



Uniwersytet
Wrocławski

EU Criminal Law

Lecture

EU Procedural Rights Suspect and Defendant

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Rights of the suspect and defendant

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

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

Rights of the suspect and defendant

Directive 2013/48/EU on the right of access to a lawyer

This Directive lays down minimum rules concerning

- 1) the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant
- 2) the right to have a third party informed upon deprivation of liberty
- 3) to communicate with third persons and with consular authorities while deprived of liberty.

In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the European Court of Human Rights, which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer.

Rights of the suspect and defendant

Directive 2013/48/EU on the right of access to a lawyer

Scope of application:

Directive applies to suspects or accused persons in criminal proceedings **from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise**, that they are suspected or accused of having committed a criminal offence, and **irrespective of whether they are deprived of liberty**. It applies **until the conclusion of the proceedings**, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

Rights of the suspect and defendant

Directive 2013/48/EU on the right of access to a lawyer

Scope of application:

Directive applies to persons subject to European arrest warrant proceedings (requested persons) from the time of their arrest in the executing Member State.

Rights of the suspect and defendant

Directive 2013/48/EU on the right of access to a lawyer

Scope of application:

Directive applies to persons subject to European arrest warrant proceedings (requested persons) from the time of their arrest in the executing Member State.

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.**

Rights of the suspect and defendant

Right of access to a lawyer

Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to **exercise their rights of defence practically and effectively.**

Rights of the suspect and defendant

Right of access to a lawyer

The right of access to a lawyer shall entail the following:

- (a) Member States shall ensure 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;**
- (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 (Fact that such participation has taken place shall be noted using the recording procedure in accordance with the respective national law.

Rights of the suspect and defendant

Right of access to a lawyer

The right of access to a lawyer shall entail the following:

- (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:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.

Rights of the suspect and defendant

Right of access to a lawyer

Suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

- (a) before they are questioned by the police or by another law enforcement or judicial authority;
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
- (c) without undue delay after deprivation of liberty;
- (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

Rights of the suspect and defendant

Right of access to a lawyer

Permissible limitations:

In exceptional circumstances and only at the pre-trial stage, Member States may temporarily **derogate from the application of right for the lawyer to attend the investigative or evidence-gathering acts** where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

Rights of the suspect and defendant

Right of access to a lawyer

In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the right of access to lawyer **to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:**

- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Rights of the suspect and defendant

Right of access to a lawyer

Any **temporary** derogation of right of access to lawyer shall

- (a) be proportionate and not go beyond what is necessary;
- (b) be strictly limited in time;
- (c) not be based exclusively on the type or the seriousness of the alleged offence; and
- (d) not prejudice the overall fairness of the proceedings.

Temporary derogations may be authorised only by a duly reasoned decision taken on a **case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.**

Rights of the suspect and defendant

Right of access to a lawyer

Member States shall respect the **confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer** provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

Rights of the suspect and defendant

The right to have a third person informed of the deprivation of liberty

Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish.

If the suspect or accused person is a child (under 18 years old), Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed.

Rights of the suspect and defendant

The right to have a third person informed of the deprivation of liberty

Member States may temporarily derogate from the application of the right to have the third person informed of the deprivation of liberty where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons:

- (a)** where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b)** where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.

Rights of the suspect and defendant

**The right to communicate, while deprived of liberty,
with third persons**

Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.

Member States may limit or defer the exercise of that right in view of imperative requirements or proportionate operational requirements.

Rights of the suspect and defendant

The right to communicate with consular authorities

Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. However, where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.

Rights of the suspect and defendant

The right to communicate with consular authorities

Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned.

Rights of the suspect and defendant

Waiver

Member States shall ensure that, in relation to any waiver of a right of access to a lawyer:

- (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and**
- (b) the waiver is given voluntarily and unequivocally.**

Rights of the suspect and defendant

Waiver

The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

Rights of the suspect and defendant

Waiver

Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, **have an effective remedy** under national law in the event of a breach of the rights under this Directive.

Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected – **no mandatory exclusion of evidence**

Rights of the suspect and defendant

**Judgment of the Court (Third Chamber) of 19 September 2019
Criminal proceedings against EP.**

**Request for a preliminary ruling from the Rayonen sad
Lukovit**

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 must be interpreted as applying to judicial proceedings, such as those provided for by the national legislation at issue in the main proceedings, which authorise, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society.

Rights of the suspect and defendant

Article 47 of the Charter of Fundamental Rights of the European Union, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for judicial proceedings authorising, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society, **where that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before that court, which were not subject to such judicial review.**

Rights of the suspect and defendant

Judgment of the Court (Second Chamber) of 12 March 2020.
Criminal proceedings against VW.
Request for a preliminary ruling from the Juzgado de Instrucción de Badalona.

The Juzgado de Instrucción n. 4 de Badalona (Court of Preliminary Investigation No 4, Badalona) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 47 of the [Charter] and, in particular, Article 3(2) of Directive [2013/48] be interpreted as meaning that the right of access to a lawyer may justifiably be delayed where the suspect or accused fails to appear when first summoned by the court and a national, European or international arrest warrant is issued, and that the assistance of a lawyer and the entering of an appearance by the lawyer in the proceedings may be delayed until the warrant is executed and the suspect is brought to court by the police?’

Rights of the suspect and defendant

Judgment of the Court (Second Chamber) of 12 March 2020.
Criminal proceedings against VW.

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, and in particular Article 3(2) thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding national legislation, as interpreted by national case-law, according to which the exercise of the right of access to a lawyer may, at the pre-trial stage, be delayed because the suspect or accused person has failed to appear following a summons to appear before an investigating judge until the national arrest warrant issued against the person concerned has been executed.**

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Directive lays down common minimum rules concerning the right to legal aid for:

- (a) suspects and accused persons in criminal proceedings; and
- (b) persons who are the subject of European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (requested persons).

Directive complements Directives 2013/48/EU and (EU) 2016/800.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:

- (a) deprived of liberty;
- (b) required to be assisted by a lawyer in accordance with Union or national law; or
- (c) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Directive also applies to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.

Directive also applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

‘Legal aid’ means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.

Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer (means test) have the right to legal aid when the interests of justice so require (merit test).

Member States may apply a means test, a merits test, or both

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Where a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:

- (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
- (b) during detention

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before:

- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the scene of a crime.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.

Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Rights of the suspect and defendant

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Member States shall take necessary measures, including with regard to funding, to ensure that:

- (a) there is an effective legal aid system that is of an adequate quality; and
- (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.