



## **JUDICIAL COOPERATION IN CRIMINAL MATTERS**

### **RIGHTS OF SUSPECTED AND ACCUSED PERSON**

#### **TEXT 5**

### **RIGHTS OF SUSPECTED AND ACCUSED PERSON**

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## JUDICIAL COOPERATION IN CRIMINAL MATTERS

### RIGHTS OF SUSPECTED AND ACCUSED PERSON

**Before you start** studying the lesson it is recommended:

- to have intermediate knowledge of general English;
- to have knowledge of key terms.

**AIM: After studying** the text you will be able in English:

- to understand key terms used in judicial cooperation in criminal matters;
- to use key terms of rights of suspected and accused person;
- to identify and use English terminology related to different rights of suspected and accused person.

#### KEY TERMS (*key term – definition*)

**The right to remain silent and the right not to incriminate oneself** - the right safeguarded by Directive 2016/343 which obliges Member States to ensure it to suspects and accused persons in relation to the criminal offence that they are suspected or accused of having committed; the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons; this right shall not be considered to be evidence that the suspected or accused persons have committed the criminal offence concerned.

**Public references to guilt** - the right safeguarded by Directive 2016/343 which obliges Member to take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty; this is without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence



**Burden of proof** - the right safeguarded by Directive 2016/343 which obliges Member States to ensure that the obligation to offer evidence for establishing the guilt of suspects and accused persons is on the prosecution; this is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law; it also entails that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

**Holder of parental responsibility** - a person who bears all rights and duties relating to the person or means any person having parental responsibility over a child; the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effects, including rights of custody and rights of access.

**Right to an individual assessment** - a right safeguarded by Directive 2016/800 which obliges Member States to establish such information about the individual characteristics and circumstances of the child a might be of use to the competent authorities; they shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account; for that purpose children who are suspects or accused persons in criminal proceedings shall be individually assessed taking into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have; the extent and detail of the individual assessment may vary;

**Confidentiality** - in the context of Directive 2013/48/UE the obligation of Member States to respect the privacy of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive; such communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law;

**Minimum rules** – rules aimed at facilitating mutual recognition of judgments and judicial decisions between Member States, taking into account the differences between their legal traditions and systems, these rules do not prevent individual Member States from envisaging in their national legislation benefits beyond those required by EU legislation;

**Remedy** – a right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide specific rights; under directives on procedural rights of suspected and accused persons Member States shall ensure that suspects or accused persons or their lawyers have the right to a remedy concerning rights provided in these instruments.

**Reconstruction of the scene of a crime** - the evidence which consists in reconstruction of the course of offence under possibly approximate conditions in which the crime occurred.

**Identity parades** - presentation of external appearance to let the identity of the person be identified.

**Vulnerable persons** – persons with special needs such as minors, unaccompanied minors, disabled



people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. A position of vulnerability refers to a situation in which the person concerned has no real alternative but to submit to abuse concerned. Minors and persons with disabilities are normally considered a vulnerable persons;

**Waiver of rights** - generally, a voluntary relinquishment of a right; the term is commonly used in EU criminal legislation with reference to the accused or suspected person, who may choose to waive some procedural rights, e.g. the right to translation.



### Case 1: right to translation and interpretation

Mr G., a Welsh football fan, was arrested in France (Marseille) during EURO 2016 following a violent attack on a Portuguese fan ahead of a match. Mr G. wanted an interpreter with a knowledge of Welsh, even if he could also freely communicate in English, but said it would be an attack on his dignity to be forced to speak this language. The French Police refused it but declares to provide him with an English-speaking lawyer.

Finally, the lawyer, who spoke to him in detention facility, had limited knowledge of English, so Mr G. could not point out all the facts that needed to be put forward in his defence. There was no assistance of an interpreter at this meeting.

The court said that he would ensure interpretation of his and his lawyer's statements during the trial but is under no obligation to arrange for an interpreter outside the courtroom (e.g. in communication with the defence in a detention facility).

### Questions:

1. Is directive 2010/64 helpful for Mr G. in this case? Which elements? Would the French Police be obliged to provide him with an interpreter into Welsh, even he could freely communicate in English?
2. Are French authorities obliged to provide interpretation for communication between Mr G. and his lawyer in a detention facility in order to prepare a defence?
3. Could Mr G. rely directly on the provisions of the directive in case of non-implementation in domestic law?

