

# THEMIS Competition 2015

## Semi-final A

**Post-Lisbon guarantees in criminal proceedings:**

**Access to a lawyer according to Directive  
2013/48/EU**

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## **I. Introduction**

Over the last decades the European Union has successfully established an area of freedom of movement, in which citizens benefit from increased travelling, studying and working in countries other than that of their residence. However, the exercise of the right to freedom of movement has, as an inevitable consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence. In these situations, the procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial.

Whilst various measures have been taken at European Union level to guarantee a high level of safety for citizens, there was an equal need to address specific problems that arose when a person was suspected or accused in criminal proceedings. This called for specific action on procedural rights, in order to ensure the fairness of the criminal proceedings. Such action, which can comprise legislation as well as other measures, enhances citizens' confidence that the European Union and its Member States will protect and guarantee their rights. A lot of progress has been made in the area of judicial cooperation on measures that facilitate prosecution and it was time to act in order to improve the balance between these measures and the protection of procedural rights of the individual, strengthening procedural guarantees within the European Union.

Since the 1999 adoption of the Tampere Conclusions<sup>1</sup>, Member States have agreed that mutual recognition should be the cornerstone of judicial cooperation, that is, that judicial decisions taken in one Member State should be considered as equivalent to each other wherever that decision is taken, and so enforceable anywhere in the EU.

The Stockholm Programme<sup>2</sup> (2010-2014) reiterated the importance of criminal judicial cooperation and called for a thorough examination of the minimum procedural rights for accused and suspected persons which was referred to as a fundamental value of the Union. It was recognised that judicial cooperation needed to be founded on mutual trust and confidence between the different judicial systems. The perception that the rights of suspects and accused persons were not respected in every instance had a disproportionately detrimental effect on mutual trust and, in

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<sup>1</sup> [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)

<sup>2</sup> OJ C 115/1 of 4.5.2010.

turn, on judicial cooperation. In fact, the Lisbon Treaty<sup>3</sup> states that the principle of mutual recognition of judgments and judicial decisions should be facilitated by means of minimum rules on procedural rights.

To increase mutual trust, and thus improve the operation of mutual recognition, in November 2009 the Council of the European Union adopted the Roadmap on Procedural Rights<sup>4</sup> setting out a step-by-step approach to strengthening the rights of suspects and accused persons. This was incorporated into the Stockholm Programme the following month. Between the measures stipulated by the Roadmap, that were proposed to be implemented the right to legal advice and legal aid were stipulated. This implied that legal assistance for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings.

As a result of the Roadmap, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings<sup>5</sup> and Directive 2012/13/EU on the right to information in criminal proceedings<sup>6</sup> have already been adopted. Directive 2013/48/EU 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<sup>7</sup>, is the third and most recent result of the Roadmap.

Each measure was aimed at dealing with a distinct procedural right or set of rights for suspects and accused persons as identified by Member States and third parties alike as needing to be strengthened by action at EU level. The purpose of these measures is to bind legislation applying to every suspect in criminal proceedings in all Member States, thus protecting EU citizens and third-country nationals alike in cases including cross-border proceedings in order to

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<sup>3</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007], OJ C 306/01 of 17.12.2007.

<sup>4</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C-295, 04.12.2009.

<sup>5</sup> 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, OJ L 280/1 of 26.10.2010.

<sup>6</sup> 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 L142/1 of 01.06.2012.

<sup>7</sup> 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 L294/1 of 06.11.2013.

clarify existing rights or even create new ones at EU level, but only in relation to the respective specific issue each measure is supposed to address.

Insufficient level of protection of fundamental rights in criminal proceedings generated the need to take measures on "legal advice and legal aid" which aim to improve the situation of suspects by ensuring that these individuals receive proper access to qualified legal advice from the earliest stages of criminal proceedings, and the measure on "communication with relatives, employers and consular authorities" which, in conjunction with the right of access to a lawyer, is one of the important safeguards against ill-treatment of detained persons.

