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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**on the implementation of 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 person  
informed upon deprivation of liberty and to communicate with third persons and with  
consular authorities while deprived of liberty**

# 1. INTRODUCTION

## 1.1. Background

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>1</sup> ('the Directive') is the third instrument adopted under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap'<sup>2</sup>). On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm Programme, which seeks to ensure an open and secure Europe serving and protecting citizens<sup>3</sup>.

The EU has adopted six directives in this field: this Directive, plus Directives on the right to interpretation and translation<sup>4</sup>; on the right to information<sup>5</sup>; on strengthening certain aspects of the presumption of innocence and the right to be present at the trial<sup>6</sup>; on procedural safeguards for children<sup>7</sup> and on legal aid<sup>8</sup>. The European Commission has already produced implementation reports on the Directives on the right to interpretation and translation and on the right to information<sup>9</sup>.

These six directives aim to contribute to the general objective of increasing mutual trust between Member States by allowing better application of the principle of mutual recognition, which is the cornerstone of the EU area of freedom, security and justice. The Directives do this by providing common minimum standards for procedural rights in all criminal proceedings, and by providing a more consistent implementation of the right to a fair trial, as set out in Article 47 of the Charter of Fundamental Rights of the European Union (TFEU<sup>10</sup>) and in Article 6 of the European Convention on Human Rights.

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<sup>1</sup> OJ L 294, 6.11.2013, p. 1.

<sup>2</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, 4.12.2009, p. 1.

<sup>3</sup> OJ C 115, 4.5.2010, p. 1.

<sup>4</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1.

<sup>5</sup> Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.

<sup>6</sup> Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, OJ L 65, 11.3.2016, p. 1.

<sup>7</sup> Directive (EU) 2016/800 on procedural safeguards for children who are suspects and accused in criminal proceedings, OJ L 132, 21.5.2016, p. 1.

<sup>8</sup> Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; corrigendum: OJ L91, 5.4.2017, p. 40.

<sup>9</sup> COM(2018) 857 final and COM(2018) 858 final.

<sup>10</sup> OJ C 326, 26.10.2012, p. 392.

## **1.2. Purpose and main elements of the Directive**

The Directive deals with suspects and accused persons' rights to access a lawyer irrespective of whether they are deprived of liberty. It also deals with their right to communicate with their family, relatives, other third persons and with consular authorities when deprived of their liberty. It merges two measures, initially put forward as two separate proposals in the Roadmap: (i) the right to legal advice (part of Measure C of the Roadmap); and (ii) the right to communicate with relatives, employers and consular authorities (Measure D of the Roadmap).

The Directive sets out minimum standards for all suspects or accused persons within the EU regardless of their legal status, citizenship or nationality. It is designed to help prevent miscarriages of justice and reduce the number of appeals. The rights granted in the Directive apply both in criminal proceedings and in European arrest warrant proceedings.

Another important reason for having common minimum rules in this area is that it can increase Member States' confidence in each other's criminal justice systems. To that end, it builds on and seeks to promote the rights laid down in, for example, Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

The Directive lays down the following rights:

- the right of access to a lawyer (Articles 3, 4, 8, 9 and 10);
- the right to have a third person informed of the deprivation of liberty (Articles 5, 8 and 10(3));
- the right to communicate, while deprived of liberty, with third persons (Article 6 and 10(3));
- the right to communicate with consular authorities (Article 7 and 10(3)).

As regards the right of access to a lawyer, following the European Court of Human Rights' judgment in the *Salduz* case<sup>11</sup>, several Member States already started adapting their legislation before the entry into force of the Directive. The Directive takes into account this jurisprudence in a number of provisions. Further adjustments of the legislation in some Member States were required due to the scope of the Directive, which covers explicitly also suspects and accused persons who are not deprived of liberty (Article 2(1) of the Directive); this applies notably to the provisions related to the right of access to a lawyer.

## **1.3. Scope of this implementation report**

The Directive's implementation has been evaluated in accordance with its Article 16, which requires the European Commission to submit by 28 November 2019 a report to the European Parliament and to the Council, assessing how far the Member States have taken the necessary measures to comply with the Directive.

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<sup>11</sup> ECtHR *Salduz v. Turkey*, application No 36391/02.

The description and analysis in this report are based primarily on the information provided by Member States, supplemented by publicly available studies carried out by: (i) the European Union Agency for Fundamental Rights<sup>12</sup>; or (ii) by external stakeholders assessing implementation of the Procedural Rights Directives using justice programme grants<sup>13</sup>. Information collected from submissions by EU citizens to the Commission often confirmed this data.

The report focuses on the measures Member States have taken so far to implement the Directive. It assesses whether Member States implemented the Directive within the specified timeframe, and whether national legislation achieves the objectives and fulfils the requirements of the Directive.

## 2. GENERAL ASSESSMENT

Under Article 15 of the Directive, Member States had to transpose the Directive into national law by 27 November 2016. At the date of expiry of the transposition period, nine Member States had not communicated the necessary measures to the Commission: Bulgaria, Cyprus, Germany, Greece, France, Croatia, Luxembourg, Slovenia and Slovakia. The Commission therefore decided in January 2017 to launch infringement proceedings under Article 258 TFEU against these nine Member States for failing to communicate their transposition measures. Meanwhile all Member States have notified full transposition. Infringement proceedings are still ongoing as not all provisions of the Directive have been transposed.