### Case 2: right to information

Mr D. was a Greek national holding a management function in a Greek government agency responsible for allocation of EU funds. Following a statement made by a witness who was an official in the same agency, he was charged with a fraud in allocation of EU funds, resulting in large damages for the Greek and the EU budget.

Following a request from a prosecutor, the court decided on his provisional arrest for 3 months. Mr D. appealed against that decision, since he claimed his innocence and believed that the evidence at disposal of the authorities would be easy to challenge. He wished to gain access to the materials of the case.

The prosecutor refused, however, to provide him with an identity of a witness and the contents of the statement he made against Mr D., arguing that it can discourage the witness from further cooperation with the prosecutor, and consequently - prejudice an ongoing investigation.

The Greek Police only offered him a 5-page document quoting relevant provisions of the Greek Code of Criminal Procedure.



### **Questions:**

1. Can the prosecutor find support for his refusal to make the statement of the witness available to Mr D. under directive 2012/13?
2. If yes, which elements of the directive would be relevant?
3. If not, could Mr D. rely directly on the provisions of the directive 2012/13 to gain effectively access to the statement of the witness?
4. Is a document quoting relevant provisions of national Code of Criminal Procedure sufficient to safeguard a right to information under directive 2012/13?

### **Case 3: right of access to a lawyer**

Mr P. was invited to visit the police station in connection with a murder and robbery. He confessed his guilt after being subjected to police questioning for about 30-40 minutes. He was not provided with access to legal advice during questioning. The police had only suggested that he could find a lawyer at a later stage of the proceedings.

His confession was decisive for the prospects of his defence and constituted a significant element on which his conviction was based. During the interrogation the police officers told him that if he wanted to go he should confess.

Mr P. was sentenced to 10 years' imprisonment for manslaughter and robbery.

### **Questions:**

1. The police argued that Mr Andreas P. arranged a lawyer for himself after the interrogation at the police station, who later advised him in the further course of the proceedings. Would the provisions of the directive 2013/48 be helpful for Mr Andreas P. to demand access to a lawyer already at the police station? Which article is relevant?
2. Could the provisions of the directive be applied directly to ensure his right of access to a lawyer during a police interrogation, in case of non-implementation in domestic law?
3. If it is established that the statement made by Andreas B. was obtained in breach of his right of access to a lawyer, can he effectively invoke the directive in order to ensure that the national court does not take it into account in its assessment of the facts?



## EXCERPTS:

### Article 34 (2) (b) Treaty on European Union (Amsterdam version):

(...) *The Council may:*

*adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.*

### Case 105/03 Pupino

(...) *The binding nature of framework decisions adopted on the basis of Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters, is formulated in terms identical with those in the third paragraph of Article 249 EC, concerning directives. It involves an obligation on the part of the national authorities to interpret in conformity with national law. Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.*

### Article 288 (3) Treaty on the Functioning of the European Union

*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*

### CJEU Case 41/74 Van Duyn

*IT WOULD BE INCOMPATIBLE WITH THE BINDING EFFECT ATTRIBUTED TO A DIRECTIVE BY ARTICLE [189] TO EXCLUDE, IN PRINCIPLE, THE POSSIBILITY THAT THE OBLIGATION WHICH IT IMPOSES MAY BE INVOKED BY THOSE CONCERNED.*

*IN PARTICULAR, WHERE THE COMMUNITY AUTHORITIES HAVE, BY DIRECTIVE, IMPOSED ON MEMBER STATES THE OBLIGATION TO PURSUE A PARTICULAR COURSE OF CONDUCT, THE USEFUL EFFECT OF SUCH AN ACT WOULD BE WEAKENED IF INDIVIDUALS WERE PREVENTED FROM RELYING ON IT BEFORE THEIR NATIONAL COURTS AND IF THE LATTER WERE PREVENTED FROM TAKING IT INTO CONSIDERATION AS AN ELEMENT OF COMMUNITY LAW. ARTICLE [177], WHICH EMPOWERS NATIONAL COURTS TO REFER TO THE COURT QUESTIONS CONCERNING THE VALIDITY AND INTERPRETATION OF ALL ACTS OF THE COMMUNITY INSTITUTIONS, WITHOUT DISTINCTION, IMPLIES FURTHERMORE THAT THESE ACTS MAY BE INVOKED BY INDIVIDUALS IN THE NATIONAL COURTS. IT IS NECESSARY TO EXAMINE, IN EVERY CASE, WHETHER THE NATURE, GENERAL SCHEME AND WORDING OF THE PROVISION IN QUESTION ARE CAPABLE OF HAVING DIRECT EFFECTS ON THE RELATIONS BETWEEN MEMBER STATES AND INDIVIDUALS.*

