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## **RIGHT OF ACCESS TO A LAWYER IN POLISH PREPARATORY PROCEEDINGS, COMMENTS ON THE DIRECTIVE 2013/48/EU**

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### **Abstract**

This article aims to present the main issues related to the right of access to a lawyer in Polish preparatory proceedings in the context of the Directive 2013/48/EU. The deadline for its implementation expired on 27 November 2016, and although the Polish legislator tried to transpose its provisions by means of the 2018 amendment, it did not substantially change any rights falling within the scope of the right to a formal defence. The scope of the procedural right of access to a lawyer during a Polish preparatory proceeding raises a number of doubts regarding its compliance with EU law, particularly at the earliest stage of such a proceeding.

### **Keywords**

access to a lawyer, right to a defence, suspect, rights upon deprivation of liberty, rights of suspects, Directive 2013/48/EU

### **INTRODUCTION**

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The right of access of accused persons to a lawyer is an essential part of the right of defence, and thus of a fair trial. At the European level, this issue was originally regulated in Article 6(3) letter c of the ECHR and repeated in Article 47 of the Charter. In 2013,

Directive 2013/48/EU<sup>1</sup> was adopted, which regulated at the EU level the minimum standards determining the scope of an accused person's right of access to a lawyer in criminal proceedings. Directive 2013/48/EU directly refers to Article 47 and 48(2) of the Charter and Article 6 of the ECHR. Furthermore, the standards set out therein should be ensured at least to the extent defined in the Strasbourg jurisprudence.<sup>2</sup> However, one must emphasise that it is extremely dynamic and has changed significantly in recent years.<sup>3</sup>

The deadline for the implementation of this Directive for Member States was 27 November 2016. By the Amendment Act of 10 January 2018,<sup>4</sup> the Polish legislator decided to 'transpose' its provisions in a specific way, through the information that the amendment, although it does not contain any provision relating to the right of access to a lawyer, is an expression of the implementation of the Directive.<sup>5</sup> Therefore, the issue of adapting regulations on criminal proceeding to EU standards still remains valid.

The main difficulties resulting from the application of the right of access to a lawyer within the meaning of the Directive in Polish criminal proceedings primarily relate to a preparatory proceeding conducted by non-judicial authorities at the earliest stage of criminal proceeding where there may be a significant restriction of the right to liberty. It is at this stage of the proceedings that there is a high risk of obtaining evidence through methods of coercion or oppression in defiance of the will of the accused. As ECtHR points out, early access to a lawyer is part of procedural safeguards, especially with regard to the very essence of the privilege against self-incrimination.<sup>6</sup> Various experiences in different countries show that the Police are not necessarily interested in lawyer participation in pre-trial interrogations.<sup>7</sup> With greater reason, it seems necessary that the relevant provisions regarding the preparatory proceedings ensure the right of access to a lawyer

1 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 [2013] OJ L 294/1 (hereinafter Directive 2013/48/EU or Directive).

2 From the beginning of the drafting process, the contents of the Directive were largely based on the case law of the ECtHR, particularly the case of *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008); see 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)' (2017) 4 European Journal of Crime, Criminal Law and Criminal Justice 327.

3 Wojciech Jasiński, 'Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski' (2019) 1 Europejski Przegląd Sądowy 24.

4 Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (2018) [Amendment Act to the Code of Criminal Procedure], Dz.U. (2018), item 201.

5 Hanna Kuczyńska, 'Bezpośrednie stosowanie dyrektywy UE w sprawach karnych. Skutki braku implementacji dyrektywy UE' in Dominika Czerniak and Jerzy Skorupka (eds), *Europejskie gwarancje prawidłowego wymiaru sprawiedliwości w sprawach karnych* (C.H. Beck 2019) 73, 76.

6 *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

7 Violet Mols, 'Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers' (2017) 8 New Journal of European Criminal Law 300, 305.

in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

This article tries to answer the question whether the provisions of the Polish Code of Criminal Procedure (1997) [*Kodeks postępowania karnego*],<sup>8</sup> with regard to the early stage of the proceedings, i.e. the preparatory proceedings, remain consistent with the provisions of the Directive. It indicates the main areas relating to the personal and material scope of the right of access to a lawyer that raise doubts in relation to EU standards. Finally, it also suggests changes that should be implemented in the Polish Code of Criminal Procedure as soon as possible in order to avoid the need to apply the Directive directly.

## 1. THE SCOPE OF THE RIGHT OF ACCESS TO A LAWYER IN POLISH PREPARATORY PROCEEDINGS

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The right of access to a lawyer, in accordance with the concept adopted by the ECtHR, refers to the formal aspect of the right to defence, consisting of the possibility of having a professional lawyer and unlimited use of their assistance throughout the entire criminal proceeding.<sup>9</sup> Obviously, this right should also include the opportunity for a lawyer to exercise a number of rights, allowing for real conduct of defence activities, including the right to unhampered contact with the suspect. At the same time, the method of informing the suspect about the right of access to a lawyer is significant, as is the manner of notifying the defence lawyer about the time and place of acts they may participate in.