Art 82(2) (b) TFEU provides the legal basis for legislation applicable not only to cross-border criminal proceedings (i.e. proceedings with a link to another MS or a third country) but also to domestic cases, since categorisation of criminal proceedings as cross-border or domestic is rather difficult in relation to a significant number of cases.

The Council adopted the Directive 2013/48/EU that stipulates the right of access to a lawyer in criminal proceedings in a historic decision 10 years after the first attempts were made to agree on a legislative measure including notably the right to legal advice and it should be transposed and national provisions have to be taken in 3 years after the entry into force of the Directive 2013/48<sup>8</sup>. The Directive 2013/48 applies to all criminal proceedings irrespective of whether they present a cross-border element or not. The reason for this is that both the policy objectives as described below can only be met if minimum rules apply to all criminal proceedings.

This Directive sets out minimum rules on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, on the right to have a third party informed upon deprivation of liberty and on the right to communicate, while deprived of liberty, with third persons and with consular authorities.

## **II. Scope of the Directive 2013/48/EU**

The personal and material scope of the Directive 2013/48 is covered by Article 2.

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<sup>8</sup> According to article 15 of the Directive, Member States have the obligation to transpose the Directive by 27 November 2016.

## II.1 Personal scope of application

The right of access to a lawyer is guaranteed to suspects or accused persons in criminal and European warrant arrest proceedings. Should a person become a suspect or be accused while being questioned by the police or by another law enforcement authority, the previously mentioned right will offer protection in this case as well.

Article 2 (1) states as follows: “This Directive applies to suspects or accused persons in criminal proceedings from the time 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.”

When referring to criminal proceedings, the term ‘suspect’ or ‘accused person’ is connected to the moment when a person is made aware of the fact that he/she is suspected or accused of having committed a crime, either through an official notification or through any other method. In fact, it was the European Court of Human Rights (hereby referred to as ‘ECtHR’) that gave an interpretation to these terms, in relation with the guarantees provided by the Convention in Article 6§1. In the case *Deweert versus Belgium*<sup>9</sup> it has been established that the ‘accusation’ brought to a person does not necessarily need to embrace a certain format and thus, the legal right covers any relevant act coming from a public authority and which changes the person’s status by containing an indirect accusation.

The right to legal assistance is guaranteed to the suspect or accused person irrespective of whether they are deprived of liberty. Two different views were shaped during the decision-making process regarding this provision. While Member States advocated that ensuring protection regardless the person’s state of liberty can lead to an ineffective course of the proceedings, the Parliament strongly campaigned for inserting the clause based on the fact that self-incriminating statements and abuses can occur in state of liberty as well. It is mandatory that the suspect or accused person enjoys this right even from the first stages of the investigation in order to prevent any abuse from the authorities. On this aspect, Article 3(2) provides that the access to a lawyer

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<sup>9</sup> *Deweert v. Belgium*, Judgement of 27 February 1980, § 46, <http://www.echr.coe.int/Pages/home.aspx?p=home&c>

must be made without undue delay and in this respect, an important point in time is described as it follows: “before they are questioned by the police or by another law enforcement or judicial authority”.

The provisions of the Directive 2013/48 confirm the ECtHR’s case-law, in particular the court’s ruling in *Salduz versus Turkey*<sup>10</sup>. The plaintiff, a minor, was arrested on suspicion of aiding and abetting an illegal organisation. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. After he was permitted to see a lawyer, he denied the accuracy of his previous statement during the trial, but the state security court used the plaintiff’s statement to the police as the main evidence on which to convict him. The Court found that there has been a violation of the right to a fair trial and neither the assistance subsequently provided by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The Court also stated that Article 6§1 requires the access to a lawyer to be ensured starting with the first police interrogation so as the right to a fair trial remains sufficiently ‘practical and effective’.