### CJEU Case 8/81 Ursula Becker

(...) *THUS, WHEREVER THE PROVISIONS OF A DIRECTIVE APPEAR, AS FAR AS THEIR SUBJECT-MATTER IS CONCERNED, TO BE UNCONDITIONAL AND SUFFICIENTLY PRECISE, THOSE PROVISIONS MAY, IN THE ABSENCE OF IMPLEMENTING MEASURES ADOPTED WITHIN THE PRESCRIBED PERIOD, BE RELIED UPON AS AGAINST ANY NATIONAL PROVISION WHICH IS INCOMPATIBLE WITH THE DIRECTIVE OR IN SO FAR AS THE PROVISIONS DEFINE RIGHTS WHICH INDIVIDUALS ARE ABLE TO ASSERT AGAINST THE STATE.*



### Case 80/86 Kolpinghuis Nijmegen

*WHEREVER THE PROVISIONS OF A DIRECTIVE APPEAR, AS FAR AS THEIR SUBJECT-MATTER IS CONCERNED, TO BE UNCONDITIONAL AND SUFFICIENTLY PRECISE, THOSE PROVISIONS MAY BE RELIED UPON BY AN INDIVIDUAL AGAINST THE STATE WHERE THAT STATE FAILS TO IMPLEMENT THE DIRECTIVE IN NATIONAL LAW BY THE END OF THE PERIOD PRESCRIBED OR WHERE IT FAILS TO IMPLEMENT THE DIRECTIVE CORRECTLY.*

*HOWEVER, ACCORDING TO ARTICLE [189] OF THE EEC TREATY THE BINDING NATURE OF A DIRECTIVE, WHICH CONSTITUTES THE BASIS FOR THE POSSIBILITY OF RELYING ON THE DIRECTIVE BEFORE A NATIONAL COURT, EXISTS ONLY IN RELATION TO "EACH MEMBER STATE TO WHICH IT IS ADDRESSED". IT FOLLOWS THAT A DIRECTIVE MAY NOT OF ITSELF IMPOSE OBLIGATIONS ON AN INDIVIDUAL AND THAT A PROVISION OF A DIRECTIVE MAY NOT BE RELIED UPON AS SUCH AGAINST SUCH A PERSON BEFORE A NATIONAL COURT.*

*IN APPLYING NATIONAL LAW AND IN PARTICULAR THE PROVISIONS OF A NATIONAL LAW SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT THE DIRECTIVE, NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSES OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE [189] OF THE TREATY.*

*HOWEVER, THAT OBLIGATION IS LIMITED BY THE GENERAL PRINCIPLES OF LAW WHICH FORM PART OF COMMUNITY LAW AND IN PARTICULAR THE PRINCIPLES OF LEGAL CERTAINTY AND NON-RETROACTIVITY. THEREFORE A DIRECTIVE CANNOT, OF ITSELF AND INDEPENDENTLY OF A NATIONAL LAW ADOPTED BY A MEMBER STATE FOR ITS IMPLEMENTATION, HAVE THE EFFECT OF DETERMINING OR AGGRAVATING THE LIABILITY IN CRIMINAL LAW OF PERSONS WHO ACT IN CONTRAVENTION OF THE PROVISIONS OF THAT DIRECTIVE.*

### Case 106/77 Simmenthal

*A NATIONAL COURT WHICH IS CALLED UPON, WITHIN THE LIMITS OF ITS JURISDICTION, TO APPLY PROVISIONS OF COMMUNITY LAW IS UNDER A DUTY TO GIVE FULL EFFECT TO THOSE PROVISIONS, IF NECESSARY REFUSING OF ITS OWN MOTION TO APPLY ANY CONFLICTING PROVISION OF NATIONAL LEGISLATION, EVEN IF ADOPTED SUBSEQUENTLY, AND IT IS NOT NECESSARY FOR THE COURT TO REQUEST OR AWAIT THE PRIOR SETTING ASIDE OF SUCH PROVISIONS BY LEGISLATIVE OR OTHER CONSTITUTIONAL MEANS*

