



# Access to a lawyer in criminal proceedings: status quo of Directive 2013/48/EU

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# Introduction

- **Third instrument** adopted pursuant to the **Roadmap** for strengthening the procedural rights of suspects and accused persons
- Directive 2013/48/EU adopted on **22.10.2013** - Transposition period ended on **27.11.2016**
- COM **Infringement proceedings** for non-transposition against 9 Member States (*BG, CY, DE, FR, EL, HR, LU, SI, SK*)

# Main elements of the Directive

The Directive lays down the **following rights**:

the **right of access to a lawyer** irrespective of whether a person is deprived of liberty

the **right to have a third party informed of deprivation of liberty**

the **right to communicate while deprived of liberty with third persons**

the **right to communicate with consular authorities.**

*(Initially 2 separate measures C+D put forward in the Roadmap)*

# Conformity Assessment

Compliance assessment by COM together with external contractor

Implementation Report by COM, 26.9.2019

*COM(2019) 560 final*

Report by FRA published in parallel

[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf)

Several projects funded by EU, e.g. *inside Police Custody, Trainac Report, Fair Project, ...*

# State of Play

Assessment of national implementing measures have raised **certain issues of compliance** in several Member States.

## Main issues:

- **Scope** of the rights;
- Extent of **derogations**;
- **Waiver** of the right of access to a lawyer;
- Right of access to a lawyer in the **issuing State** (EAW proceedings).

# Scope of application of the Directive

- **Criminal proceedings**
  - National legislations do not necessarily specify the moment of being 'made aware', but conformity often inferred.
  - Issues arise where scope of application remains unclear or is linked to formal acts at a later stage of the proceedings or where rules apply only to persons deprived of liberty.
- **EAW proceedings**
  - *Mutatis mutandis* application of rules on criminal proceedings; need to ensure all rights provided for by the Directive.

# Starting point and content of the right of access to a lawyer

- In most MS before questioning, sometimes only during questioning or unclear.
- Without undue delay after deprivation of liberty: legislation compliant in the large majority of the Member States
- Certain issues with regard to the duration of consultation prior to questioning and the “effective participation” of the lawyer during questioning.

# Temporary derogations

- Possibility to derogate based on **geographical remoteness** used in 5 Member States – certain issues with regard to the temporary and exceptional nature.
- Possibility to derogate based on **risks for persons or investigation needs** exist in 4/5 of the Member States.
- Issues related to the legal conditions allowing for derogations.
- Time limits for lawyers to show up.



# Confidentiality of communication and Waiver

- **Confidentiality of communication:**
  - Strong statement of principle
  - Certain compliance issues with regard to temporal/personal scope and derogations.
- **Waiver**
  - Subject to legislation in most Member States
  - Issues arise with regard to the information about the right of access to a lawyer, the consequences of a waiver and the possibility to revoke a waiver.

# European arrest warrant proceedings

- **Executing Member State**

- *Mutatis mutandis* application of rules concerning criminal proceeding in many Member States.
- In several Member States transposition based on specific rules regulating EAW proceedings.

- **Issuing Member State**

- Cooperation mechanism often not subject to specific rules.

# Right to have a third party informed about deprivation of liberty

- Without undue delay: restriction to certain situations of deprivation of liberty or certain categories of person
- Sometimes independent of the wish of the person
- Issues related to possible derogations

# Right to communicate with third persons/consular authorities

- **Right to communicate with third persons**
  - Legislation in all Member States: rules on criminal proceedings; rules concerning the administration of penitentiary facilities
  - In respect to certain Member States: doubts as regards the assurance of the right without undue delay
- **Right to communicate with consular authorities**
  - Issues arise with regard to potential derogations
  - Sometimes independent of the wish of the person

# Conclusions

- **Considerable EU added value** by strengthening the rights of suspects and accused persons in criminal proceedings and EAW proceedings
- **Extent of impact varies** according to the national criminal system in place
- **Still conformity issues** with regard to key provisions in several Member States
- **Efforts to be continued:** Member States (to ensure conform legislation and application in practice), COM (dialogue, guidance, infringements), Practitioners (awareness raising, training) and stakeholders (awareness raising, information).

# Thank you for your attention!

## Questions and Answers?

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