The principle has also been affirmed in other following cases such as *Nechiporuk and Yonkalo versus Ukraine*<sup>11</sup>: “The Court has consistently viewed early access to a lawyer as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment”<sup>12</sup>.

Therefore, the Directive 2013/48 respects the requirements imposed by the Convention, demanding the Member States to take all the necessary steps to respect the right of any suspect or accused person to a lawyer since they have been notified and before being interrogated.

Furthermore, Article 2(3) provides that the persons who become suspected or accused while being interrogated by the police should be granted with the right of access to a lawyer: “This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspect or accused.”

The Directive 2013/48 does not confer the access to a lawyer to a witness while being interrogated during criminal proceedings, but from the moment he/she becomes a suspect or

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<sup>10</sup> *Salduz v. Turkey*, Judgement of 27 November 2008, § 58

<sup>11</sup> *Nechiporuk and Yonkalo v. Ukraine*, Judgement of 21 April 2011

<sup>12</sup> *Ibidem*, § 263.

accused of a crime. Neither the method nor the moment of changing the status is being clarified within the text of the article. It is the authorities that are expected to intervene and stop the proceedings until the person is given the possibility to contact a lawyer. It has been stated<sup>13</sup> that unless specific and clear criteria on the moment of changing the status are determined, the Directive 2013/48 should provide the interruption of the interrogation for legal assistance when there is a doubt regarding the person's status. Furthermore, the right to be assisted by a lawyer shall be promptly guaranteed to any witness who requires so<sup>14</sup>. Indeed this type of situation cannot be covered by the criterion on notification or on the existence of an accusation. The moment when the judicial body becomes aware of the change of the witness' status depends on the subjective perception of the person carrying out the interrogation. Thus, the situation is an extremely sensitive one as it raises the possibility of the authority to avoid ensuring the witness' access to a lawyer and put him/her in an extremely vulnerable situation. However, the problem could be resolved by applying the standards set out in *Salduz versus Turkey*. Unless the witness is assisted by a lawyer, his/her declaration cannot be further used in a criminal trial against him/her. It could have been probably easier to guarantee the right to a lawyer to a witness as well. Whether this idea will be adopted at a European level, it still remains to be seen.

## **II.2 Material scope of application**

Article 2 (4) provides that: "Without prejudice to the right to a fair trial, in respect of minor offences:

- a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
- b) where deprivation of liberty cannot be imposed as a sanction; this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters. In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings."

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<sup>13</sup> L.B. Winter, *The EU Directive on the right to access to a lawyer: a critical assessment*, Human Rights in European Criminal Law, page. 114.

<sup>14</sup> *Ibidem*.

As with regard to minor offences, these are exempted from the material scope of application of the Directive 2013/48. The explanation is conferred by the preamble of the Directive 2013/48, in particular Recitals (16) and (17). Contrary to the situations of deprivation of liberty, in case of relatively minor offences – such as traffic offences – a public authority is not empowered jurisdictionally to apply a sanction and thus, guaranteeing all the rights provided by the Directive 2013/48 seems to be excessive. However, if the legislation of a Member State allows judicial remedies against the sanction applied, the previously mentioned rights become applicable when exerting a specific legal recourse. Furthermore, ensuring the right to defence is not mandatory in cases where minor offences are not considered to be of criminal nature and courts cannot opt for the deprivation of liberty. Nevertheless, whenever a person who has committed a minor offence can be legally deprived of liberty, the Member State is bound to ensure that the provisions on rights are respected, including the access to legal assistance. In other words, “non-judicial sanctioning proceedings for minor offences fall out of the scope of the Directive and only once they are handled before a court with criminal jurisdiction will the right to a lawyer arise: those cases where minor offences are considered criminal offences but are dealt with by non-judicial authorities will not be considered criminal proceedings for the purpose of granting the right to access a lawyer”<sup>15</sup>.