## STRENGTHENING PROCEDURAL RIGHTS OF SUSPECTED AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

### OUTLINE OF RECENT DEVELOPMENTS AND CHALLENGES

#### I.

Approximation of procedural rights in the framework has long been one of the most controversial issues in the course of development of judicial cooperation in criminal matters in the EU. Since more than a





decade the instruments adopted in this field concerned mostly mechanisms of cooperation (in particular based on mutual recognition principle, such as the European Arrest Warrant) but have not touched upon very principles of procedural law. It does not really come as a surprise, since judicial procedures often reflect the legal tradition of the Member States and are more difficult to approximate than, for example, substantive law (e.g. setting up a common definition of an offence). A lack of European legislation in the field of procedural rights was particularly striking in the context of development of instruments focused on more effective fight against cross-border criminality. The emphasis was therefore on the repressive dimension, while procedural rights were set aside. The protection of individuals was regulated mostly on a fragmentary basis, such as grounds of refusal concerning in absentia proceedings<sup>1</sup>. Moreover, it was not clear if general clauses contained in instruments of mutual recognition – referring to protection of fundamental rights – allowed a refusal to recognize and execute decisions of other Member States, if there was a suspicion of infringement of rights of an individual.

At the same time, it was also evident that the fact that all Member States of the European Union are parties to the European Convention of Human Rights may be not enough to remedy existing shortcomings, since proceedings before the Strasbourg Court in individual cases could not compensate for the non-existence of well-established common procedural standards in the EU.

In this background, it was becoming clear that the further development of cooperation in the EU was not possible without a common approach towards minimum procedural norms. Such norms could strengthen mutual trust which, in turn, is necessary for the smooth course of cooperation of judicial authorities, in particular in the framework of mutual recognition.

This gap between repression and protection of rights gave rise to the proposal made by the Commission in 2004 to adopt framework decision on certain procedural rights in criminal proceedings<sup>2</sup>. However, after some negotiation, this initiative has failed, due to an alleged lack of legal basis in the Treaty to legislate explicitly on procedural rights. II. The situation has changed with the entry into force of the Treaty of Lisbon on December 1st, 2009. Article 83 (2) of the Treaty on functioning of the European Union provided an explicit legal basis in this field. In line with this provision:

“To 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, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

(...) (b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime; (...)

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.”

<sup>1</sup> Council Framework Decision 2009/299/JHA of February 26th, 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, 27.3.2009, p. 24–36

<sup>2</sup> Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union {SEC(2004)491}



This explicit legal basis gave rise to new initiative in this field whose aim was to increase mutual trust, which was a condition sine qua non of putting into effect more vigorously the principle of mutual recognition of judicial decisions. The political bases for further action was contained in the Roadmap on strengthening of procedural rights<sup>3</sup> adopted on November 30th, 2009. The roadmap reflects a “step by step” approach, i.e. regulation of one right in one directive, rather than a general instruments covering all procedural rights. The measures subject to further legislation were the following:

Measure A: Translation and Interpretation

Measure B: Information on Rights and Information about the Charges

Measure C: Legal Advice and Legal Aid

Measure D: Communication with Relatives, Employers and Consular Authorities Measure E:

Special Safeguards for Suspected or Accused Persons who are Vulnerable Measure F: A Green Paper on Pre-Trial Detention

## II.

Until today, a large part of the roadmap has been already put into effect. Firstly, the right to translation and interpretation was regulated under Directive 2010/64/EU<sup>4</sup>. According to this instrument, a suspected or accused person who does not understand or speak the language of the criminal proceedings concerned will be provided without delay with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, during all court hearings and during any necessary interim hearings. Where necessary for the purpose of ensuring the fairness of the proceedings, interpretation will also be available for communication between the suspected or accused person and his legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications, such as for bail. Moreover, a suspected or accused person who does not understand the language of the criminal proceedings concerned is provided with written translation of all documents which are essential to ensure that he is able to exercise the right to defend himself and to safeguard the fairness of the proceedings. The directive explains that essential documents include decisions depriving a person of his liberty, the charge/indictment and any judgment. The competent authorities shall decide in any given case whether any other document is essential. The suspected or accused person or his legal counsel may submit a reasoned request to this effect. As an exception to the general rules concerning written translation, an oral translation or an oral summary of essential documents may be provided instead of a written translation, on condition that such oral translation or oral summary does not affect the fairness of the proceedings. The directive also provides for interpretation for proceedings in execution of the EAW as well as the written translation of the EAW itself.

## III.

<sup>3</sup> Resolution of the Council of November 30th, 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal OJ 2009/C 295/01.

<sup>4</sup> Directive 2010/64/EU of the European Parliament and of the Council of October 20th, 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.