The right of access to a lawyer in the Polish model of criminal proceedings is regulated at several levels. The main normative act relating to criminal proceedings is the Code of Criminal Procedure of 1997. The relevant provisions relating to the right to defence, including formal defence, are also found in the Constitution.<sup>10</sup> The scope of this right is also influenced by the provisions of ECHR and the Strasbourg jurisprudence. Direct impact in this field also results from EU legislation, primarily the provisions of the Directive. When comparing these levels, clear discrepancies can be noticed.

The main difficulties relate to the personal scope of the protection provided for by the Directive, the scope of activities in which the presence of a lawyer should be respected, as well as the manner that ensures the right of access to a lawyer.

8 Dz.U., (1997), No 89, item 555 with subsequent amendments.

9 Although Article 2(4) of the Directive indicates its application relates to proceedings before a court having jurisdiction in criminal matters, which could suggest that the preparatory proceedings remain outside its scope, its detailed provisions and the preamble itself imply it applies from the earliest stage of criminal proceedings, such as investigative activities conducted by the police or other law enforcement.

10 The Constitution of the Republic of Poland (1997), Dz.U. (1997), No 78, item 483 with subsequent amendments.

## 1.1. The personal scope of the right of access to a lawyer

The first question one should answer is to whom the Polish Code of Criminal Proceedings (CCP) grants the right of access to a lawyer. The issue of the right to defence is regulated in the Polish legal order on several levels. It is guaranteed, both at the level of the constitution and the Code of Criminal Procedure itself, but it should be emphasized that the subjective scope of this right in the CCP is narrower than the constitutional one. In both levels, there is no doubt that the suspect has the right to a defence. The difficulties under the Code of Criminal Procedure arise in relation to the moment when this right is granted. This problem directly translates into the right of access to a lawyer, which is part of the right to defence. The existing constitutional standard provides for the right to defence, including the right of access to a lawyer from the first action directed against a specific person. To this extent the provisions of CCP are inconsistent with the constitutional provision granting the same right to every person, regardless of their procedural status.<sup>11</sup> Article 6 of the CCP expressly grants the right to defence only to the formal party of the proceeding, therefore at the stage of pre-trial proceeding, it is only available after a decision has been issued to present charges or charges have been presented in relation to interrogation as a suspect.<sup>12</sup> A suspected person is not a formal party to the proceeding, *ergo* their status is not the same as that of a suspect and may only use the guarantees and rights that have explicitly been granted to them. A literal interpretation of the provision, conferring the right to a defence under the CCP, earnestly questions the possibility of extending it to the suspected person. Importantly, the legislator also fails to introduce a formal definition of a suspected person, and the doctrine adopts numerous definitions.<sup>13</sup>

At the stage of negotiating the contents of the Directive, the subjective scope of the right of access to a lawyer triggered a wide discussion between the Member States.<sup>14</sup> Ultimately,

11 Dariusz Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie* (Lubelskie Wydawnictwa Prawnicze 1999) 202; Włodzimierz Wróbel, ‘Konstytucyjne prawo do obrony w perspektywie prawa karnego materialnego’ in Violetta Konarska-Wrzosek, Jerzy Lachowski and Józef Wójcikiewicz (eds), *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi* (Wolters Kluwer Polska 2010) 225; Ryszard A. Stefański, ‘Prawo do obrony osoby podejrzanej’ in Tomasz Grzegorzczak, Jacek Izydorczyk and Radosław Olszewski (eds), *Z problematyki funkcji procesu karnego* (Wolters Kluwer Polska 2013) 296, 308; Sławomir Steinborn and Małgorzata Wąsek-Wiaderek, ‘Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej’ in Maria Rogacka-Rzewnicka, Beata T. Bieńkowska, Hanna Gajewska-Kraczkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego* (Wolters Kluwer Polska 2015) 429, 430.

12 Article 71 para 1 of the CCP.

13 More on the definition of a suspected person see: Szymon Pawelec and Aleksandra Komar ‘Problem reprezentacji praw osoby podejrzanej a rola profesjonalnego pomocnika na wczesnym etapie postępowania przygotowawczego’ in Iwona Sepioło (ed), *Nullum crimen sine lege* (C.H. Beck 2013) 327, 327-329.

14 Alicja Klamczyńska, Tomasz Ostropolski, ‘Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy’ [2014] (15) Białostockie Studia Prawnicze 143, 147.