The Commission's main objective has been to ensure that all Member States transpose the requirements of the Directive into their national law, so that the rights it contains are protected throughout the European Union. The transposition of the Directive is a prerequisite for properly assessing the extent to which the Member States have taken the necessary measures to comply with it.

The Directive's impact is limited to setting minimum rules, so it leaves the possibility for differences between national criminal procedural laws. Nevertheless, it imposes clear obligations on Member States.

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<sup>12</sup> Study by the European Union Agency for Fundamental Rights (FRA), '*Rights in practice – Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings*'.

<sup>13</sup> Notably:

*TRAINAC Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings*, 2016, Study by the Council of Bars and Law Societies of Europe (CCBE) and the European Lawyers Foundation (ELF); report available at: <http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf>.

*Inside Police Custody*, 2014, project led by the Maastricht University; report available at: [https://intersentia.be/nl/pdf/viewer/download/id/9781780681863\\_0/](https://intersentia.be/nl/pdf/viewer/download/id/9781780681863_0/)

*Inside Police Custody 2*, 2018, project designed and implemented by the Irish Council for Civil Liberties (ICCL) in collaboration with the Open Society Justice Initiative (OSJI); report available at: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/Inside-Police-Custody-2-JUSTICIA-Comparative-Report.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Inside-Police-Custody-2-JUSTICIA-Comparative-Report.pdf)

*Right to a lawyer and to legal aid in criminal proceedings in five jurisdictions*, 2018, project led by the Bulgarian Helsinki Committee (BHC); report available at: [https://www.helsinki.hu/wp-content/uploads/Right\\_to\\_lawyer\\_and\\_legal\\_aid\\_COMPARATIVE\\_REPORT\\_2018.pdf](https://www.helsinki.hu/wp-content/uploads/Right_to_lawyer_and_legal_aid_COMPARATIVE_REPORT_2018.pdf)

The assessment of national implementing measures has raised certain issues of compliance in several Member States. The most prominent issues are:

- the scope of the rights provided for by the Directive — in some jurisdictions rights provided for by the Directive require a formal act in order to be triggered or might not apply to persons who are not deprived of liberty;
- the extent of possible derogations, in particular from the right of access to a lawyer;
- the waiver of the right of access to a lawyer; and
- the right of access to a lawyer in the Member State issuing a European arrest warrant.

Unless remedied, such divergences may limit the effectiveness of the rights provided by the Directive. The Commission will take every appropriate measure to ensure conformity with the Directive throughout the EU, including, where necessary, initiating infringement proceedings under Article 258 TFEU.

In accordance with Articles 1 and 2 of the Protocol (No 22), on the position of Denmark, the latter is not taking part in the adoption of the Directive and is not bound by it or subject to its application. In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, the United Kingdom and Ireland have notified that they are not taking part in the adoption and application of the Directive. Hence, Denmark, the United Kingdom and Ireland are not considered in the following assessment.

### **3. SPECIFIC POINTS OF ASSESSMENT**

#### **3.1. Subject matter (Article 1)**

Article 1 of the Directive specifies that the Directive lays down rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to European arrest warrant proceedings to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Member States already had legislation on these rights. The transposition process therefore involved Member States mainly amending any pre-existing legislation or adopting more specific legislation. A new component consisted of provisions on the right to appoint a lawyer in the Member State issuing a European arrest warrant (Article 10(4) and (5) of the Directive).

#### **3.2. Scope (Article 2)**

Article 2 of the Directive outlines the scope of application of the Directive.

### **3.2.1. Scope of application — Article 2(1) and (2)**

Article 2(1) of the Directive states that the 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. The Directive 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. According to Article 2(2) of the Directive, it also 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 Article 2(1) of the Directive, most Member States do not specifically address the moment at which a suspect or accused person is 'made aware' of the suspicion or accusation, nor do they specify that the rights provided for by the Directive apply throughout the criminal proceedings. However, a systematic analysis of the different stages of criminal proceedings in the respective national legal contexts shows that conformity can be inferred for a large number of Member States. However, in four Member States, rights under the Directive are made dependent on a formal act. This formal act is often also the condition for acquiring the status of suspect or accused. In a small number of Member States, the legislation lacks clarity on persons who are not deprived of liberty.

As regards Article 2(2) of the Directive, the vast majority of Member States have applied the rights provided for by the Directive by applying the general criminal procedural rules to European arrest warrant proceedings *mutatis mutandis* (i.e. an application with the necessary modifications). However, national law in six Member States does not ensure that all rights ensured by the Directive are also applicable in European arrest warrant proceedings. This is indicative of problems of transposition.

### **3.2.2. Witnesses becoming suspects — Article 2(3)**

Article 2(3) of the Directive clarifies that it also applies, under the same conditions as provided for in Article 2(1) of the Directive, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.

Almost all Member States complied with this provision. A couple of Member States transposed the Directive almost literally, and several Member States explicitly refer to the change of procedural status during questioning. In others, the transposition is less evident, but still can be inferred from provisions with a broad scope, granting the right of access to a lawyer to all parties of the proceedings and ensuring that witnesses are entitled to a lawyer during questioning. No specific rules on this point could be identified in the legislation of four Member States.

### **3.2.3. Minor offences — Article 2(4)**

Article 2(4) of the Directive sets out that for minor offences, it only applies to proceedings before a court having jurisdiction in criminal matters:

- 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 provision is without prejudice to the right to a fair trial. The provision goes on to state that in any event the Directive fully applies where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings. This provision is therefore of particular relevance with regard to the right of access to a lawyer.