Member States must comply with the provisions related to the right to a fair trial the way it is highlighted in Article 6 of the Convention. In this regard, the ECHR considers that a criminal accusation does not depend solely on the qualification given by the national law<sup>16</sup> and so the guarantees conferred by the Convention – including the right to defence – may cover administrative proceedings as well. Nevertheless, the provisions of the Directive 2013/48 are consistent with those of the Convention when referring to the establishment of a minimum level of gravity in order to confer the right of access to a lawyer to the one entitled to it. In *Zaichenko versus Russia*<sup>17</sup>, the Court decided that there existed no infringement with regard to Article 6 § 3 c) from the Convention. Following a traffic control, two cans of diesel were found in Mr Zaichenko’s car and when questioned by the police, he confessed to having stolen that diesel. In the absence of a lawyer, Ms Zaichenko signed a written statement attesting to having stolen the

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<sup>15</sup> L.B. Winter, op. cit., page 118

<sup>16</sup> The so-called “Engel-criteria” developed by The Court in the case *Engel and Others v. the Netherlands* to determine whether a prosecution is a “criminal charge” in the meaning of the Convention: (a) the domestic classification, (b) the nature of the offence, and (c) the severity of the potential penalty which the defendant risks incurring.

<sup>17</sup> *Zaichenko v. Russia*, Judgement of 18 february 2010.



diesel and to the fact that he was informed of the privilege against self-incrimination. The Court considered all the circumstances of the case, particularly the fact that the plaintiff was not arrested nor interrogated in police custody. Also, the declaration given by Mr Zaichenko was used only to initiate a criminal trial against him while in *Salduz versus Turkey*, the plaintiff's declaration was an underlying element for its conviction. Furthermore, the Court stated that the declaration was reiterated within a criminal trial as well, this time in the presence of a lawyer. We can conclude, therefore, that depending of the circumstances of each case, it is not necessarily mandatory to provide legal assistance in case of minor offences; the right to defence is not infringed. Given the fact that the purpose of the Directive 2013/48 is to provide minimum standards of harmonization at the level of national legislations, excepting the minor offences from its scope of application cannot be regarded as a problem. Members States are still bound to respect the ECHR standard in the field, so the risk to infringe the right of access to a lawyer is minimum.

### **III. The right of access to a lawyer in criminal proceedings**

Judges and prosecutors throughout the EU have stressed that the difficulties in the application of EU cooperation measures can be felt in day to day practice but are not always translated into a higher number of refusals to surrender persons requested under European Arrest Warrants. Moreover, there were no adequate and properly enforced standards to govern the provision of access to a lawyer and notification of custody across the EU. This entailed adverse effects for judicial cooperation between Member States, which was the main problem, but adverse effects existed also for the fundamental right of suspect and accused persons.

The failure to provide proper access to legal advice frequently rendered the criminal proceedings unfair and jeopardized the other suspects/accused defence rights as such access is a recognized fair trial guarantee which together with the right of notification of custody serves as a preventative measure against abuse and forced confessions.

As a result of the case law developed over the past years by ECtHR, a number of important modifications have already been made to all Member States' legislation in order to provide sufficient guarantees for a fair trial. For instance, according to article 159(9) of the Criminal Procedure Code of Romania, entered into force in 2014, the suspected or accused person is informed about the right of access to a lawyer who can participate during a domiciliary search

before executing the measure. If the suspected or accused person requests the presence of a lawyer the search is delayed before his arrival, but no more than two hours from the communication.

Minimum rights and fair trial standards for all member States of the Council of Europe (including all of the EU Member States) are laid down in the ECHR.

In the light of the limitation to the current protection of the right to legal advice currently afforded by the ECHR and its enforcement mechanism, it became apparent that an EU measure addressing the problem would possess much added value, since a EU directive will be applicable (upon transposition by Member States and, to a certain extent, even despite the absence of timely transposition, under the doctrine of direct effect) before domestic courts and would take precedence, under the principle of primacy of EU law, over conflicting domestic provisions. Risks of violation of EU standards by national authorities will be diminished by the mechanism of reference for a preliminary ruling, which allows the ECJ to provide the domestic court with the correct interpretation of EU provisions, in the course of (and not after) national proceedings.