Article 2(1) of the Directive declares it applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities, 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. Furthermore, Article 3(2) clarifies that access to a lawyer shall be granted to the suspect or accused person without undue delay, starting with the earliest investigative steps indicated therein. The intention of the EU legislator was, in one respect, to extend the right of access to a lawyer not only for the accused at the stage of court proceedings, but also for suspects against whom preliminary proceedings are conducted, and in the other, that this right be guaranteed as early as possible, regardless of whether these are the formally presented charges or the investigating measures taken against a given person that *ipso facto* prove the pending proceeding is directed against them. This interpretation remains consistent with the Strasbourg standard.<sup>15</sup> Numerous representatives of the doctrine follow such argumentation,<sup>16</sup> pointing out that the right of access to a lawyer under the Directive shall be granted since the authorities carry out any investigative act against a person because he is being suspected of committing a crime, and also without undue delay if deprived of liberty.<sup>17</sup> With such an interpretation, the provisions of the Polish CCP remain in opposition not only to the constitutional guarantees but also to those granted by the Directive. It should be noted, however, that representatives of the Polish executive interpreted the provisions of the Directive differently and argue that the provisions of the Directive should be applied to a formal suspect, while a suspected person is not covered by its guarantees. Consequently, in their view, the Polish CCP, which grants the right of access to a lawyer only with respect to the suspect, fully reflects its provisions and there is no need for any adjustments.<sup>18</sup>

Acknowledging the position that the Directive introduces order to the right of access to a lawyer from the earliest possible moment, one must realise that Polish pro-

15 Małgorzata Wąsek-Wiaderek ‘Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej’ [2019] (1) Europejski Przegląd Sądowy 17, 18.

16 See *inter alia*: ibid; 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’ [2019] (1) Europejski Przegląd Sądowy 4, 5; Klamczyńska, Ostropolski (n 14) 150; Tomasz Tadeusz Koncewicz and Anna Podolska ‘Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim’ [2017] (9) Palestra 9, 13-14; Sławomir Steinborn in ‘Opinia Komisji Kodyfikacyjnej Prawa Karnego w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE’ <[www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego](http://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego)> accessed 9 August 2021.

17 Lorena B. Winter ‘The EU Directive on the Right to Access to a Lawyer: A Critical Assessment’ in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer International Publishing Switzerland 2015) 111.

18 See Helsińska Fundacja Praw Człowieka [Helsinki Foundation for Human Rights], ‘Odpowiedź podsekretarza stanu Ministerstwa Sprawiedliwości z dnia 13 lutego 2017 r. na pismo sekretarza zarządu Helsińskiej Fundacji Praw Człowieka z dnia 24 stycznia 2017 r. w sprawie implementacji dyrektywy 2013/48/UE’ <[www.hfhr.pl/wp-content/uploads/2018/05/HFPC-dyrektywa-ue-odpowiedz-MS.pdf](http://www.hfhr.pl/wp-content/uploads/2018/05/HFPC-dyrektywa-ue-odpowiedz-MS.pdf)> accessed 9 August 2021.

visions, which do not directly grant the suspected person the right to a defence, remain incompatible with EU law. The constitutional case law presenting the constitutional standard<sup>19</sup> fails to solve existing dilemmas. Even if one assumes that the right to defence is granted from the first action directed against a specific person, regardless of their status, one should also note that such a right comes down to a mere general declaration, supported by neither the specific rights resulting from the provisions of the Code of Criminal Procedure nor clear remedies in the event of its violation under the CCP. The practical and effective protection of the suspected person may only result from the direct application of the provisions of the Directive, which, however, should not constitute an alternative to the obligation to implement it.<sup>20</sup>

## 1.2. The material scope of the right of access to a lawyer

The very essence of the right of access to a lawyer is the possibility of a defence attorney to participate in certain activities of the preparatory proceeding. The issues in this respect primarily relate to the scope of the investigative acts, in which the suspect may request access to a lawyer, the method of instructing them about such a right, and to the real problems arising from notifying the lawyer about the undertaken procedural acts, as well as to the possibility of preparing a defence. The Amendment Act of 10 January 2018, designed in theory to implement the Directive, did not substantially revise any provisions on the formal right to a defence.

### 1.2.1. Questioning

The basic procedural step to be referred to is the questioning. Under the *Salduz* doctrine, as a rule, a suspect should always have the right of access to a lawyer prior to and during all questioning by any of the law enforcement authority.<sup>21</sup> However, on the basis of Polish regulations, there is not unquestionable, guaranteed right off access to a lawyer when questioning a suspect. Pursuant to Article 301 of the CCP, the participation of an appointed lawyer should be ensured on a motion from the suspect. *Expressis verbis* it follows from this provision that the right to demand the participation of a lawyer is applicable only in relation to a suspect. For this reason, it is doubtful that Article 301 of

19 See, *inter alia*, the following rulings of the Polish Constitutional Tribunal [*Trybunał Konstytucyjny* (TK)]: K 37/11, 11 December 2012, [2012] (11) *Orzecznictwo Trybunału Konstytucyjnego*, Series A, item 133; K 19/11, 3 June 2014 [2014] (6) *Orzecznictwo Trybunału Konstytucyjnego*, Series A, item 60; K 30/11, 8 October 2013 [2013] (7) *Orzecznictwo Trybunału Konstytucyjnego*, Series A, item 98. In this context see also Marek Zubik 'Konstytucyjne aspekty prawa wyboru obrony i obrońcy w sprawach karnych w perspektywie orzecznictwa Trybunału Konstytucyjnego' [2019] (1) *Europejski Przegląd Sądowy* 11.