The provision is relevant for those Member States where administrative authorities, the police or courts having jurisdiction in other than criminal matters are responsible for dealing with minor offences. Only in five Member States does legislation provide for an exception to the right of access to a lawyer in respect of minor offences. In several Member States, the legislation does not provide for a specific system for minor offences. In other Member States, where such specific legislation exists, either it provides for a *mutatis mutandis* application of the general rules of criminal proceedings, or it reflects the rights provided for in the Directive in the legislation on minor offences itself. However, in two Member States, which use the latter technique, not all the safeguards provided for by the Directive are ensured in cases of minor offences.

## **3.3. Right of access to a lawyer in criminal proceedings (Article 3)**

Article 3(1) of the Directive states that suspects and accused persons have the right of access to a lawyer at such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

### **3.3.1. Timeframe — Article 3(2)**

In accordance with Article 3(2), and taking into account Recital 20 of the Directive, the right of access to a lawyer has to be granted without undue delay to suspects and accused persons. The Directive refers to a number of points in time from which the right of access to a lawyer has to be ensured, whichever occurs the earliest.

While two Member States transposed the provision literally, the requirement to grant the right ‘without undue’ delay could be inferred from three sources: (i) provisions stating the immediate nature of the right or the information about it; (ii) the fact that the right is granted from the moment the status of suspect or accused is acquired; or (iii) through provisions of a broad scope, which ensure the right of access to a lawyer at any stage of the proceedings.

**3.3.1.1. *Right of access to a lawyer before questioning by police or by another law enforcement or judicial authority — Article 3(2)(a)***

Article 3(2)(a) of the Directive was transposed accurately by a number of Member States. However, nine Member States transposed the provision only partially. The reasons which led some of these Member States to only partially transpose Article 2(1) of the Directive also affected the transposition of Article 3(2)(a) (see 3.2.1.). Moreover, in two of these Member States, the right of access to a lawyer is only clearly stated during questioning, not before. In a few other Member States, there are doubts concerning the right of access to a lawyer before questioning, at least for certain categories of persons. In one Member State, if the person has received a written invitation to questioning, it is presumed that a consultation with a lawyer took place before the questioning.

**3.3.1.2. *Right of access to a lawyer when an investigative or other evidence-gathering act is carried out in accordance with Article 3(3)(c) — Article 3(2)(b)***

A substantial majority of Member States complied with this provision, and two Member States transposed it literally. In others, correct transposition can be concluded because the law either: (i) refers specifically to evidence-gathering acts referred to in Article 3(3)(c) of the Directive; or (ii) ensures the right through provisions with a broad scope that ensure the right of access to a lawyer from the start or at any stage of the proceedings or which make reference to any investigative act. For a small number of Member States, however, the reasons which led to partial transposition of Article 2(1) of the Directive also affected the transposition of Article 3(2)(b) of the Directive (see 3.2.1.).

**3.3.1.3. *Right of access to a lawyer without undue delay after deprivation of liberty — Article 3(2)(c)***

Almost all Member States transposed this provision either through legislation on deprivation of liberty or through a general principle ensuring the right of access to a lawyer throughout all stages of criminal proceedings. Complete transposition is only questionable concerning one Member State where the ‘without undue delay’ criterion is not clearly set out in a relevant legislative instrument.

**3.3.1.4. *Right of access to a lawyer where persons have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court — Article 3(2)(d)***

Even though the legislation in three Member States might lack clarity, especially concerning the due time necessary to prepare the case, no particular transposition issues arose for this provision.

**3.3.2. *Content of the right of access to a lawyer — Article 3(3)***

Article 3(3) of the Directive lays down the elements that the right of access to a lawyer entails, in other words it describes the content of the right.



### **3.3.2.1. *Meeting in private and communicate with the lawyer, including prior to questioning — Article 3(3)(a)***

According to this provision, suspects or accused persons must 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.

While three Member States transposed this provision literally, the legislation in other Member States refers to concepts such as communication, meetings, contact or discussion. Issues of partial transposition, however, arose in 11 Member States. In most Member States, such shortcomings related to issues also identified in the context of the transposition of Articles 2(1) and 3(2)(a) of the Directive (see 3.2.1. and 3.3.1.1.). In some of these Member States, issues related to the transposition of Article 4 of the Directive also had a negative impact in the context of Article 3(3)(a) (see 3.4.).

Conformity issues were identified in seven Member States. One Member State, for example, provides for the presumption that a person who has received a written invitation for questioning has had a confidential consultation with a lawyer before that questioning (see 3.3.1.1.). A couple of Member States allow for derogation from the confidentiality of communication with the lawyer (see 3.4.), and in a few Member States the communication is restricted to 30 minutes before the (first) questioning or to a phone contact with the lawyer of imprisoned persons once a week as a rule.

### **3.3.2.2. *Presence and effective participation of the lawyer when questioned — Article 3(3)(b)***

Article 3(3)(b) of the Directive lays down the right of suspects or accused persons to have their lawyer present and participating effectively when questioned. While such participation needs to be in accordance with procedures under national law, such procedures must not prejudice the effective exercise and essence of the right concerned. The concept of effective participation is further explained in Recital 25 of the Directive as the possibility for the lawyer to ask questions, request clarification and make statements, which should be recorded in accordance with national law. The fact that the lawyer participated has to be recorded.

In all Member States, the lawyer may be present during questioning, and this circumstance is also recorded. Rules on the lawyer's participation could be identified for a significant number of the Member States. In six Member States, however, not all suspects and accused are entitled to this right. These shortcomings are largely related to issues also identified in the context of the transposition of Article 2(1) (see 3.2.1.).