### **III.1 The content of the right of access to a lawyer in criminal proceedings**

The Directive 2013/48 confers the right of access to a lawyer, the right to have a third party informed of the deprivation of liberty, and the right to communicate, while deprived of liberty, with third persons and consular authorities.

According to Article 3(3)(a) of the Directive 2013/48, Member States shall provide that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority. To give full effect to these right, Article 4 of the Directive 2013/48 provides that 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 under the Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law. The exact conditions, time and duration of these communications shall be strictly regulated by the Member States.

As we can observe, the Directive 2013/48 protects the confidentiality of communication, in the exercise of the right of access to a lawyer provided by the Directive. *Per a contrario*, in any

other situations that are not covered in article 3(3), communication between suspects or accused persons and their lawyer can be intercepted although it is a tough task to draw a line between the situations mentioned. Another aspect that we can observe is the wide range of communication means covered by Article 4 which grants confidentiality, including meetings, correspondence, telephone conversations and other forms of communication permitted under national law, the list not being exhaustive. However, it has been argued that the main problem is the adequate space to hold a private meeting between the suspected or accused person and his lawyer and in those cases where it exists, an officer might be present.<sup>18</sup>

In this respect, it is possible to derogate under extraordinary circumstances from the obligation to ensure confidentiality between the lawyer and suspect. In accordance to the case law of the ECtHR, surveillance by the investigating judge of the contacts of a detainee with his defence counsel is a serious interference with an accused's defence rights and very weighty reasons should be given for its justification. This was so in the case of *Kempers v. Austria*<sup>19</sup> where the applicant was suspected of being the member of a gang and utmost confidentiality was necessary in order to catch the other members. In contrast, such extraordinary features could not be made out in the case of *Lanz v. Austria*<sup>20</sup>, The Court finding that the domestic courts essentially relied on a risk of collusion, but this was the very reason for which detention on remand had already been ordered. The restriction on contacts with defence lawyer for a person who was already placed in detention on remand is an additional measure which requires further arguments and The Court couldn't find that the Austrian courts or the Government had furnished convincing arguments in this respect .

According to article 3(3)(b), Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned. Although the Directive does not regulate the concrete scope of participation of the lawyer during questioning, which shall be regulated by the national law of the Member State, it provides that

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<sup>18</sup> L.B. Winter, op. cit., page 120.

<sup>19</sup> *Kempers v. Austria*, Judgement of 27.02.1997.

<sup>20</sup> *Lanz v. Austria*, Judgement of 31.01.2002.

during such hearing the lawyer may, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.<sup>21</sup>

Moreover, pursuant to Article 3(3)(c), Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned: identity parades, confrontations and reconstructions of the scene of a crime. As long as the presence of the lawyer does not prejudice the success of the investigation a wider possibility of participation from the defence should be allowed during the investigation. The suspect or accused can also waive the right to be assisted by a lawyer at any moment (Article 9).

On short, effective access to a lawyer, includes the following elements<sup>22</sup>:

- It is available from the early stages of criminal proceedings and remain available in all phases of the proceedings;
- it encompasses a well-specified range of activities by the lawyer;
- the right of access is either not waivable or subject to waiver only with strong guarantees so as to avert any abuse;
- it contains a general clause under which Member States shall ensure that the defendant has an effective remedy in instances where his right has been violated;
- it is available to persons subjected to EAW proceedings both in the executing and in the issuing Member State.

While the ECHR and its jurisprudence do not cover certain aspects of the issue which are pivotal to ensure fair trial, the Directive 2013/48 ensures that access of suspects and accused to a lawyer and to notification of custody will continue to be protected at the Member States level in accordance with their constitutional and international obligations. It can be observed that there are some differences between the standards asserted by the ECHR acquis and the Directive's prescriptions in what implies the right of access to a lawyer, the Directive giving broader guarantees during the criminal proceedings.