20 Kuczyńska (n 5) 88.

21 Steven Cras, 'The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings' [2014] (1) *EUCRIM* 32, 38.

the CCP could be the foundation of such a power in relation to a witness who, during an interrogation, might become a suspect or even a decision might be made to press charges against them. This provision also does not directly explain what the real scope of rights are of a suspect who, whilst oblivious, responded to a summons to a witness which led to charges being pressed.<sup>22</sup> In accordance with the standards resulting from the Directive in such a situation, law enforcement should first instruct on the right to request defence and, if the suspected person requires so and a lawyer is available, adjourn the proceeding until legal counsel is present. Only on this basis would a witness or a suspected person be able to participate in the hearing in the presence of their lawyer. However, it has to be pointed out that, despite the correctness of such a rule, the practical implementation of this rule may be difficult, particularly, as during the questioning of a witness it is unclear when the person will start to be considered a suspected person and no longer a witness.<sup>23</sup>

In addition to the above-mentioned difficulties related to the subjective scope, the following problems should be highlighted, the general nature of which Article 301 of the CCP does not explain. The first of them refers to the disputed question whether it concerns an already appointed defence lawyer, as indicated by its literal wording,<sup>24</sup> or whether it results from an order to allow the suspect to appoint a lawyer if they have not yet appointed one.<sup>25</sup> The question whether this right is available only once,<sup>26</sup> or it applies to all subsequent hearings during the entire preparatory proceeding,<sup>27</sup> also raises controversy. Furthermore, there are factual problems related to the possibility of contacting a lawyer, if one has not been appointed, the manner of notifying a legal counsel about the investigation act, the waiting time for their arrival, enabling the suspect to contact the lawyer in order to prepare a defence, as well as the consequences of their failure to appear before authorities.<sup>28</sup> The current shape of the regulation under Article 301 of the CCP makes the right of access to a lawyer often deceptive, as it allows

22 Based on Article 313 of the CCP, questioning is not necessary to create an accused party, which means that after issuing and announcing the decision on presenting charges, the suspected person becomes a formal suspect, and consequently also becomes the addressee of the right under Article 301 of the CCP.

23 Winter (n 17) 111.

24 Jan Grajewski *Przebieg procesu karnego* (C.H. Beck 2013) 59; Michał Kurowski in Dariusz Świecki (ed), *Kodeks postępowania karnego. Komentarz*, Vol. 1, paras 1-424 (Wolters Kluwer Polska 2018) 1135.

25 Piotr Hofmański, Elżbieta Sadzik and Kazimierz Zgryzek in Piotr Hofmański (ed), *Kodeks postępowania karnego. Komentarz do artykułów 297-467*, Vol. 2 (C.H. Beck 2011) 30.

26 Tomasz Grzegorzczak *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz* (Wolters Kluwer Polska 2008) 638; Jacek Kosonoga in Ryszard A. Stefański (ed), *System Prawa Karnego Procesowego. Postępowanie przygotowawcze*, Vol. 10 (Wolters Kluwer Polska 2016) 777-778; Kurowski (n 24) 1134-1135.

27 Piotr Krzysztof Sowiński *Uprawnienia składające się na prawo oskarżonego do obrony* (Wydawnictwo Uniwersytetu Rzeszowskiego 2012) 287.

28 Sławomir Steinborn 'Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi *de lege lata* i *de lege ferenda*' [2019] (1) Europejski Przegląd Sądowy 38, 41-42.

the questioning to be carried out without the participation of a lawyer even in spite of such a demand, in far too many situations. For example: 1) the suspect has not yet appointed a lawyer, 2) the suspect appointed a lawyer, but not knowing that they will be questioned as a suspect appeared themselves, while the authorities did not adjourn the proceedings until they arrival of a lawyer, 3) the lawyer failed to attend, also in the case of a justified absence, 4) there is another questioning of the suspect, while the previous one took place in the presence of a lawyer. One might come to the conclusion that the procedural obligations of the authorities related to ensuring access to a lawyer have been set at an extremely low level.<sup>29</sup>

### 1.2.2. Other investigative acts

The Directive, by establishing the minimum levels of the right of access to a lawyer, is not limited to questioning only, other investigative acts also come under scrutiny in terms of how access to a lawyer should be ensured. This group includes: 1) identity parades, 2) confrontations and 3) reconstructions of the scene of a crime. The provisions of the Polish, criminal procedure do not establish separate conditions for the participation of a lawyer during these activities, therefore general rules should be applied.

The provisions relating to an interrogation apply to a confrontation, since in the Polish, legal order it is considered a type of this act. Henceforth, the above-mentioned remarks remain analogous. However, it should be emphasised that, in practice, the application of Article 301 of the CCP may be questionable in a situation when the suspect was accompanied by a lawyer during the previous questioning. As a result, the literal wording of this provision raises doubts as to whether this right is still valid for each subsequent investigating act. If, however, the confrontation concerns a suspected person or a witness, the problems under CCP relating to the personal scope of the right of access to a lawyer remains relevant. It should be remembered that both the witness and the suspected person under the CCP do not enjoy the status of a party. Consequently, at best, they can appoint an attorney, but only when their interests require it. This is, ultimately, decided by the authority. The Directive regulating the right of access to a lawyer does not grant the witness one, but the suspected person's rights should be ensured to a degree that allows for the practical and effective exercise of the right to defence.