However, in 16 Member States, the effectiveness of the participation is questionable. Many of them allow a lawyer to participate only at the end of the questioning. This might raise problems, especially in more complex cases where questioning can be extensive. Lawyers might not be in a position to put their questions directly to the person being questioned, being restricted instead only to putting them through the authority leading the questioning. Lawyers might also be restricted to submitting requests, observations and reservations to the public prosecutor. In some Member States, legislation combines such restrictions. In one Member

State, the legislation is even silent about the lawyer's participation except in relation to court sessions, where the lawyer is allowed to ask questions after the prosecutor and the expert witness.

### ***3.3.2.3. Presence of the lawyer during investigative or evidence-gathering acts — Article 3(3)(c)***

This provision regulates the right of access to a lawyer during evidence-gathering acts. It outlines three evidence-gathering acts as a minimum, during which suspects and accused persons are entitled to have their lawyer attend. These are: identity parades, confrontations, and reconstructions of the scene of a crime. This applies only where such acts are provided for under national law and if under national law the suspect or accused person is required or permitted to attend the act concerned. Therefore, whenever such an evidence-gathering act does not exist under national law, the Directive does not require the respective Member State to create it. At the same time, the three acts are set out as a minimum list, and Member States may provide for further evidence-gathering acts, during which the lawyer has the right to attend.

Transposition issues arose in relation to nine Member States. The failure of a small number of Member States to fully transpose Article 3(2)(b) resulted in their incomplete transposition of Article 3(3)(c) (see 3.3.1.2). In a few other Member States, no right of access to a lawyer is granted as regards relevant investigative acts, even though these investigative acts actually exist in those countries' national law or practice. In the legislation of a couple of other Member States, some evidence-gathering acts are not provided for, which means that non-transposition in this respect has no effect on completeness.

### **3.3.3. Information and arrangements to facilitate the access to a lawyer — Article 3(4)**

This provision contains rules on the level of obligation on Member States to facilitate the access of suspects and accused persons to a lawyer. While the Directive applies irrespective of whether these persons are deprived of liberty (Article 2(1), first sentence, of the Directive), Article 3(4) differentiates between the situation of those who are deprived of liberty and those who are not. For those who are free to leave, Member States must endeavour to make general information available to them so as to facilitate the obtaining of a lawyer; for those who are deprived of liberty, the level of obligation on Member States is greater. In the latter case, Member States must make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer.

Member States underpinned the transposition of this provision by national measures such as the following:

- the provision of information;
- clarifications on rights and on how to benefit from them;

- the provision of means for direct contact with the lawyer, such as a helpline, systems of on-call duty lawyers, lists of lawyers, dedicated websites, search engines, leaflets and — in the case of one Member State — a chat service.

In particular for those deprived of liberty, some Member States have put in place emergency services to facilitate the appointment of a lawyer. In a number of Member States, deprivation of liberty is a reason for mandatory defence, and a lawyer might be appointed *ex officio*.

However, in a small number of Member States, arrangements to facilitate access to a lawyer may not be available to those at the early stages of the proceedings, e.g. before being formally charged under national law, or those falling under specific acts of sectoral legislation. In one of these Member States, for example, contact with a lawyer is also dependent on the ‘means available’, which appears to be too vague a formulation.

### **3.3.4. Derogations — Article 3(5) and 3(6)**

#### ***3.3.4.1. Temporary derogations based on geographical remoteness — Article 3(5)***

This provision allows for temporary derogations due to the geographical remoteness of a suspect or accused person. It only allows the Member State to derogate from Article 3(2)(c) of the Directive if it is impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty. In such circumstances, no questioning of the suspect or accused person or evidence gathering in the sense of Article 3(3)(c) of the Directive may take place during the application of the temporary derogation (see also Recital 30).

Only five Member States made use of this option. Two of them transcribed the text of the Directive verbatim in their law. In three other Member States, the legislation allows for the questioning of the person, which is not in conformity with the Directive. Certain other elements also raise concerns. Firstly, the possibility to derogate might not be restricted to the pre-trial stage as provided for by the Directive. Secondly, the exceptional and temporary nature of derogations might be doubtful, and thirdly, some of the relevant laws allow persons who are not lawyers under national law to assist the suspect or accused person.

#### ***3.3.4.2. Temporary derogations based on risks for persons or investigation needs — Article 3(6)***

Article 3(6) of the Directive allows for temporary derogations from the right of access to a lawyer. It enables the questioning of the suspect or accused person or evidence gathering in the sense of Article 3(3)(c) of the Directive to be carried out in exceptional circumstances and only at the pre-trial stage. On this basis, Member States may provide for temporary derogations to the extent justified in the light of the particular circumstances of the case, for 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.

Only five Member States chose not to make use of any of these possibilities to derogate. Derogations were identified in 20 other Member States, justified by risks to individuals or for investigation needs. However, the correctness of the Directive's transposition is beyond doubt in only a small number of those Member States, meaning that potential conformity issues were identified in a number of them. Looking at the Member States with conformity issues, it can be seen that some of the derogations they lay down in are line with the Directive, while other raise concerns. For example, national legislation reflecting the situations described in Article 3(6) might not clearly state that all the derogations should be applied only in exceptional circumstances and to the extent justified in the light of the particular circumstances of the case.