For instance, the ECHR ensures that access to a lawyer is granted upon the first police

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<sup>21</sup> Recital 25 of the Preamble of the Directive 2013/48/EU of The European Parliament and of the Council.

<sup>22</sup> 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, p. 25.

interrogation (or from deprivation of liberty) and throughout the proceedings, it specifies the content of the right, provides that any waiver of the right to access to a lawyer is subject to the requirement that the person has received prior legal advice or has obtained full knowledge of the consequences of the waiver and has the necessary capacities to understand these consequences contains a right to an effective remedy when his right of access to a lawyer has been violated.

Different from that, the Directive stipulates some additional guarantees which are going to be beneficial for the defendant such as ensuring that access to a lawyer is granted ahead of any police questioning and throughout the proceedings and prohibiting to use at trial any evidence obtained in breach of the right to legal advice.

### **III.2 Temporary derogations**

The balance between effectiveness of justice systems in the Member States and individuals' right of defence has come in question from the first debates between the Council and the European Parliament. As a result, provisions regarding temporary derogations from the right of access to a lawyer in criminal proceedings have been included in the Directive.

The grounds and criteria for any temporary derogations from the right of access to a lawyer are set out in the national law of the Member States. Still, according to article 8 of the Directive which stipulates the general conditions for applying temporary derogations under articles 3(5) and (6) of the Directive, whenever derogations are invoked, they should be proportional and duly necessary, strictly limited in time and not based on the type and gravity of the offence.

According to article 3 (5), in case of geographical remoteness of the suspect or accused person, such as in overseas territories or where the Member State undertakes or participates in military operations outside its territory, Member States are permitted to derogate temporarily from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. In such case, the competent authorities should not question the person concerned or carry out any of the investigative or evidence-gathering acts. Other means of access to a lawyer should be used and Member States should arrange for communication via telephone or video conference when possible.<sup>23</sup>

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<sup>23</sup> Recital 30 of the Preamble of the Directive 2013/48/EU.

The temporary derogation stipulated in article 3(6) refers to situations in the pre-trial phase where (i) there is an urgent need to avert serious adverse consequences for life, liberty or physical integrity of a person or (ii) immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, as to prevent destruction or alteration of essential evidence or interference with witnesses. In such case, the competent authorities may question suspects or accused persons without a lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings.<sup>24</sup>

The use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person, as well as an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime, are permitted. Moreover, this derogation does not interfere with national law regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be presented before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.<sup>25</sup>

In the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to a lawyer, or in cases where a derogation from that right was authorized in accordance with this Directive, Member States should safeguard the rights of defence and the fairness of the proceedings. In this context, regard should be had to the case-law of the European Court of Human Rights.

In the case of *Salduz v. Turkey*, the ECtHR ruled that the rights of the defence will be, in principle, irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. In order for the right to a fair trial to remain sufficiently “practical and effective”, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated in the

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<sup>24</sup> Recital 32 of the Preamble of the Directive 2013/48/EU.

<sup>25</sup> Recital 50 of the Preamble of the Directive 2013/48/EU.

light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.

In the case of *Dayanan v. Turkey*<sup>26</sup>, the applicant's right to be assisted by a lawyer had been restricted under the national law then in force and the ECtHR ruled that a systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody.

Nevertheless, in the case of *Ibrahim and others v. UK*<sup>27</sup>, the Court ruled that even if the applicants were interviewed by the police in the absence of a lawyer, there was an exceptionally, serious and imminent threat to public safety and that this threat provided compelling reasons which justified the temporary delay of all applicants' access to lawyers. In fact, the police were operating under severe practical constraints, having that the investigation concerned terrorist offences (attempted bombings).