Moreover, referring to the act of an identity parade (regulated in Article 173 of the CCP), one should note that this is an activity that, in practice, mainly concerns the suspected person, not the formal suspect. Therefore, it should be concluded that, in this respect, the Polish provisions do not refer to the participation of a lawyer during such an act at all. Carrying it out in the *in personam* stage clearly does not place the suspect in a more favourable position. Article 173 of the CCP does not establish an independent basis. Therefore the general provisions of Article 316 and 317 of the CCP, concerning

<sup>29</sup> Ibid, 42.

the participation of the parties and their lawyers in the activities of the preparatory proceeding, should be applied. For this reason, an established lawyer should, as a rule, be allowed to participate in the act of an identity parade, which is unique by definition. However, it is not without significance that there are no regulations on the method of notifying the parties about investigative acts, particularly specifying the minimum time between the notification and the date of the planned action, as well as the possibility of preventing the parties and their lawyers from undertaking any measures should the risk of loss or distortion of evidence arise in the case of a delay. The application of Article 317 of the CCP can cause even more problems, as it introduces a principle allowing participation in investigative acts only on request of the defence. In the absence of an announcement of the planned date to the defence, it basically is a barrier to exercise one's rights. Moreover, in this case, the legislator provides for the possibility of refusing admission to participate due to the important interest of the investigation. Comments on Articles 316 and 317 of the CCP also apply to the act of crime scene reconstruction.

### 1.2.3. Deprivation of liberty

The guarantees relating to the right of access to a lawyer upon deprivation of liberty constitute an issue that requires separate discussion. Article 245 of the CCP (along with Article 244 para 2 of the CCP), granting the detained person the right of access to a lawyer, is a source of a number of difficulties in practice.

First, the instruction for the detained does not contain specific information about practising lawyers who could assist them in the course of the proceedings. In fact, the detained is often unable to independently indicate the contact data that would allow them to establish contact with their lawyer on short notice. To increase the efficiency of exercising the right of access to a lawyer, it would be advisable to provide, at each police station, an appropriate list of lawyers with their contact details and the possibility of introducing voluntary duty hours at night and on non-working days for lawyers who could help with arrests and interrogations.<sup>30</sup> At the same time, the mere provision of access to a lawyer through the duty counsel system may not suffice in connection with the adoption of the Directive (EU) 2016/1919<sup>31</sup> and it would be necessary to ensure immediate access to a lawyer as part of legal aid and the system of the rapid appointment of a lawyer funded by the state.<sup>32</sup> The indicated problems with access to a lawyer are

30 Postulated by the Helsinki Foundation for Human Rights, the Polish Bar Council and the Warsaw Bar Council. Postulates of Helsinki Foundation for Human Rights, the Polish Bar Council and the Warsaw Bar Council <[www.hfhr.pl/wp-content/uploads/2019/10/Lista-postulat%C3%B3w\\_EDP.pdf](http://www.hfhr.pl/wp-content/uploads/2019/10/Lista-postulat%C3%B3w_EDP.pdf)> accessed 6 August 2021.

31 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 [2016] OJ L 297/1.

32 Wąsek-Wiaderek (n 15) 20.

visible not only in relation to the detained, but also those deprived of liberty for other reasons, such as being temporarily detained in another case or serving a prison sentence.

Second, doubts with regard to questioning remain analogous to those regarding detention. In addition, in this case, in Polish, domestic law there are no specific regulations that would define the method of ensuring contact with a lawyer, including the waiting time for their arrival. It is obvious that it is impossible to ensure unrestricted access to a lawyer due to the rapid pace of a detention procedure. One should, however, keep in mind that certain minimal standards, similar to those set out in Article 8 of the Directive, must be fulfilled. As an exception, the Directive provides for the possibility of introducing certain temporary restrictions on access to a lawyer. However, each time they should meet strict conditions, primarily relating to proportionality and necessity. Moreover, any decision limiting that access should be submitted to judicial review. In the interim, in accordance with Article 245 of the CCP, a detained person may not be refused contact with an attorney. However, no provision of the Code obliges the authorities to interrupt the interview or not to proceed with it if the counsel has not yet presented themselves.<sup>33</sup> The Code regulations allow the detainee to be questioned in the absence of a lawyer, even if they submit such a request.<sup>34</sup> Moreover, practice shows that detainees face real obstacles when seeking professional legal assistance and this contact is sometimes impeded by law enforcement officers.<sup>35</sup>

Incidentally, it is worth mentioning that doubts as to compliance with the Directive also appear with regard to the hearing procedure referring to temporary detention. *De lege lata*, before applying a preventive measure, the suspect should be questioned, whereas the appointed counsel should be allowed to participate in the hearing if they are present. At the same time, this provision refers only to an appointed lawyer (see previous comments). Moreover, according to Article 249 para 3 of the CCP, there is no obligation to notify a lawyer of the time and place of such a hearing<sup>36</sup> which clearly contradicts the right of access to a lawyer.

