

# Rights of the defence in criminal and other proceedings in EU law

Dominik Dürsterhaus

Funded by the European Union's Justice Programme (2014-2020)

The content of this publication represents the views of the author only and is her/his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



# Right to be advised, defended and represented

- The normative foundations
- ECJ Case-law on the right to be ADR in (non-)criminal procedures
- The right to be advised, defended and represented in criminal matters
- **Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings**
  - Choice and quality of legal assistance
  - Adequate time and facilities to prepare one's defence
  - Waiver of the right to be advised, defended and represented
- **Directive 2012/13/EU on the right to information in criminal proceedings**
- Legal aid (Directive 2016/919/EU)
- **Victims of crime (Directive 2012/29/EU)**

# The normative foundations (I)

## **Article 47 CFR - Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. **Everyone shall have the possibility of being advised, defended and represented.**

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

## **Article 48 – Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

# The normative foundations (II)

## Article 6 ECHR – Right to a fair trial

1. In the determination of his civil rights or obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ... .
  2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
  3. **Everyone charged with a criminal offence has the following minimum rights:**
    - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    - (b) to have adequate time and facilities for the preparation of his defence;
    - (c) **to defend himself in person or through legal assistance of his own choosing** or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- ...

## ECJ case-law on the right to be advised, defended and represented (I)

- Very little mention in the ECJ case-law of the right to be advised, defended and represented, which Article 47 CFR specifically provides for in both criminal and other proceedings. With regard to the reasons, one may distinguish between cases dealing with this right in national procedures and in direct actions against EU institutions.
- The scarce references to this right in ECJ case-law dealing with national procedures appear to be largely due to the Charter's limited scope of application and the lack of common procedural rules, which the Court could be called upon to interpret.
- A growing body of minimum common standards in criminal matters nevertheless provides an opportunity for harmonizing interpretation
- Beyond this legislative achievement, infusing national procedures with a common, Charter-compliant standard is a tedious task by means of more or less case-specific guidance with the general proviso that, in principle, Member States are entitled to lay down the procedures they deem appropriate.
- As regards the field of civil judicial cooperation, which would be a prime matter for harmonization, few instruments actually concern genuine procedural issues and, where necessary, refer to national law instead, thus leaving room for procedural autonomy and fundamental rights pluralism.

## ECJ case-law on the right to be advised, defended and represented (II)

Large chunks of domestic (civil) litigation do not meet the condition of “implementing” EU law within the meaning of Article 51 CFR. Under this requirement, Article 47 CFR matters in national (civil) proceedings only

- *where substantive EU law is the subject of the litigation;*
- *where substantive EU law frames procedural obligations;*
- *where EU law sets out common/specific procedural rules;*
- *where jurisdiction is examined on the basis of EU law;*
- *where service of the writ is (to be) effected pursuant to EU law;*
- *where a judgment is to be certified for the purpose of cross-border enforcement;*
- *where such enforcement is contested;*
- *where evidence is gathered abroad or*
- *where EU law makes specific procedural provision for the domestic adjudication of cross-border disputes.*

Conversely, in direct actions before the EU Courts, the right under Article 47 CFR to be advised, defended and represented can always apply, but seldomly matters and has not yet been found to be infringed.

It indeed appears that even in the few cases touching upon the right to be advised/represented the ECJ has not yet had to delve too deep into it.

