

Rights ahead: Access to a lawyer and legal aid in criminal proceedings throughout the EU: where are we?



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Case 1 – part 1 access to a lawyer:

The prosecutor in Portugal starts an investigation for creditcard fraud. One of the suspects, Jan, is a Dutch citizen, living in Amsterdam. The Portuguese authorities issued an EIO to the Netherlands and asks the police to hear Jan as a suspect. Jan receives an invitation to be questioned by the Dutch police. This is the first time he gets aware of the investigation.

Jan contacts a Dutch lawyer - Gwen - to represent him during the police questioning. Gwen contacts a Portuguese lawyer, Vania, to get more information about the case and the Portuguese procedures.

Some time after the statement in the Netherlands, Jan is invited to attend an Oslo confrontation in Portugal. Jan flies over to attend.

During that stay in Portugal, the holiday house of Jan in Portugal, is searched by the police.

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EU – LEGISLATION

▶ 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.

▶ 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.

▶ 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.

▶ Implementation report due: 25-05-2022

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Directive 2013/48/EU – access to a lawyer

Article 2 - Scope

1. This 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**. [...]

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Implementation report:

3.2.1. Scope of application – Article 2(1) and (2)

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 [...]

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.

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Directive 2013/48/EU – access to a lawyer

Article 3 - The right of access to a lawyer in criminal proceedings

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, 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
- (c) without undue delay after deprivation of liberty;

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Directive 2013/48/EU – access to a lawyer

3. 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. [...]
- (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 (1) **those acts are provided for under national law** and (2) **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.

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Directive 2013/48/EU – access to a lawyer

- ▶ **Identity parades:** at which the suspect or accused person figures among other persons in order to be identified by a victim or witness.
- ▶ **Confrontations:** where a suspect or accused person is brought together with one or more witnesses or victims where there is disagreement between them on important facts or issues;
- ▶ **Reconstructions:** of the scene of a crime in the **presence of the suspect or accused** person, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person (par. 26).

Member States may make **practical arrangements concerning the presence of a lawyer** during investigative or evidence-gathering acts. Such practical arrangements **should not prejudice the effective exercise and essence of the rights concerned**.

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Implementation report:

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)

For a small number of Member States 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.

- ▶ The rights under the Directive are made dependent on a formal act.
- ▶ The legislation lacks clarity on persons who are not deprived of liberty.

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Implementation report:

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

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.

In a few 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.

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Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

(9) A similar right to the presence of a lawyer should be granted every time that national law expressly **allows or demands the presence of the suspected or accused person** at a procedural step or evidence gathering such as a **search**; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question; **this right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer**;

(10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include [...] the search for exculpatory evidence [...].

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Case 1 – part 2 legal aid:

The prosecutor in Portugal starts an investigation for creditcard fraud. One of the suspects, Jan, is a Dutch citizen, living in Amsterdam. The Portuguese authorities issued an EIO to the Netherlands and asks the police to hear Jan as a suspect. Jan receives an invitation to be questioned by the Dutch police. This is the first time he gets aware of the investigation.

Jan contacts a Dutch lawyer - Gwen - to represent him during the police questioning. Gwen contacts a Portuguese lawyer, Vania, to get more information about the case and the Portuguese procedures.

Some time after the statement in the Netherlands, Jan is invited to attend an Oslo confrontation in Portugal. Jan flies over to attend.

During that stay in Portugal, the holiday house of Jan in Portugal, is searched by the police.

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Directive (EU) 2016/1919 – legal aid:

Article 2 - Scope

1. This 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.

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Directive (EU) 2016/1919 – legal aid:

Article 4 - Legal aid in criminal proceedings

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

4. 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.

5. Member States shall ensure that 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 the investigative or evidence-gathering acts referred to in point (c) of Article 2(1) are carried out.

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Directive (EU) 2016/1919 – legal aid:

The following situations **do not constitute a deprivation of liberty** within the meaning of this Directive (par. 15):

- i) identifying the suspect or accused person;
- ii) determining whether an investigation should be started;
- iii) verifying the possession of weapons or other similar safety issues;
- iv) **carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as**
 - i) **body checks,**
 - ii) **physical examinations,**
 - iii) **blood, alcohol or similar tests,**
 - iv) **or the taking of photographs or fingerprints;**
- v) bringing the suspect or accused person to appear before a competent authority, in accordance with national law.

This Directive lays down minimum rules. **Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts other than those specifically referred to in this Directive are carried out (par 16).**

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Case 2 the interrogation / derogations:

The investigation in Portugal did not result in a criminal case in Portugal.