#### 1.2.4. Confidentiality of contact with a lawyer

One should also consider the method of exercising contact with a lawyer. The provisions of the Directive explicitly require respect for the confidentiality of communication between a suspect and their legal counsel, including meetings, correspondence, telephone conver-

33 Dominika Czerniak, *Europeizacja postępowania dowodowego w polskim procesie karnym. Wpływ standardów europejskich na krajowe postępowanie dowodowe* (C.H. Beck 2021) 156.

34 Ibid.

35 Adam Klepczyński, Piotr Kładoczny and Katarzyna Wiśniewska *O (nie)dostępny dostęp do adwokata. Raport na temat wdrożenia Dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE* (HFHR 2017) 37-38 <[www.hfhr.pl/wp-content/uploads/2018/01/HFHR\\_JUSTICIA2017\\_National-Report\\_PL.pdf](http://www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf)> accessed 10 January 2022.

36 Piotr Kruszyński ‘Tymczasowe aresztowanie’ in Piotr Kruszyński (ed) *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r.* (Dom Wydawniczy ABC 1999) 221, 234.

sations and other forms of communication permitted under national law. It should be emphasised, however, that the confidentiality of these contacts is not subject to limitations or exceptions under Article 8 of the Directive. The application of temporary derogations has been provided for the right to ensure immediate contact with a lawyer upon deprivation of liberty. An in depth analysis of the provisions of the Directive, including the preamble, should lead to the conclusion that the purpose of any restrictions is to delay access to a lawyer and the possibility of carrying out activities in their absence, not to interfere with the confidentiality of any such contact.<sup>37</sup> Taking this into consideration, the provisions of Article 73 and 245 para 1 of the CCP, to the extent that they allow for the presence of the prosecutor or another person authorised by the prosecutor's office during meetings of the temporarily arrested or detained with an appointed defender or a lawyer, as well as the control of correspondence for a period of 14 days from the date of temporary arrest, should be considered contradictory to the Directive.<sup>38</sup> Without going into a detailed analysis of these limitations, the following problems arising from them should be indicated: 1) the freedom of contact has been guaranteed with regard to the appointed counsel, therefore it does not refer directly to meetings with a lawyer who is not yet appointed, 2) the condition allowing the use of restrictions is of a general nature, which, in fact, allows for its wider application,<sup>39</sup> 3) the decision to admit the presence during meetings and control of correspondence is not subject to appeal.<sup>40</sup>

## 2. REMEDIES

No less important is the issue of remedies in the event of a violation of the right of access to a lawyer. The appropriate system of corrective measures support the implementation of guarantees resulting from such a right. The provisions of the Directive remain rather

37 Recital 33 of Directive states that the MS should respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in Directive, without derogation. Klamczyńska, Ostropolski agree with this view (n 14) 159; however Steinborn sees it differently arguing that confidentiality may be subject to time limits, see Steinborn 'Dostęp do obrońcy' (n 28) 44.

38 It is noteworthy that the Polish Constitutional Tribunal takes the position that limiting the unhampered contact of the accused and the defender is, especially at the initial stage of the proceedings, constitutionally and conventionally permissible. See: SK 39/02 of 17 February 2004, [2004] (2) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 7; K 25/11 of 10 December 2012, [2012] (11) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 132.

39 One should mention that the practice of law enforcement indicates that the premise intended to refer to exceptional situations is used as a rule; see Klepczyński, Kładoczny, Wiśniewska (n 35) 31.

40 The postulate to grant the detained the right to appeal against the decision issued pursuant to Article 73 para 2 or 3 of the CCP is raised by Maciej Fingas 'O konieczności poszerzenia zakresu kontroli zażaleniowej nad niektórymi decyzjami dotyczącymi praw oskarżonego – wybrane problemy implementacji unijnych dyrektyw w polskim procesie karnym' [2018] (1) Białostockie Studia Prawnicze 47, 58-59; Steinborn 'Dostęp do obrońcy' (n 28) 44.

enigmatic in this regard. In fact, Article 12(1) states that Member States shall ensure that suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of the rights under this Directive. In the original draft, the exclusion of unlawfully gathered evidence had been provided. However, due to the objections of the Member States, the decision was made to depart from this concept.<sup>41</sup> *De lege lata*, the provision of Article 12(2) read together with the Preamble, only suggests the need to consider the exclusion of evidence obtained in breach of Article 3(6) of the Directive, in order to preserve the fairness of the proceeding.<sup>42</sup> The current Strasbourg jurisprudence also rejected the thesis about the automatic influence of the violation of the right of access to a lawyer on the lack of fairness of the entire proceeding.<sup>43</sup>

In practice, this issue is extremely important. Statements received from the suspect at the initial stage of the preliminary proceeding may be of key importance for the case. The presence of a legal counsel during questioning, especially at an early stage of the proceeding, helps respect the right not to incriminate oneself, prevents testimonies obtained by means of violence, threats, torture or inhuman and degrading treatment, required respect for the principle of equality of arms, and takes into account the mental health and physical condition of the suspect. It also presents an opportunity to better assess the situation and prepare a line of defence.<sup>44</sup> Moreover, the ECtHR has repeatedly ruled that it is practically impossible to remedy a violation of the right of access to a lawyer at a later stage of a criminal trial.<sup>45</sup> In this respect, the scope of the possibility to use evidence from statements received in the lawyer's absence is of significant importance.