The derogations stipulated in articles 3(5) or (6) apply in case of EAW proceedings, but only in the executing State and shall be authorized only by a duly reasoned decision taken in the light of particular circumstances of every case by a judicial authority or by another competent authority on condition that the decision can be submitted to judicial review.

However, even if the derogations refer to exceptional situations that shall be strictly regulated by the Member States, they could still lead to abuses and undermine the purpose of the Directive. In this respect, it is up to the national law to avoid any vague provisions so that the Member States would make restricted use of any temporary derogations.

#### **IV. The right of access to a lawyer in European arrest warrant (EAW) proceedings**

Article 10 of the Directive lays down minimum rules concerning the right of access to a lawyer in proceedings for the execution of an EAW pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures

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<sup>26</sup> *Dayanan v. Turkey*, judgment of 13 October 2009, §33.

<sup>27</sup> *Ibrahim and others v. The United Kingdom*, judgment of 16 December 2014, §201-203.

between Member States. These apply to the requested persons from the time of their arrest in the executing Member State and include the right of access to a lawyer in such time and in such a manner as to allow the requested person to exercise their rights effectively and in any event without undue delay from deprivation of liberty.

The requested persons have the right to meet in private and communicate with the representing lawyer, who, in accordance with the national law of the executing state, can participate during a hearing of a requested person by executing judicial authorities and ask questions, request clarification and make statements. His role is limited to the specific of the EAW proceedings, but it aims to ensure that the procedural rights of the requested person are duly exercised.

Member States may make practical arrangements concerning the duration, frequency and means of communication (including use of videoconferencing and other communication technology) between the requested persons and the lawyer representing them in the executing state, taking into account the particular circumstances of the case and ensuring safety and security at the place where the meeting between the lawyer and the requested person is conducted. Such practical arrangements should not affect the exercise and essence of the right of requested persons to meet in private with their lawyer. It should be possible for such communication to take place at any stage, including before any exercise of the right to meet with the lawyer.

Furthermore, in case requested persons do not have a lawyer and unless they have waived this right, executing Member States should ensure their effective access to a lawyer in the executing Member State by any means, including those on legal aid if applicable under national law of the executing Member State.<sup>28</sup>

Apart from the above mentioned, the Directive sets out the right to appoint a lawyer in the issuing Member State, whose role is mainly to assess the lawyer appointed in the executing state.

But is the same right of access provided by article 10 of the Directive to be granted to a lawyer in the issuing State?

The role of the lawyer in the issuing state set out in article 10(4) – „providing with information and advice” – is highly important because in many cases its preparation of the case (e.g. obtaining the documents of a previous judgment) can lead to the application of the principle „ne bis in idem”, which is one of the grounds for mandatory non-execution of the EAW.

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<sup>28</sup> Recitals 43-45 of the Preamble of the Directive 2013/48/EU.



Although the Directive facilitates the appointment of a second lawyer in the issuing state by providing information to the requested persons in case they do not have an appointed lawyer, it may not actually grant an effective protection of their rights. It has been considered insufficient, especially when the requested persons do not have the economic resources and will be forced to rely on legal aid in the issuing state. Moreover, even though it is not the scope of a Directive to regulate the proceeding itself, the above mentioned provision might lack effectiveness if there are no practical measures to be taken by the authorities in the executing state regarding the issue.<sup>29</sup>

The need for legal representation in the issuing Member State is a direct outcome of cases involving requested persons wrongfully deprived of liberty and highlights the risk of placing complete confidence in the fair trial safeguards of the issuing states (especially in the light of the fact that they are legally bound to comply with article 6 of the ECHR).

As part of the work on the Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings<sup>30</sup>, on 27 November 2013 the European Commission proposed a new Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, which is closely linked to Directive 2013/48/EU. It is expected to contribute to granting effective right of access to a lawyer for suspects or accused persons deprived of liberty at the early stages of the proceedings, as well as for requested persons in EAW proceedings, who shall have access to legal aid to ensure the right of access to a lawyer in both the executing and issuing Member State ("right of dual defence").<sup>31</sup>

Meanwhile, in the absence of a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the EU Charter, the European Convention of Human Rights and the case-law of the ECtHR.