## ECJ case-law on the right to be advised, defended and represented (III)

- In actions brought against the EU institutions, claimants sometimes put forward arguments touching upon the right to be advised, defended and represented.
  - One issue is the obligation under Article 19 of the CJEU Statute, according to which parties other than the institutions, EU EEA and EFTA States 'must be represented by a lawyer'. According to some claimants, an interpretation of this provision as requiring that even a lawyer cannot represent himself violates their right under Article 47 CFR to do so. The Court does not agree and notes that in the EU legal order and the constitutional traditions of the Member States, a lawyer acting on behalf of a party should be independent of the latter. (**ECJ, C-535/12 P, *Faet Oltra*, 6 June 2013, para. 19**).
- May a lawyer legally receive payment for his services from a client whose funds are frozen under an EU sanctions regime?
  - The requirement imposed by Article 19 of the Statute of the Court of Justice is based on a view of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs (...).
  - Moreover, ... as no provision is made in the Statute or Rules of Procedure of the Court of Justice for a derogation from or exception to that obligation, an application signed by the applicant himself is insufficient for the purposes of instituting proceedings (...).
  - When taking a decision on whether to grant a derogation for the release of funds and economic resources ..., the competent national authority ... must exercise its powers in a manner which upholds the rights provided for in the second sentence of the second paragraph of Article 47 of the Charter and, in a situation such as that in the main proceedings, observes the indispensable nature of legal representation in bringing an action challenging the lawfulness of restrictive measures. (**ECJ, C-314/13, *Peftiev*, 12 June 2014, paras. 28 and 29**)

# Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings

Spot question:

Have you ever relied on Directive 2013/48/EU in court ?

Yes / No



## Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings

- lays down minimum rules concerning the rights of suspects or accused persons in criminal and European arrest warrant proceedings. 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” until the “conclusion of the proceedings” (that is, the final determination of the offence, including sentencing and appeal), article 2(1).
- The directive also applies to individuals who are not suspects but become suspects in the course of an interview, article 2(3). However, different standards of protection apply to individuals who have not been deprived of their liberty; although they are free to contact, consult or be assisted by a lawyer through their own arrangements, Member States are not obliged “to take active steps” to ensure that they are assisted by a lawyer.
- The directive nevertheless excludes “minor offences” from its scope of protection, art. 2(4).
- Article 3 (1) of the directive requires that access to a lawyer is provided in such time and manner to allow the persons concerned to exercise their rights of defence practically and effectively. Article 3 (3) gives suspects or accused persons the right to meet in private and communicate with the lawyer representing them. Article 3 (4) requires EU Member States to make available general information to facilitate the obtaining of a lawyer by suspects or accused persons.

## Quality of legal assistance

- The right to legal assistance is a right to effective assistance and representation (ECtHR, *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993, para. 43).
- The presence of a lawyer who has no opportunity to intervene to ensure respect for the accused or suspected person's rights is of no benefit to the accused or suspected person (ECtHR, *Aras v. Turkey (No. 2)*, No. 15065/07, 18 November 2014, para. 40).
- **Under EU law**, Directive 2013/48/EU on the right of access to a lawyer confirms that a suspect or an accused person have the right for his/her lawyer to “be present and participate effectively”. The lawyer's participation must be “in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned”, article 3(3)(b).

## Legal assistance of one's own choosing

- Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to a lawyer of one's own choosing is not absolute. It is notably subject to regulation where free legal aid is concerned because the state controls the criteria and financing for legal assistance (**ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29**; see also ECtHR, *Correia de Matos v. Portugal*, No. 48188/99, 15 November 2001 ).
- The right may also be subject to restrictions by way of professional regulation; for example, different qualifications may be required for different levels of jurisdiction. Additionally, the special nature of proceedings may justify using specialist lawyers (**ECtHR, *Meftah and Others v. France* [GC], Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002**).
- Directive 2013/48/EU refers in a recital (28) to “arrangements” by Member States which “could imply”, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose.

## Restrictions on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings (I)

- The right to speak to a lawyer in confidence may be restricted, but restrictions require substantial justification (**ECtHR, *Sakhnovskiy v. Russia* [GC], No. 21272/03, 2 November 2010, para. 97**).
- “Weighty reasons” are required to override this right; for example, surveillance of an applicant’s contacts with his/her lawyer may be justified where the applicant is suspected of being a gang member and this is necessary to catch the other gang members (**ECtHR, *George Kempers v. Austria*, No. 21842/93**).
- Article 3 of Directive 2013/48 provides that a temporary derogation from the right of access to a lawyer laid down in the directive is possible in three sets of circumstances, referred to, respectively, in Article 3(5), Article 3(6)(a) and Article 3(6)(b) thereof. See also Article 8 and Recital 38.