Another concern is that the possibility to derogate may go beyond the pre-trial stage of the proceedings. In the rules of a couple of Member States, the criteria of 'urgency' and/or 'serious adverse consequences' are doubtful (Article 3(6)(a) of the Directive). Derogations provided for in several Member States can be considered as aiming to prevent criminal proceedings from being jeopardised (Article 3(6)(b)), but their scope is not limited to the conditions mentioned in the Directive and does thus not meet the requirements of immediate action being imperative or the need to prevent substantial jeopardy. Such rules allowing for derogations refer, for example, to general risks of 'impairing the evidence', 'making the investigation more difficult' or 'hampering the interest and success of the investigation'.

In 15 Member States, the possibilities to derogate lack a link to the requirements laid down in points (a) and (b) of Article 3(6) of the Directive and do not fit within the scenarios provided for by the Directive. This creates a risk that suspects and accused persons might be left in limbo, with no guarantee that questioning or evidence gathering in the sense of Article 3(3)(c) of the Directive would take place in the absence of a lawyer only, if the person has waived that right under the conditions set out in Article 9 of the Directive (see 3.9). We find references in national legislation to, for example, an 'unreasonable extension of the detention period', to cases of 'force majeure', to it being 'unsafe' to delay investigative acts, to the presence of a lawyer during questioning 'which may have already begun', and to rather vague conditions such as 'justified grounds'. Laws in different Member States state that the absence of the lawyer during investigation does not impede the performance of procedural acts if there is proof that the lawyer was informed about the date and hour of that act. Other examples include provisions that a lawyer might not be able to be present during investigative acts where the 'act cannot be postponed' and 'notification thereof cannot be provided'.

Lastly, some Member States have fixed time limits for the lawyer to appear, with the legislation in those countries enabling questioning or evidence gathering in the sense of Article 3(3)(c) of the Directive to take place without the lawyer or without the presence of a clear waiver. In a few legislations, such time limits are as short as 2 hours, or even 1 hour in the case of one Member State. This leaves substantial leeway to proceed with questioning or evidence gathering in the absence of a lawyer or of a clear waiver, thus resulting in a broad derogation not set out by the Directive. This affects conformity.

### **3.4. Confidentiality (Article 4)**

Article 4 of the Directive contains a strong statement of principle concerning the respect of the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access. This includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law. The provision does not set out circumstances where Member States could derogate from this right to confidentiality. This is underpinned by Recital 33, which explains that confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial.

More than half of the Member States transposed this provision correctly. However, issues of partial transposition were identified for some Member States. Such shortcomings are linked to the lack of coverage of certain groups of persons at particular stages of proceedings, or to the legislation not reflecting certain communication methods such as meetings, telephone communication, mail and other consignments. In four Member States, the legislation allows for derogations from the confidentiality requirement, affecting conformity with the Directive.

### **3.5. The right to have a third person informed of the deprivation of liberty (Article 5)**

#### **3.5.1. General principle — Article 5(1)**

Article 5(1) of the Directive provides for the right of suspects or accused persons who are deprived of liberty to have at least one person, such as a relative or an employer, to be informed of their deprivation of liberty without undue delay if they so wish.

Issues of partial transposition were found for 11 Member States. In many of these Member States, it is not clear whether the third person is informed without undue delay. In a number of Member States, the right to have a third person informed is restricted to certain situations of deprivation of liberty or to certain categories of suspects or accused persons. In a few Member States, limitations of the personal scope identified in the context of Article 2(1) of the Directive also affected the transposition of Article 5(1). Another concern was that requirements of the Directive are only reflected in provisions concerning the information to be provided to the suspect or accused person.

The correctness of transposition is doubtful in several other Member States. This is because there are limits on who may be informed about the deprivation of liberty, or because third persons are informed independently of the wish of the person deprived of liberty.

#### **3.5.2. Temporary derogations — Article 5(3)**

Article 5(3) of the Directive allows temporary derogations from the right to have a third person informed (including in cases involving children, see 3.5.3. below), where justified in the light of the particular circumstances of the case, for one of the following compelling reasons:

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

Such possibilities to derogate exist in the legislation of 18 Member States. The assessment of national implementing measures shows that Article 5(3) is one of the provisions with the highest level of disparities between Member States.

Several Member States allow refusals corresponding to the grounds set out in the Directive. Some other Member States, however, provide for derogations subject to conditions similar to those laid down by the Directive, but less restrictive. Other Member States have even more lenient conditions under which the right to inform a third person can be set aside, referring, for example, to the need to ‘ascertain the truth in criminal proceedings’, to situations where the notification ‘would prejudice criminal proceedings’, to a ‘significant impediment to the investigation’ or to the ‘clarification and investigation of the case’. Justification for a refusal might also stem from the need to ‘ensure fulfilment of the purpose of an important act’, to ‘prevent a criminal offence’, or to avoid ‘undermining the purpose of custody’. Other grounds cited in national legislation include ‘unreasonable difficulties’, ‘insurmountable circumstances’ or vague ‘justified reasons’ or ‘any other reasons’.

### **3.5.3. Particularities concerning children — Article 5(2) and (4)**

Articles 5(2) and (4) of the Directive lay down specific rules concerning children (defined as persons below the age of 18 years). Under Article 5(2) of the Directive, the holder of parental responsibility for the child must be informed as soon as possible of the deprivation of that child’s liberty and of the reasons for it, unless this would be contrary to the child’s best interests, in which case another appropriate adult needs to be informed. In cases where temporary derogations are applied, an authority responsible for the protection or welfare of children needs to be informed without undue delay of the deprivation of liberty of the child (Article 5(4) of the Directive). The purpose of that provision is to avoid instances of *incommunicado* detention of children.

