with their contact details and in assisting a detainee in establishing contact with the lawyer of his or her choice.

REFERENCES

Cras Steven, 2017. „The directive on the right to legal aid in criminal and EAW proceedings. Genesis and description of the sixth instrument of the 2009 roadmap", Eucrim. The European Criminal Law Associations' Forum 1: 34-45. Luty 3, 2020 - https://eucrim.eu/articles/directive-right-legal-aid-criminal-and-eaw-proceedings/.pdf.

Eichstaed Krzysztof, 2019. „Komentarz do art. 71 k.p.k." In: Kodeks postępowania karnego, Tom I, Komentarz aktualizowany, ed. by. Dariusz Świecki, LEX/el.

Gądzik Zuzanna, 2015. „Komentarz do art. 15" In: Ustawa o Policji. Komentarz, Czebotar Łukasz, Gądzik Zuzanna, Łyżwa Aneta, Michałek Aneta, Świerczewska-Gąsiorowska Anna, Tokarski Mirosław, LEX/el. 2015, thesis 3.

Grabowska-Moroz Barbara (ed.) 2018. Prawo dostępu do obrońcy w świetle prawa europejskiego. Podręcznik. Warszawa 2018 - http://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf.

Gros Félix, 2017. „The EU directives on the rights of suspects. State of transposition by France", Eucrim. The European Criminal Law Associations' Forum 1: 27-30

- https://eucrim.eu/articles/state-transposition-france-eu-directives-rights-suspects.pdf.
Klamczyńska Alicja, Ostropolski Tomasz, 2014. „Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy", Białostockie Studia Prawnicze 15: 143-163.
Koncewicz Tomasz, Podolska Anna, 2017. „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim", Palestra 9: 9-23.
Kosonoga Jacek, 2018. „Dział VI, Środki przymusu, Rozdział 8, Zatrzymanie, Art. 46". In: Kodeks postępowania w sprawach o wykroczenia. Komentarz, ed. by. Andrzej Sakowicz, 270-277. Warszawa: Wydawnictwo C.H.Beck.
Kurowski Michał, 2019. „Komentarz do art. 314 k.p.k." In: Kodeks postępowania karnego, Tom I, Komentarz aktualizowany, ed. by. Dariusz Świecki, LEX/el.
Pączek Tomasz, 2005. „Pozycja prawna osoby podejrzanej o popełnienie wykroczenia w procesowym prawie wykroczeń", Policja 3: 45-48.
Sadło-Nowak Agnieszka, 2018. „Dział VII. Czynności wyjaśniające, art. 54". In: Kodeks postępowania w sprawach o wykroczenia. Komentarz, ed. by. Andrzej Sakowicz, 298-324. Warszawa: Wydawnictwo C.H.Beck.
Skowron Andrzej, 2004. „Kontrowersje wokół czynności wyjaśniających w sprawach o wykroczenia (część 2)", Paragraf na Drodze 8: 31-35.
Steinborn Sławomir, 2016. „Komentarz do art. 314 k.p.k." In: Sławomir Steinborn (ed.), Kodeks postepowania karnego. Komentarz do wybranych przepisów, LEX/el.
Steinborn Sławomir, 2019. „Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", Europejski Przegląd Sądowy 1: 38-46.
Światłowski Andrzej, 2018. „Dział I. Zasady ogólne, art. 1". In: Kodeks postępowania w sprawach o wykroczenia. Komentarz, ed. by. Andrzej Sakowicz, 4-12. Warszawa: Wydawnictwo C.H. Beck.
Wąsek-Wiaderek Małgorzata, 2018. „Dział I. Zasady ogólne, art. 4". In: Kodeks postępowania w sprawach o wykroczenia. Komentarz, ed. by. Andrzej Sakowicz, 16-21. Warszawa: Wydawnictwo C.H.Beck.
Wąsek-Wiaderek Małgorzata, 2019. „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", Europejski Przegląd Sądowy 1: 17-23.