In the current Polish legal status, it should be considered that limiting the right of access to a lawyer during investigative acts does not exclude the possibility of recognising such evidence as the basis for decisions of the court adjudicating on the merits. In accordance with the principle of free assessment of evidence expressed in Article 7 of the CCP, the authorities form their beliefs on the basis of all the evidence gathered, only with the exception of that for which certain exclusions are in force. Free assessment requires the court to thoroughly analyse the circumstances of how evidence was being gathered, which involves the need to assess, *inter alia*, the conditions for questioning in the absence

41 For more details see 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' (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 31, 35.

42 Kuczyńska (n 5) 100-102.

43 *Ibrahim and others v United Kingdom* Apps nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 February 2016).

44 Andrzej Sakowicz 'Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy' [2019] (1) Europejski Przegląd Sądowy 47, 49 with literature and jurisprudence indicated therein.

45 *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008). However, this does not change the fact that the current jurisprudence indicates that generally it is permissible to limit the right of access to a lawyer at the stage of preparatory proceedings for compelling reasons (see *Ibrahim and Others v United Kingdom*).

of a lawyer. Nevertheless, there is no legal basis for the automatic admission that evidence obtained in violation of the right of access to a lawyer should, by definition, be excluded. This is confirmed both by the previously indicated provisions of the Directive and the ECtHR jurisprudence. Under Polish legislation, violating the provisions on gathering evidence does not in itself result in the exclusion of the evidence provided as such an outcome does not result directly from a specific provision. Therefore, the exclusion of evidence will cover, for example, statements received under duress or under the influence of a threat (Article 171 para 7 of the CCP), which may, in some cases, be related to the absence of a defence lawyer, while the violation of the right of access to a lawyer in itself does not lead to excluding evidence. Moreover, one should bear in mind that Polish provisions allow for a wide range of procedural acts in the absence of a lawyer. Doubts may arise in connection with a clear violation of the provisions of the procedure, such as the lack of instructions on the right to access to a lawyer and performing acts despite the clear objections of the suspect who demands the presence of a lawyer.

Representatives of the doctrine, who are in favour of imposing an exclusion of a suspect's statements taken in absence of a lawyer from evidence,<sup>46</sup> refer to the Article 170 para 1 (1) and Article 168a of the CCP which presents many problems of interpretation and its editing is not unambiguous. Regardless of the presented different interpretations of the indicated provision<sup>47</sup>, both doctrine and jurisprudence state, however, that this provision should be understood as meaning that evidence gathered in violation of procedural provisions is legally inadmissible, if at the same time it was obtained in violation of constitutional or international rights of an individual, including the rights resulting from the standard of a fair trial. As noted by the Supreme Court, despite the introduction of a general rule on the admissibility of illegal evidence: 'Article 168a of the CCP may not constitute the legal basis for admitting evidence obtained in violation of procedural provisions or by means of a prohibited act, if gathering such evidence would render the process unfair within the meaning of Article 6(1) of the ECHR'.<sup>48</sup> A problem, however, arises from the correlation between the right of access to a lawyer and the rule of fair trial in the jurisprudence of the Strasbourg Court, which are not uniform in this respect.

There is no doubt that a fair trial consists of a number of procedural safeguards, including the right to a defence, both material and formal. The European Parliament and the Council, as well as the ECtHR itself, ultimately do not support an absolute exclusion of gathered evidence in the event of the violation of the right of access to a lawyer in a criminal case. Furthermore, although, initially, the jurisprudence was heading in this

46 Sakowicz (n 44).

47 Anna Demenko, 'Selected remarks on the accused's right of access to a lawyer under Directive 2013/48/EU' [2018] (12) *Palestra* 14, 16.

48 Polish Supreme Court [*Sąd Najwyższy* (SN)] decision of 26 June 2019, IV KK 328/18, [2019] (8) *Orzecznictwo Sądu Najwyższego w sprawach Karnych i Wojskowych*, item 46.

direction,<sup>49</sup> the latest judicature indicates opposite tendencies.<sup>50</sup> The continental model of elimination of evidence obtained in violation of law characterised by the fact, that ‘the admissibility of deficiently gathered or presented evidence can be freely assessed by a judge, who takes into account the principles arising from the Constitution, the ECHR and generally recognized values’.<sup>51</sup> The ECtHR claims that each case should be analysed *ad casu*, taking into account all circumstances and, only on this basis, should a court decide on the impact of the evidence when passing a sentence. The assessment of the violation of the right of access to a lawyer from the point of view of a fair trial requires, each time, an examination of the following factors: 1) whether there was a restriction on the right to a lawyer, 2) whether there were compelling reasons for this restriction, 3) whether the proceedings, as a whole, were fair.<sup>52</sup> For this reason, deriving evidence exclusion from an international norm seems too far-reaching a conclusion. Moreover, although the fairness of proceedings, the objectives of the Directive, the general sense of justice and the principle of trust in national authorities speak for such a need, there are currently no clear, legal grounds for such a solution. Currently, the general rules related to the control of verdicts issued by courts of first instance, are the only true remedy that allow for a possible correction of such violations. Therefore, any deficiencies in access to a lawyer may constitute the basis for a change or revocation of a judgment issued, as part of the appeal procedure, due to a violation of procedural provisions that may have affected the judgment.