Specific rules containing specific safeguards for children exist in all Member States. Legislation in 10 Member States allows for another appropriate adult to be informed if informing the holder of parental responsibility would be against the child’s best interest. Examples of such persons might be another appropriate adult person possibly indicated by the child, an authority for the protection of minors or a guardian *ad litem* (i.e. the child’s court-appointed guardian). In a number of other Member States, the legislation does not determine a clear mechanism for taking into account the child’s best interest. In three Member States, the legislation does not make it clear that the act of informing should take place as soon as possible. Also as regards children, in a small number of Member States limitations of the scope resulted in incomplete transposition by taking into account only children formally charged under national law or charged or questioned. In one Member State,

minors between 16 and 18 are included in the general regime applicable to adults and do not benefit from the special treatment provided for in Article 5(2) of the Directive.

In several Member States, an exception to informing the holder of parental responsibility is possible if the child expresses the wish that this not take place. Such an exception is not provided for by the Directive. The law of one Member State provides for an exception from the notification obligation, allowing for the notification requirement to be set aside not only if it is contrary to the child's best interests, but also 'where there are any other reasons for it'.

Half of the Member States do not allow for a derogation from the right to have the holder of parental responsibility or another appropriate adult informed of the deprivation of liberty of a child as set out in Article 5(2) of the Directive, whereas the other half allow for such a derogation. Most of the laws in this latter group of Member States provide for the safeguards laid down in Article 5(4), while two Member States did not transpose these requirements at all. In another Member State, the law does not clearly require the authority responsible for the protection or welfare of children to be informed without undue delay.

One Member State allows a derogation from the obligation to notify an authority responsible for the protection or welfare of children when this would 'put at risk fulfilment of the purpose of an important act' or where such notification would entail 'unreasonable difficulties'.

### **3.6. The right to communicate, while deprived of liberty, with third persons (Article 6)**

Article 6 of the Directive lays down the obligation to 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 (Article 6(1)). The exercise of this right may, however, be limited or deferred in view of imperative requirements or proportionate operational requirements (Article 6(2)).

Legislation in all Member States provides for a right to communicate while being deprived of liberty. Such rules might state a general principle or lay down detailed rules referring to the time and frequency of the communication or specific means of communication such as the use of a telephone, visits or written communication. Relevant legislation is often not only contained in laws on criminal proceedings, but also in rules concerning the administration of penitentiary facilities.

However, there are concerns that many Member States: (i) are not ensuring that the right to communicate with third persons can be exercised without undue delay, including during deprivation of liberty by the police; and (ii) have in place restrictions on the scope of the provision that are not provided for in the Directive. Although the possibilities to limit or defer the right provides for a rather large margin of discretion for Member States, legislation in several of them may raise concerns, for example because rules provide for excessive limitation of the number or duration of contacts with third persons or even for a complete ban without clear conditions.

### **3.7. The right to communicate with consular authorities (Article 7)**

Article 7 of the Directive gives non-national suspects or accused persons the right to have the consular authorities of their State of nationality informed of their deprivation of liberty without undue delay and to communicate with those authorities if they so wish. Article 7 also ensures that such suspects and accused persons 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 by their consular authorities.

The transposition of Article 7 of the Directive is largely complete in nearly all the Member States. Certain potential gaps are mostly bridged by direct applicability of the 1963 Vienna Convention on Consular Relations<sup>14</sup>, including its Article 36. This would, for example, make up for the lack of explicit references to the situation of persons who have two or more nationalities or the possibility to have legal representation arranged.

However, there are doubts about the conformity of the legislation in about half of the Member States. In several Member States, this is due to potential derogations from the right or, in the case of one Member State, to a rather vague reference to communication by ‘means available’. Such laws or procedures may not result in full effect being given to the purposes for which the rights under Article 7 of the Directive are intended (see Article 7(3)). In some other Member States, consular authorities are notified regardless of the consent of the person concerned. This is not in line with Article 7(1), as it makes informing the relevant consular authority dependent on the wish of the person.

### **3.8. General conditions for applying temporary derogations (Article 8)**

Article 8 of the Directive lays down additional conditions for applying temporary derogations set out in Articles 3(5) and (6) and 5(3) of the Directive. Article 8(1) of the Directive requires derogations to: (i) be proportionate and not go beyond what is necessary; (ii) be strictly limited in time; (iii) not be based exclusively on the type or the seriousness of the alleged offence; and (iv) not prejudice the overall fairness of the proceedings. Decisions of all such derogations need to be 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. The derogations laid down in Article 3(5) and (6) of the Directive must be authorised through a duly reasoned decision, which must also be recorded.

Article 8(2) of the Directive concerns possible derogations from the right of access to a lawyer. In most of the Member States who provide for such derogations and who transposed Article 8(2) of the Directive, the decision on derogations may be taken by an authority that is not a judicial authority; only a few of these Member States require the intervention of a judicial authority. Both the requirement to have a reasoned decision and the requirement to record that decision, if not literally transposed, can often be inferred from general procedural rules. Conformity issues arise in several Member States, where often only part of the provisions allowing for derogations set out the required guarantees. This is mainly due to the

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<sup>14</sup> [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf) .



absence of clear rules on the recording of decisions, but also to the absence of rules providing for a judicial review if decisions are taken by bodies that are not judicial authorities and, to a lesser extent, to a lack of provisions on the reasoned nature of the decision.

