



RIGHT OF ACCESS TO A LAWYER UNDER DIRECTIVE 2013/48/EU

Vanessa Untiedt

vanessauntiedt@hotmail.com

Spanish Ministry of Justice



GENERAL INFORMATION AND THE SCOPE OF THE DIRECTIVE



What rights are provided by Directive 2013/48/EU?



The directive covers the right of access to a lawyer in criminal proceedings and for those subject to a European arrest warrant; the right to have a third party informed of deprivation of liberty; and the right to communicate with third persons and with consular authorities while deprived of liberty.

—◇—

Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (spell out the right to correspond to Article 6 and 13 of the ECHR) guarantee various rights of defendants in criminal proceedings.

These include:

- The presumption of innocence
 - The right to a defense
- The right to a fair trial, which is of “cardinal importance as a guarantee” that all the rights of individuals and the rule of law will be safeguarded.
- The right to an effective remedy

**Roadmap: resolution of
the Council of 30
November 2009 for
strengthening procedural
rights of suspected or
accused persons in
criminal proceedings**



approach towards establishing a catalogue of procedural rights of suspects and accused persons in criminal proceedings. It calls for the adoption of six measures:

Measure A, the right to translation and interpretation in criminal proceedings;

Measure B, the right to information in criminal proceedings;

Measure C, access to a lawyer and legal aid in criminal proceedings;

Measure D, the right to communicate with family and consular services;

Measure E, special safeguards for vulnerable suspects;

Measure F, a green paper on pre-trial detention.

Measure C



Measure C in the roadmap concerns legal advice and legal aid stating that ‘the right to legal advice for the suspected or accused person in criminal proceedings at the earliest appropriate stage is fundamental to safeguarding the fairness of the proceedings’

Transposition date of Directive 2013/13/EU 27

Nov 2016



After transposition deadline passes directives become directly applicable to the national law on a condition that the provision of the directive is sufficiently precise and unconditional.

In that case, if the national law is contrary to the directive, it must be set aside.

This means that even if the Member State refuses to implement the directive, the individuals can still invoke the rights incorporated to the directive

When one analyses if the national law meets the requirements of Directive 2013/48/EU, three aspects must be taken into consideration

1. The Charter of Fundamental Rights of the European Union applies now to the subject matter covered by Directive 2013/48/EU.

2. Strasbourg standards must be considered, but Article 52 (3) of the Charter guides the EU to consider the Strasbourg standards only as minimum ones.

Therefore, when one reads the directive, she must carefully consider if the EU has harmonized or raised certain existing Strasbourg standard.

In Strasbourg system the right to counsel arises from Article 6 (1) and (3) c of the European Convention on Human Rights (ECHR) and is embraced by the Salduz case law

3. The standards of directive themselves are minimum ones and do not restrain the Member States to guarantee higher protection to suspects and accused persons

**RIGHTS OF SUSPECTED OR ACCUSED
PERSONS (OR THOSE SUBJECT TO AN
EUROPEAN ARREST WARRANT)**



THE RIGHT OF ACCESS TO A LAWYER IN EUROPEAN ARREST WARRANT PROCEEDINGS (ARTICLE 10)



Right of access to
a lawyer

Right to meet and
communicate with
the lawyer

Right for their
lawyer to be
present

Article 4,5,6,7, 9 and
8 in accordance with
Article 5 (3) apply
mutatis mutandis

Information of the
right to appoint a
lawyer in the issuing
Member State

Access to a lawyer in criminal proceedings



Essential rights Article

3:



Access to a lawyer without undue delay

Before being questioned by the police. Upon the carrying out by investigating or other competent authorities. After deprivation of liberty. If summoned to appear before a court having jurisdiction in criminal matters

Right for the lawyer to attend

Identity parades. Confrontations .Reconstructions of the scene of a crime

Exceptions at the pre-trial stage

Danger for the life, liberty or physical integrity of a person. Prevention of substantial jeopardy to criminal proceedings

Third party informed of deprivation of liberty



RIGHT TO HAVE A THIRD PERSON INFORMED OF THE DEPRIVATION OF LIBERTY (ARTICLE 5)



At least one
person

Parents, if
accused person
is a child

Exceptions
(like Article 3)

Communication with third persons and consular authorities



RIGHTS TO COMMUNICATE IN CASES OF DEPRIVATION OF LIBERTY (ARTICLE 6, 7)



With at least one third
person

With consular
authorities for non-
nationals

**IDENTIFY THE ACCOMPANYING CASE
LAW OF THE EUROPEAN COURT OF
HUMAN RIGHTS WITHIN THE SCOPE OF
THE ARTICLE 6 OF THE CONVENTION**



Main European instruments on criminal procedural rights



- 1. European Convention of Human Rights**
- 2. Charter of Fundamental Rights of the European Union (Charter)**

These are further interpreted and delineated by:

European Court of Human Rights (ECtHR)

Court of Justice of the European Union (CJEU).