## Restrictions on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings (II)

*Undue delay* in granting access to a lawyer after deprivation of liberty permissible at the pre-trial stage where the geographical remoteness of a suspect or accused person makes it impossible to ensure that right (Article 3(5))

*Temporary no access* permissible where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person (Article 3(6)(a))

or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings (Article 3(6)(b))

## Adequate time and facilities to prepare one's defence

- Under the ECHR and EU law, the accused or suspected person is entitled to adequate time and facilities to prepare his/her defence because a lawyer's ability to provide effective legal assistance may be undermined by the circumstances of meeting or communicating with a client.
- This right is set out in Article 6 (3) (b) of the ECHR and inherent in Article 48 (2) in conjunction with Article 47 (2) CFR.

- **See Article 3 and Recital 23 of Directive 2013/48/EU**

“... Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer”

## Waiver of the right to legal assistance

The right to legal assistance is of such fundamental importance that the accused or suspected person may only waive it in limited circumstances (**ECtHR, *A.T. v. Luxembourg*, No. 30460/13, 9 April 2015, para. 59**). The ECtHR has strictly restricted such waiver and emphasises the importance of safeguards (**ECtHR, *Pishchalnikov v. Russia*, No. 7025/04, 24 September 2009, paras. 77–78**).

**Under EU law, Article 9 of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings specifies three conditions for a valid waiver:**

- the suspect or accused person must be 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;
- the waiver must be given voluntarily and unequivocally;
- it must be recorded in accordance with the law of the Member State.

## Directive 2012/13/EU on the right to information in criminal proceedings

imposes obligations to inform suspects and accused persons on their rights in criminal proceedings, including, for example, their right to access case materials to prepare their defence

Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

the right of access to a lawyer - any entitlement to free legal advice and the conditions for obtaining such advice - the right to be informed of the accusation - the right to interpretation and translation - the right to remain silent (article 3)



# Legal aid

- **Directive (EU) 2016/1919 on legal aid** seeks to ensure the effectiveness of the right of access to a lawyer provided for under Directive 2013/48/EU by making available the assistance of a lawyer funded by the Member State for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings.
- ‘According to its Art. 1(2), nothing in the Directive should be interpreted as limiting the rights provided for in Directive 2013/48/EU. This is meant to take account of the smaller scope of the legal aid Directive. The same applies with regard to the Directive on procedural safeguards for children, which provides a self-standing right for children to be granted legal aid in certain circumstances.

# Victims of crime

- Following Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, **Directive 2012/29/EU (the Victims' Rights Directive)** establishes minimum standards on the rights, support and protection of victims of crime.
- Article 2 defines the term “victim” broadly: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.
- The Victims' Rights Directive obliges Member States to provide support services (Articles 8 and 9) and certain fair trial rights – the right to be heard (Article 10) and the right to legal aid (Article 13) – to victims. It also contains new provisions on a right to review in the event of a decision not to prosecute (Article 11) and expanded provisions on specific protection needs (Articles 22–24).
- Victims must be given practical support to enable them to access justice. This includes providing victim support, raising victims' awareness of their rights, and sufficient training of law enforcement personnel.
- EU law also provides for compensation for crime victims: Article 16 of the Victims' Rights Directive addresses compensation, and the EU Compensation Directive 2004/80/EC established a system of cooperation to facilitate access to compensation for victims of crimes in cross-border situations.

## Finally, a remark on the scope of the different Directives and guarantees

- Recitals 11, 40 and 54 of, respectively, Directives 2012/29, 2012/13 and 2013/48 underline that these directives lay down minimum rules and that the Member States, bound by the ECHR, may always upgrade the guarantees laid down
- Where such guarantees stem directly from Articles 47 and 48 CFR, the limited scope of the directives cannot lead to a person coming within the scope of the Charter guarantees not benefitting from them
- This is why it is always necessary to examine whether these guarantees apply at the same time, or instead of, one of the directives
- As regards this question, see already slide no 6, as well as, inter alia, **ECJ, C-481/19, *Consob*, 2 February 2021, paras. 42-45**

# This is (not) the end

Thank you very much for your attention until now,  
let us move on to the case studies

[dominik@duesterhaus.org](mailto:dominik@duesterhaus.org)