However the Dutch authorities started another investigation in the Netherlands based on some information they got from Portugal. Jan is arrested at 7 AM. On his request, Gwen is appointed (at 8 AM) as his (legal aid) lawyer and Jan wishes to be represented by her during the police interrogations.

Due to other obligations Gwen is only able to attend the interrogations from 1PM.

After the police interrogations, the investigating judge decides to put Jan in PTD.

Gwen thinks it is necessary to do more research in Lisbon. She asked for a search in the company where Jan works.

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Directive 2013/48/EU – access to a lawyer

Article 3 - The right of access to a lawyer in criminal proceedings

5. In **exceptional circumstances** and **only at the pre-trial stage**, Member States may **temporarily derogate** [after deprivation of liberty] 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.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of [the right to private communication, effective defence during questioning and attendance of the evidence gathering] 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.

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Directive 2013/48/EU – access to a lawyer

Article 8 - General conditions for applying temporary derogations

1. Any temporary derogation under Article 3(5) or (6) 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.

2. Temporary derogations under Article 3(5) or (6) 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**. [...]

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Implementation report:

3.3.4.1. Temporary derogations based on geographical remoteness – Article 3(5)

In three 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.

- 1) Firstly, the possibility to derogate might **not be restricted to the pre-trial stage** as provided for by the Directive;
- 2) Secondly, the **exceptional and temporary nature of derogations might be doubtful**;
- 3) Thirdly, some of the relevant laws allow **persons who are not lawyers** under national law to assist the suspect or accused person.

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Implementation report:

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

Some national legislation 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.

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'**.

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Implementation report:

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

This creates a risk that suspects and accused persons might be left in limbo, with no guarantee that questioning or evidence gathering would take place in the absence of a lawyer only, if the person has waived that right.

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 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.

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Implementation report:

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

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**.

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 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**.

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CASE OF SOYTEMİZ v. TURKEY

(Application no. [57837/09](#)) 27 November 2018

44. Therefore, the right to be assisted by a lawyer requires not only that the lawyer is **permitted to be present**, but also that he is **allowed to actively assist** the suspect during, inter alia, the questioning by the police and to **intervene to ensure respect for the suspect's rights** (see *Brusco v. France*, no. [1466/07](#), § 54 in fine, 14 October 2010; *Aras v. Turkey* (no. 2), no. [15065/07](#), §§ 39-42, 18 November 2014; and *A.T.v. Luxembourg*, no. [30460/13](#), § 87, 9 April 2015) as a person charged with a criminal offence should be able to obtain **the whole range of services** specifically associated with legal assistance, not only in the course of trial but also during the pre-trial stage given its particular importance for the preparation of the criminal proceedings (see *Dvorski v. Croatia* [GC], no. [25703/11](#), § 78, ECHR 2015).(...)

45. Moreover, the right to be assisted by a lawyer applies **throughout and until the end of the questioning** by the police, **including when the statements taken are read out and the suspect is asked to confirm and sign them**, as assistance of a lawyer is equally important at this moment of the questioning. The lawyer's presence and active assistance during questioning by police is an important procedural safeguard aimed at, among other things, preventing the collection of evidence through methods of coercion or oppression in defiance of the will of the suspect and protecting the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police."

46. The Court also recalls that **the police are, in principle, under an obligation to refrain from or adjourn questioning in the event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect**. The same considerations also hold true in case the lawyer **has to - or is requested to - leave before the end of the questioning of the police and before the reading out and the signing of the statements taken** (see *Pishchalnikov v. Russia*, no. [7025/04](#), §§ 74 and 79, 24 September 2009, and *Kulik v. Ukraine* [Committee], no. [34515/04](#), §§ 186-87, 2 February 2017).

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Directive 2013/48/EU – access to a lawyer

Article 9 - Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Art 3:

- (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**.

2. 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.

3. 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.

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Directive 2013/48/EU – access to a lawyer

Article 12 - Remedies

2. Without prejudice to national rules and systems on the admissibility of evidence, 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.

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Directive 2013/48/EU – access to a lawyer

Member States should ensure that 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 from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (par. 50).

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CASE OF BEUZE v. BELGIUM

(Application no. [71409/10](#)), 9 November 2018

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the *Salduz* judgment (cited above, § 55) as follows:

“... in order for the right to a fair trial to remain sufficiently ‘practical and effective’ ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262).

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. [...] The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

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CASE OF BEUZE v. BELGIUM

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court’s case-law, should, where appropriate, be taken into account (see *Ibrahim and Others*, cited above, § 274, and *Simeonovi*, cited above, § 120):

- (a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
- (b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with - where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- (c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
- (d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- (e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- (f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- (g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
- (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
- (i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
- (j) other relevant procedural safeguards afforded by domestic law and practice.

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Thank you !
Dank je wel!
Obrigada!

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