Article 8(3) of the Directive concerns potential derogations from the right to have a third person informed about a deprivation of liberty. In many of the Member States who provide for such derogations and who transposed Article 8(3) of the Directive, the decision on derogations may be taken by an authority that is not a judicial authority; only a smaller number of these Member States require the intervention of a judicial authority. Transposition issues only arose in a few Member States — these were due to the absence of rules providing for a judicial review if decisions are taken by bodies that are not judicial authorities, or even due to complete non-transposition of the requirements of Article 8(3) of the Directive.

### **3.9. Waiver (Article 9)**

This provision sets out safeguards if suspects and accused persons, irrespective of deprivation of liberty, waive their rights under Articles 3 and 10. The Directive states that in such cases the suspect or accused person needs to be provided with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it. This information can be provided orally or in writing. Any waiver has to be given voluntarily and unequivocally. Article 9 also requires the waiver and the circumstances under which it was given to be recorded, and stipulates that suspects and accused persons may revoke the waiver subsequently at any point during the criminal proceedings. Suspects and accused persons must be informed about the possibility to revoke the waiver. Such a revocation has effect from the moment it is made.

A significant number of Member States have legislation in place governing the possibility to waive the right of access to a lawyer. No such legislation exists in five Member States. One Member State offers no possibility to waive the right of access to a lawyer, and defence is thus always mandatory.

While three Member States transposed the Directive almost literally, many shortcomings in the transposition of Article 9 were identified. Transposition of the requirements of Article 9(1) and (2) is adequate in only some of the Member States, while in a number of others there are serious transposition issues. This is often due to the circumstance that the information provided to suspects or accused persons does not go beyond what is required by the relevant provisions of Directive 2012/13/EU on the right to information, for example it lacks information on the consequences of a waiver. As for Article 9(3), transposition can be assessed as satisfactory only in a few Member States.

In three Member States, only adults can waive the right of access to a lawyer. One of these Member States also differentiates between a waiver from the right to legal representation and the right to consultation with a lawyer prior to questioning. In two Member States, legislation on waivers is provided for only in the context of rules about what is considered in these Member States as ‘mandatory defence’, thus rendering the defence no longer mandatory.

### **3.10. The right of access to a lawyer in European arrest warrant proceedings (Article 10)**

#### **3.10.1. The right of access to a lawyer in the executing Member State — Article 10(1) and (2)**

Articles 10 (1) and (2) of the Directive state that persons subject to European arrest warrant ('requested persons') have the right of access to a lawyer in the executing Member State upon arrest pursuant to the warrant. In the executing Member State, requested persons must have the right to a lawyer without undue delay from when they are deprived of liberty, the right to meet and communicate with the lawyer representing them and the right for their lawyer to be present and participate effectively in the procedural acts. Where a lawyer participates during the hearing, this is to be noted using the recording procedure in accordance with the law of the Member State concerned.

In most Member States, legislation provides for application of some or all the rules concerning criminal proceedings *mutatis mutandis*. This means that the substance of the rights granted in European arrest warrant cases corresponds to the right that suspects and accused persons enjoy during national criminal proceedings. In five Member States, the transposition of the right of access to a lawyer is based exclusively on specific rules regulating European arrest warrant proceedings and addressing the rights of the Directive in that context.

In 21 Member States, the right of access to a lawyer in European arrest warrant proceedings is clearly ensured upon arrest (Article 10(1) of the Directive). In four Member States, the safeguard of this time aspect is less obvious. Many of the Member States correctly transposed the right for a requested person's lawyer to participate during the hearing (Article 10(2) (c) of the Directive).

Certain issues related to the correct transposition of Article 10(2) of the Directive arose due to the *mutatis mutandis* application of rules governing criminal proceedings. Such issues include a rather vague reference to the possibility to contact a lawyer 'by any means available', and the restriction of the communication between the requested person and the lawyer to half an hour (see 3.3.2.1. and 3.3.3.). Because of the rules on criminal proceedings were applied *mutatis mutandis*, derogations from the right of access to a lawyer in criminal proceedings may also apply in European arrest warrant proceedings in several Member States, something that is not provided for by Article 10(1) and (2) of the Directive.

#### **3.10.2. The right of access to a lawyer in the issuing Member State — Article 10(4) and (5)**

According to Article 10(4) of the Directive, the requested person has also the right to appoint a lawyer in the issuing Member State. That lawyer's role is to assist the lawyer in the executing Member State by providing the latter with information and advice to ensure the effective exercise of the rights of requested persons in the European arrest warrant proceedings. The competent authority in the executing Member State needs to inform

requested persons about this right without undue delay after they have been deprived of liberty. Article 10(5) of the Directive states that where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State is required to promptly inform the competent authority in the issuing Member State. The competent authority of that Member State must provide without undue delay the requested persons with information to help them appoint a lawyer there.

The legislation in four Member States does not at all reflect the right of requested persons to appoint a lawyer in the issuing Member State. Some five Member States do not clearly ensure that requested persons receive information about this right without undue delay (Article 10(4) of the Directive).

Moreover, the cooperation mechanism set out in Article 10(5) of the Directive is often not subject to specific rules. In seven Member States, the legislation lacks the requirement that the competent authority in the executing Member State promptly informs the competent authority in the issuing Member State in cases where requested persons who do not already have a lawyer in the issuing Member State wish to appoint one. Furthermore, the legislation in 10 Member States does not transpose the requirement for the competent authority of the issuing Member State to provide without undue delay the requested persons with information to help them appoint a lawyer there.