The next directive in the field of procedural rights (Directive 2012/13/EU<sup>5</sup>) concerned the right to information. In line with this directive, suspects or accused persons are provided promptly with information concerning at least the following procedural rights:

- the right to access to a lawyer
- any entitlement to legal advice free of charge and the conditions to obtaining it
- the right to be informed of the accusation
- the right to interpretation and translation
- the right to remain silent

This information shall be provided either orally or in writing in a simple and accessible language, taking into account any particular need of vulnerable suspected or accused persons. Moreover, any person arrested or detained, or arrested for the purpose of EAW, has the right to receive upon arrest a so-called “Letter of Rights” in a language that he or she understands. It should be drafted in a simple and accessible language so as to be easily understood. The directive provides an indicative model of such a “Letter of Rights” and Member States would be free to use this model or draw up a similar document on the basis of that model. The directive also foresees a right of access to the materials of the case. This right is intended to provide the suspect or accused person with detailed information about the charge in order to allow him or her to prepare a defence (in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the court). This information or access must be provided free of charge.

#### IV.

Probably the most difficult instrument in the entire roadmap was that concerning a right to a lawyer (Directive 2013/48/EU<sup>6</sup>) This Directive provides for a right of access to a lawyer to 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, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal. A possible waiver must be informed, voluntary and unequivocal. The right of access to a lawyer applies to suspects or accused persons in criminal proceedings:

- (a) before they are questioned 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 evidence-gathering act (at least identity parades, confrontations, reconstruction of scene of a crime) ;
- (c) without undue delay after deprivation of liberty;

<sup>5</sup> 47 Directive 2012/13/EU of the European Parliament and of the Council of May 22nd, 2012 on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012.

<sup>6</sup> Directive 2013/48/EU of the European Parliament and of the Council of October 22nd, 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, 6.11.2013.



(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

The directive stipulates that the Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law. No derogations are allowed to confidentiality.

Moreover, the directive provides for the right to have a third person informed of the deprivation of liberty (e.g. relative or employer), the right to communicate, while deprived of liberty, with third persons (nominated by them) and the right to communicate with consular authorities. Most rights provided under this directive are subject to derogations. These derogations shall be:

- (a) proportionate and not go beyond what is necessary;
- (b) strictly limited in time;
- (c) not based exclusively on the type or the seriousness of the alleged offence; and
- (d) no prejudice to the overall fairness of the proceedings

One of the most important novelties introduced by this directive concerns a so-called double defence in European Arrest Warrant proceedings. In effect, the competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State 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 persons under Framework Decision 2002/584/JHA. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.

## V.

The next instrument in the series of procedural measures focused on presumption of innocence<sup>7</sup>. This act did not figure in the Roadmap, referred to above, but the European leaders agreed in the Stockholm Programme that these aspects should be also addressed by the EU legislation.

The Directive on presumption of innocence will guarantee that suspects are not considered guilty simply because they exercise their right to remain silent. It also asks Member States to ensure that, before a final conviction, public authorities should refrain from public statements that could damage the person's reputation or influence the jury or the court's final decision ("innocent until proven guilty"). The Directive sets out that the burden of proof is on the prosecution and any doubt benefits the suspect or accused person. It also lays down the principle that everyone has the right to remain silent as regards the facts he/she is accused of. Finally, the Directive provides that the accused has the right to be present at the trial.

## VI.

<sup>7</sup> Directive 2016/343/EU 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, OJ L 65, 11.3.2016, p. 1–11



The last directive adopted under the Roadmap focuses on rights of suspected and accused children<sup>8</sup>. It was agreed that the category of “vulnerable” persons referred to in the Roadmap should cover children in the first place. This Directive aims to make sure that children are able to understand and follow criminal proceedings, including by having mandatory access to a lawyer in the proceedings. This means that children cannot waive their right to be assisted by a lawyer, as there is a high risk that they would not understand the consequence of their actions. Children are also set to benefit from other safeguards such as being informed promptly about their rights, being assisted by their parents (or other appropriate persons), not being questioned in public hearings and the right to receive medical examination if deprived of liberty.

## VII.

The current challenge for the Member States is to ensure timely and effective implementation of these directives. The implementation deadlines are the following:

- Right to translation and interpretation - October 27th, 2013
- Right to information - June 2nd, 2014
- Right of access to a lawyer - November 26th, 2016
- Right to presumption of innocence – April 1st, 2018
- Rights of suspected and accused children – June 11th, 2019

In principle, the national authorities should only rely on transposing legislation when applying provisions of these directives. What happens, though, if a directive is not implemented fully or on time? It clearly results from the well-established case-law of the ECJ that they can be invoked directly by individuals before national courts<sup>9</sup> (in vertical relations individual-state) where they are clear, precise and legally complete. This may be the case for the instruments adopted for the purpose of implementation of the Roadmap on procedural.