## **V. Conclusions**

Taking into account the beneficial effects we previously highlighted, we can expect the Directive 2013/48 to have a major impact on the right to a fair trial in cross-border and domestic

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<sup>29</sup> L.B. Winter, *op. cit.*, p. 123.

<sup>30</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C-295, 04.12.2009.

<sup>31</sup> Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (2013/0409 (COD)).

situations.

We may also argue that this new legal instrument is a remarkable step forward in assuring effective protection to the rights of suspects and accused persons, who are likely to be subjected to abuses and ill treatments during criminal proceedings, as well as an efficient mechanism that will be used in EAW proceedings to safeguard the rights of the requested persons.

At the same time, we consider that there is room for further action on the part of the European Union to ensure full implementation and common interpretation of its rules, doubled by more legal instruments to enforce compliance with the EU rules. In this respect, the Directive 2013/48 does not set out additional guarantees, apart from the ones that derive from the ECtHR case law, which could be its main drawback.

We consider that in the future it could be appropriate for some provisions of the Directive 2013/48 to be reconsidered and revised in order to bring some fresh air and raise the minimum standards imposed nowadays on the rights of suspects and accused persons in criminal proceedings. Although it might seem premature, it might be an appropriate approach to start discussions between Member States in this respect, but only after a preliminary period of observation and assessment of the implementation of the Directive 2013/48 in each Member State, taking into account a list of indicators, as mentioned in the Impact Assessment accompanying the initial Proposal for the Directive 2013/48<sup>32</sup>: number of refusals of requests for judicial cooperation, number of domestic appeals related to lack or insufficient access to a lawyer, number of application to the ECtHR related to the lack of or insufficient access to a lawyer, number of requests for preliminary rulings to the ECJ from domestic courts and tribunals. We consider that these indicators' list is not exhaustive and that further criteria should be taken into account, such as: number of cases where the ECtHR observed the violation of the right to defence as an active component of the right to a fair trial and also the number of cases in which national courts have admitted claims regarding remedies for the infringement of the provisions of the Directive 2013/48.

We consider that a Handbook designed for magistrates and easily accessible throughout the Union would strengthen the application of the Directive 2013/48 by judges and prosecutors

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<sup>32</sup> Commission Staff Working Document 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 of 08.06.2011, page 43.

and would facilitate effective and well-informed criminal and EAW proceedings for the magistrates.

A practical Union handbook designed for magistrates is in demand because of the complexity of the criminal proceedings, such as EAW cases.

Until the Handbook is elaborated, we propose a decisional tree for the judicial authorities of the Member States to simplify the application of the Directive 2013/48 - **ACCESS** to a lawyer:

Acknowledge the type of offence according to Article 2(4).

If it is a minor offence:

- We have to discern whether the administrative procedure provided for solving the case implies or not the possibility to deprive the person of liberty. In the first case, the Member States must ensure access to a lawyer from the first stage of the proceedings. If not, the right of access to a lawyer is granted only when the administrative procedure is provided with appeal before a court and only in this last stage of procedure.

If it is a criminal offence:

- The access to a lawyer is granted from the moment of the notification of accusation (Article 2(1)).

Check if any temporary derogations are applicable to the case, according to Article 3(5) and 3(6).

- If so, no access to a lawyer will be granted for a limited period of time.
- If not, access to a lawyer will be fully granted.

Confer full effectiveness to the right.

Article 3(3) is applicable from the moments stipulated in Article 3(2).

Ensure confidentiality between the suspected or accused person and his lawyer during the exercise of the rights stipulated by Article 3(3).

Solve the case.

Supply effective remedies in case of violation of rights, according to Article 12.