Article 6 ECHR lays down the minimum criminal procedural rights



Article 6 (1) provides for the right to a fair trial, guaranteeing equality of arms and the right to adversarial proceedings, as well as the right to a prompt and public hearing by an impartial and independent court.

Article 6 (2) and (3) imposes several additional requirements applicable to criminal proceedings.

Article 6 (2) introduces the presumption of innocence.

Article 6 (3) includes specific aspects of fair trial rights and sets out the five minimum rights that an accused person has in criminal proceedings.

Article 6 (3) includes specific aspects of fair trial rights and sets out the five minimum rights that an accused person has in criminal proceedings



The right to be informed promptly, in a language understandable to the suspect, of the detail of “the nature and cause of the accusation against them”.

To have adequate time and facilities to prepare a defense.

To defend oneself in person or through legal assistance of one’s own choosing or, if one cannot afford it, “to be given it free where the interests of justice so require”.

To examine, or have examined, witnesses and to ensure their attendance and examination.

To have the free assistance of an interpreter if one cannot understand or speak the language used in court

Article 6 (3) (a) of the ECHR specifically lists the right to information about the accusation as a minimum safeguard in criminal proceedings, while **Article 5 (2)** provides for the right of arrested persons to be informed of the reasons for their arrest and any charges against them.

Although the **ECHR** does not specifically set out the right to information about procedural rights, the **ECtHR** ruled that authorities must ensure that the accused has sufficient knowledge of their right to legal assistance and legal aid, and of their right to remain silent and not incriminate themselves.



**RELEVANT DOMESTIC CRIMINAL
PROCEDURAL LAW REGARDING THE
DEFENDANT'S RIGHT OF ACCESS TO A
LAWYER**



According to the ECHR standards, a person should have access to legal assistance from the moment there is a 'criminal charge' against them within the autonomous meaning of the ECHR, namely when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence



Procedural rights in domestic criminal proceedings

The various rights guaranteed by the Charter and outlined in the Roadmap include defendants' right to:

- ✓ information in criminal proceedings from the moment they are aware they are suspected of having committed a crime
- ✓ to silence and the privilege against self-incrimination
- ✓ to access a lawyer.



Improvement is needed to help defendants to understand their rights (some shortcomings):

A hurry to get procedures over and done with (lawyers in Bulgaria)

Stress or the psychological state of the defendant, especially if they are in this position for the first time (lawyers in Bulgaria and Greece)

A perceived link between a defendant's level of education and understanding of rights, with more highly educated defendants showing better understanding (in the experience of a monitoring body representative in Bulgaria, for example)

Police not trying to ensure that defendants understand their rights, and instead simply reading the rights and asking if defendants understood them (lawyers in Bulgaria and France)

Problems in how information about rights is conveyed (lawyers in Austria, Bulgaria, France, the Netherlands, Poland, and Romania).

**WAIVER OF RIGHTS:
ARTICLE 9 OF
DIRECTIVE**



Framework through which suspected and accused persons can waive their right of access to a lawyer at any stage of proceedings:



First, the accused or suspected person must know about the details of the right of access to a lawyer and the consequences if they decide not to exercise this right. Such information must be clear and sufficient, in simple and understandable language.

Second, the waiver must be given voluntarily and unequivocally. The decision to waive the right must be recorded. In addition, authorities must inform the suspected or accused persons of the possibility of revoking a waiver at any point in time during the proceedings. The waiver of right, however, is not applicable to cases in which national law requires mandatory professional defence.

SPAIN



**The transposition
initially took place
through the amendment
of the Criminal
Procedure Act**



1. The introduction of a confidential interview between the lawyer and the person under investigation, prior to the interrogation of any authority, including the police authority
2. The presence of the lawyer must be taken into account in all statements made by the person under investigation as well as in proceedings involving identity parades, face-to-face confrontations, and reconstruction of the scene of a crime
3. Requirements to be met for a waiver of access to a lawyer in order to effectively handle those cases in which the waiver is permitted
4. The confidential nature of communications between the person under investigation and his/her lawyer is expressly recognized
5. The detainee has the right to inform, without undue delay, a relative or person of his/her choice about his/her deprivation of liberty and the place of custody in which he/she is being detained at all times