Many provisions of the adopted instruments apparently meet the conditions of direct effect. Moreover, the obligation of conforming interpretation of national law with the provisions of these directives will also apply in both cases.

## VIII.

One important challenge concerning the application of these directives relates to the so-called variable geometry, which entails that not all the Member States participate in these instruments. In this case, Denmark takes advantage of the opt-out Protocol to the Treaty of Lisbon according to which Denmark is not bound by these measures. The UK and Ireland may, in turn, choose to opt-in within 3 months after the presentation of the proposal or after the adoption of the measure. With regard to the acts implementing the Roadmap on procedural rights of the suspects and the accused in criminal proceedings, both the UK and Ireland have opted in to the adoption of the so-called measure A and measure B of the Roadmap (respectively: right to translation and interpretation, right to information for the suspects and the accused in criminal proceedings), however not the remaining ones. Given that the participation in new instruments becomes increasingly uneven, the practice of variable geometry may carry a risk for the integrity of judicial

<sup>8</sup> 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, OJ L 132, 21.5.2016, p. 1–20

<sup>9</sup> See e.g. 41/74.



cooperation in criminal matters. Brexit will complicate this picture even more. The field in question has never been conceived as an “à la carte” system, but rather a framework to be mutually interlinked and function as a whole. As a result of opt-outs, the procedural instruments risk to bring limited advantage, if they do not bind all the Member States since repressive instruments, where all the Member States participate will not always be properly counterbalanced by common EU norms aimed to safeguard the rights of suspected and accused persons.



## KEY TERMS

(English key term – English definition – translation of a key term to Polish)

**The right to remain silent and the right not to incriminate oneself (korzystanie z prawa do nieskładania wyjaśnień lub z prawa do nieobciążania samego siebie)** - the right safeguarded by Directive 2016/343 which obliges Member States to ensure it to suspects and accused persons in relation to the criminal offence that they are suspected or accused of having committed; the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons; this right shall not be considered to be evidence that the suspected or accused persons have committed the criminal offence concerned.

**Public references to guilt (publiczne wypowiedzi o winie)** - the right safeguarded by Directive 2016/343 which obliges Member to take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty; this is without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence

**Burden of proof (ciężar dowodu)** - the right safeguarded by Directive 2016/343 which obliges Member States to ensure that the obligation to offer evidence for establishing the guilt of suspects and accused persons is on the prosecution; this is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law; it also entails that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

**Holder of parental responsibility (podmiot odpowiedzialności rodzicielskiej)** - a person who bears all rights and duties relating to the person or means any person having parental responsibility over a child; the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effects, including rights of custody and rights of access.

**Right to an individual assessment (prawo do indywidualnej oceny)** - a right safeguarded by Directive 2016/800 which obliges Member States to establish such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities; they shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account; for that purpose children who are suspects or accused persons in criminal proceedings shall be



individually assessed taking into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have; the extent and detail of the individual assessment may vary;

**Confidentiality (poufność)** - in the context of Directive 2013/48/UE the obligation of Member States to respect the privacy of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive; such communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law;

**Minimum rules (minimalne standardy)** – rules aimed at facilitating mutual recognition of judgments and judicial decisions between Member States, taking into account the differences between their legal traditions and systems, these rules do not prevent individual Member States from envisaging in their national legislation benefits beyond those required by EU legislation;

**Remedy (środek ochrony prawnej)** – a right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide specific rights; under directives on procedural rights of suspected and accused persons Member States shall ensure that suspects or accused persons or their lawyers have the right to a remedy concerning rights provided in these instruments.

**Reconstruction of the scene of a crime (odtworzenie przebiegu przestępstwa; eksperyment procesowy)** - the evidence which consists in reconstruction of the course of offence under possibly approximate conditions in which the crime occurred.

**Identity parades (okazanie w celu rozpoznania)** - presentation of external appearance to let the identity of the person be identified.

**Vulnerable persons (osoby szczególnie narażone)** – persons with special needs such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. A position of vulnerability refers to a situation in which the person concerned has no real alternative but to submit to abuse concerned. Minors and persons with disabilities are normally considered as vulnerable persons;

**Waiver of rights (zrzeczenie się praw)** - generally, a voluntary relinquishment of a right; the term is commonly used in EU criminal legislation with reference to the accused or suspected person, who may choose to waive some procedural rights, e.g. the right to translation.