### **3.10.3. *Mutatis mutandis* application of other rights provided for by the Directive — Article 10(3)**

According to Article 10(3) of the Directive, the rights laid down in Articles 4, 5, 6, 7 and 9 of the Directive apply *mutatis mutandis* to European arrest warrant proceedings. If an Article 5(3) derogation is applied, Article 8 of the Directive also applies in the same way to European arrest warrant proceedings.

Most Member States also cross-refer in their legislation on European arrest warrant proceedings to rules on criminal proceedings governing the rights of suspects and accused persons. However, in a small number of Member States, such *mutatis mutandis* application does not clearly cover all or some of the requirements laid down in the relevant provisions of the Directive. Examples of this include the rights to have a third person and consular authorities informed of deprivation of liberty, the right to communicate with third persons and consular authorities, and rules on the waiver of the right of access to a lawyer.

Another consequence of the *mutatis mutandis* application of rules governing criminal proceedings is that issues concerning the complete and correct transposition of the articles referred to in Article 10(3) of the Directive may in turn affect the rights in European arrest warrant proceedings.

### 3.11. Legal aid (Article 11)

Article 11 of the Directive states that it is without prejudice to national law in relation to legal aid, which applies in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. This area is now covered by EU legislation: Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings<sup>15</sup>. Article 12 of that Directive stipulates that Member States have to bring into force the laws, regulations and administrative provisions necessary to comply with it by 5 May 2019.

### 3.12. Remedies (Article 12)

Article 12(1) of the Directive lays down the obligation to 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 the Directive. This also applies to requested persons in European arrest warrant proceedings.

Member States largely transposed this provision accurately. Remedies often refer to a right to appeal or complain either to a court or to a competent authority of a higher instance, or else provide for the invalidity or nullity of procedural acts that constitute a substantial breach of the procedural rules and a violation of the relevant rights. In addition, Member States may lay down rules on civil, disciplinary or criminal liability, compensation or the intervention of a public monitoring body, such as an Ombudsperson.

More specifically in respect to the right of access to a lawyer, Article 12(1) requires Member States to ensure that the rights of the defence and the fairness of the proceedings are respected 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). This is without prejudice to national rules and systems on the admissibility of evidence. This provision of the Directive takes into account related European Court of Human Rights case-law that puts the emphasis on ensuring the fairness of proceedings by balancing the rights of the defence with the needs of the investigation. This balancing exercise is further detailed in Recital 50 of the Directive, using wording from the *Salduz* judgement by the European Court of Human Rights<sup>16</sup>.

Remedies in cases of violations of defence rights are available in all Member States. Legislation in a number of Member States contains explicit rules on the exclusion of evidence or on the nullity of acts. In more than half of the Member States, rules on remedies refer to the lack of intervention by a lawyer. In a couple of Member States, cases where a derogation to this right of access to a lawyer was authorised are clearly covered by such rules.

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<sup>15</sup> OJ L 297, 4.11.2016, p. 1; corrigendum: OJ L91, 5.4.2017, p. 40.

<sup>16</sup> ECtHR *Salduz v. Turkey*, application No 36391/02, in particular pt. 55.

### **3.13. Vulnerable persons (Article 13)**

According to Article 13 of the Directive, the particular needs of vulnerable suspects and vulnerable accused persons need to be taken into account in the application of this Directive.

Member States have varying approaches to transposing Article 13 of the Directive. All Member States have specific rules concerning disabled persons and children. Some of these provisions provide for mandatory assistance by a lawyer in all cases or under certain additional conditions. Other national provisions refer to the obligation of authorities to explain the rights to suspects and accused persons or to check whether they have actually understood these rights.

## **4. CONCLUSIONS**

The Directive was adopted to ensure that the right of suspects or accused persons to access a lawyer and to communicate upon arrest is applied both in criminal proceedings and in European arrest warrant proceedings. By establishing common European minimum standards, the Directive has a significant impact on the protection of suspects or accused persons in Member States. It achieves this by providing a more consistent implementation of the rights and guarantees set out in Articles 47 and 48 of the Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights. In this way, the Directive contributes to improving mutual trust among Member States, as set out in the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.

Overall, the Directive has provided EU added value by improving the protection of citizens involved in criminal proceedings, especially in some Member States where the right of access to a lawyer was not granted to all suspects and accused persons, especially at the early stages of proceedings. Also, a right of access to a lawyer in the issuing Member State of a European arrest warrant is now clearly established.

The extent of the Directive's impact on Member States varies according to the national criminal justice systems in place. This implementation report highlights that there are still difficulties regarding key provisions of the Directive in a number of Member States. This is particularly the case as regards:

- the scope of the rights provided for by the Directive;
- the extent of possible derogations, in particular from the right of access to a lawyer;
- the waiver of the right of access to a lawyer; and
- the right of access to a lawyer in the issuing Member State of a European arrest warrant.

These shortcomings risk to affect the correct implementation of the other procedural rights directives, in particular Directive (EU) 2016/1919 on legal aid in criminal proceedings, which

builds upon this Directive (see Article 2(1) of Directive (EU) 2016/1919). Directive (EU) 2016/1919 had to be transposed by Member States by 5 May 2019<sup>17</sup>.

The evaluation also shows that while there is currently no need to revise the Directive, its transposition into national law and practical application need to be further improved. The Commission will continue to assess Member States' compliance with the Directive and take every appropriate measure to ensure conformity with its provisions throughout the European Union.

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<sup>17</sup> See corrigendum: OJ L91, 5.4.2017, p. 40.