## CONCLUSIONS

The analysis of applicable provisions leads to the conclusion that the right of access to a lawyer in the Polish, criminal procedure is not in compliance with the Directive. The adopted, legal solutions allow for wide deviations from this principle, thus violating the standards adopted by the Directive. The optimism of the executive in this regard is unjustified and the very ‘fashion’ of implementing the Directive raises serious doubts, especially in the light of the above-mentioned issues. To reiterate, it is necessary to postulate the introduction of rapid, legislative changes by clearly extending the scope of the right of access to a lawyer. In this respect, it is extremely important to indicate the need for:

49 *Salduz v Turkey*; *Adamkiewicz v Poland* App no 54729/00 (ECtHR, 2 March 2010); *Demir v Turkey* App no 25381/02 (ECtHR, 28 July 2009); *Brusco v France* App no 1466/07 (ECtHR, 14 October 2010).

50 See, *inter alia*, the following rulings of the ECtHR: *Ibrahim and others v United Kingdom* Apps nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 February 2016); *Artur Parkhomenko v Ukraine* App no 40464/05 (ECtHR, 16 February 2017); *Zherdev v Ukraine* App no 34015/07 (ECtHR, 27 April 2017).

51 Hanna Kuczyńska, ‘Mechanisms of elimination of undesired evidence from criminal trial: a comparative approach’ (2021) 7 *Revista Brasileira de Direito Processual Penal* 43, 72 <<https://doi.org/10.22197/rbdpp.v7i1.473>>.

52 See for example *Tandoğan v Turkey* App no 27300/12 (ECtHR, 13 July 2021).

1. a clear extension of the subjective scope of the right to defence, also to the suspected person,
2. the amendment of Article 301 of the CCP, explicitly granting the right to demand the presence of a lawyer during each questioning of the suspected person or suspect, while a justified absence of the lawyer should obstruct the course of the act,
3. practical and effective safeguards of the access to a lawyer, also by the detained, through appropriate and accessible instructions, providing lists of advocates along with contact details of those who provide legal assistance in criminal matters, regulating the minimum waiting time for a lawyer to arrive and not performing any activities during this time,
4. clear specification of the premises justifying temporary restrictions to the right of access to a lawyer,
5. the amendment of Article 73 and 245 para 1 of the CCP by ensuring the confidentiality of contact with a lawyer, unlimited in time and type,
6. regulation of the rules for notifying a lawyer about the time and place of a procedural act, taking into account the real possibilities of participation in said act,<sup>53</sup>
7. the exclusion of unlawfully gathered evidence in relation to violation of the right of access to a lawyer.<sup>54</sup>

Amendments in the scope outlined above seem necessary in order to implement the Directive into the Polish legal system. Although there are alternative mechanisms to ensure the effectiveness of its operation. For example, through its direct application, which is possible in relation to the rights granted to individuals improving their legal situation in criminal proceedings<sup>55</sup> or indirect application, consisting in interpreting national provisions while taking into account their wording.<sup>56</sup> It must be stressed that this is insufficient to respect the suspect's fundamental procedural guarantees.

53 In this context, it is worth paying attention to the solutions adopted in France, where the advocate should be notified of the date of the requested procedural act no later than 2 days before the planned date of its conduct (Article 82-2 of the French CCP), and in the case of a planned hearing of a party, no later than 5 days before the act (Article 114 of the French CCP). Of course, in urgent situations, the authorities may shorten these deadlines, but nevertheless this is an exception to the general rule requiring notification of activities in such a way that it is possible to actually exercise one's rights.

54 Although the exclusion of unlawfully gathered evidence was not introduced in the Directive, it is worth mentioning that in 12 MS there are specific countermeasures for violation of the right to access a lawyer, and in most of them it is prohibited to use evidence gathered unlawfully (Belgium, Bulgaria, the Czech Republic, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain), while another 4 have general remedies for violation of procedural rights, including exclusion of unlawfully obtained evidence (Estonia, Germany, Luxembourg, the Netherlands). For more details see Anneli Soo 'How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed' (2017) 8 *New Journal of European Criminal Law* 73, 69-74.

55 Klamczyńska, Ostropolski (n 14) 161 referring to the ruling of the European Court of Justice in Case 41/74 *Van Duyn v Home Office*, EU:C:1974:133 and in Case 148/78 *Italy v Ratti*, EU:C:1979:110.

56 In this context, see, *inter alia*, the following rulings of the CJEU: Case C-105/03 *Italy v Pupino*, EU:C:2005:386, Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, EU:C:1990:395.

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