



Co-funded by the Criminal Justice Programme of the European Union 2014-2020

Selected issues of the right of access to a lawyer under Directive 2013/48/EU

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1. General information and the scope of the directive

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 liberty¹ covers number of rights of suspects and of accused persons. This overview focuses mainly on the following aspects of the directive:

1. the right of access to a lawyer, which is provided in Article 3,
2. conditions for applying temporary derogations provided in Article 8,
3. waiver provided in Article 9,
4. the right of access to a lawyer in EAW proceedings provided in Article 10, and
5. remedies provided in Article 12.

Directive 2013/48/EU is based on Measure C in a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings of the 30 November 2009, adopted by the Council of the EU which stated that 'there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.'² According to the Roadmap, the action taken by the EU serves a goal to balance between the measures of judicial and police cooperation

¹ OJ 2013 L 294/1.

² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ 2009 C 295/1, recital 2.

and the defence rights of individuals.³ Measure C in the roadmap concerns legal advice and legal aid stating that '[t]he right to legal advice for the suspected or accused person in criminal proceedings at the earliest appropriate stage is fundamental to safeguarding the fairness of the proceedings[.]' Due to the complexity of an issue legal aid was put aside for a while and the focus of Directive 2013/48 EU was solely on the right of access to a lawyer. Nevertheless, the road to Directive 2013/48/EU was still long and difficult. Negotiations on the directive proved to be complex due to the fear of some Member States that the directive would be a threat to the diversity of criminal justice systems in the EU.⁴ The difficulties during negotiations can be divided into four aspects: first, difficulty relating to the interpretation of the concept of the right of access to a lawyer, and the fact that in Member States the legal aid system greatly varies; second, the difficulty relating to the fact that on several points, the directive has a far-reaching effect on the national legal systems; third, the difficulty relating to the safeguards that should apply regarding derogations and confidentiality; and fourth, the difficulty relating to the changes in respect of the EAW system.⁵ For this reason, the final version of the directive is a compromise between involved parties. The need to compromise is clearly reflected by the fact that 18 articles in the directive are accompanied by lengthy preamble of 59 recitals. In addition, exceptions and derogations are incorporated to the directive, which is also a significant sign of a compromise as well as the fact that some provisions (e.g., confidentiality) have very general wording. Also, as will be demonstrated above, remedies clause was significantly altered during negotiations.

Transposition date of Directive 2013/13/EU was 1.5 years ago, on 27 November 2016. After transposition deadline passes directives become directly applicable to the national law on a condition that the provision of the directive is sufficiently precise and unconditional.⁶ In that case, if the national law is contrary to the directive, it has to be set aside.⁷ This means that even if the Member State refuses to implement the directive, the individuals can still invoke the rights incorporated to the directive. Unlike substantive law, procedural rules can be applied to all proceedings pending at the time when they enter into force.⁸ In addition, implementation of directives is subject to the monitoring of the Commission. Member States not only have to report upon the way in which they have implemented directives, but the Member State which fails to implement a directive can be brought before the ECJ by the Commission. When one analyses if the national law meets the requirements of Directive 2013/48/EU, three aspects have to be taken into

³ 'Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual. Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union.' OJ 2009 C 295/1, p. 2.

⁴ V. Mitsilegas. *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*. Hart Publishing, 2016, pp. 165-166.

⁵ S. Cras. *The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings*. *Eucrim* 2014 (1), p. 35.

⁶ *Criminal proceedings against Antoine Kortas*, 1 June 1999, C-319/97, p. 21.

⁷ A. Klip. *European Criminal Law. An Integrative Approach*, 3rd Ed. Intesentia, 2016, p. 169.

⁸ *Criminal proceedings against Giovanni Dell'Orto*, 28 June 2007, C-467/05, p. 48.

consideration. First, the Charter of Fundamental Rights of the European Union (Charter)⁹ applies now to the subject matter covered by Directive 2013/48/EU. Second, Strasbourg standards have to be taken into account, but Article 52 (3) of the Charter guides the EU to consider the Strasbourg standards only as minimum ones. Therefore, when one reads the directive, she has to carefully consider if the EU has harmonised or raised certain existing Strasbourg standard. In Strasbourg system the right to counsel arises from Article 6 (1) and (3) c of the European Convention on Human Rights (ECHR) and is embraced by the *Salduz* case law¹⁰. Third, the standards of directive themselves are minimum ones and do not restrain the Member States to guarantee higher protection to suspects and accused persons.

According to Article 2 (1) of the directive '[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. It 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.' Here the case law of the European Court of Human Right (ECtHR) has to be taken into account according to which 'charge' in the context of Article 6 has to be defined as the official notification of an individual by the competent authority that they have allegedly committed a criminal offence, a definition in line with the test whether 'the situation of the [person] has been substantially affected'.¹¹ Therefore, Article 6 of the ECHR comes into play also when a person is questioned as a witness despite the fact that the authorities suspect her of committing the crime.¹² This principle has been incorporated to Article 2 (3) according to which the directive also applies '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.' Recital 21 explains that if in the course of questioning a person becomes a suspect, questioning should be suspended immediately and could be continued only if the person is made aware of the fact that she is suspected of a crime and is able to fully exercise her rights under the directive. The persons subject to EAW warrant also fall within the scope of the directive from the time of their arrest (Article 2 (2)). However, the directive does not apply to all offences as in Article 2 (4) there is a minor offences exception, which states that for offences sanctioned by an authority other than a court having jurisdiction in criminal matters or in cases deprivation of liberty cannot be imposed as a sanction, the directive applies only to the proceedings before a court having jurisdiction in criminal matters or if a person is deprived of liberty. In any case, it has to be taken into consideration that all offences falling under Engel criteria should be covered by the directive. Whether the directive applies only natural persons or also to legal persons is unclear and therefore, up to the ECJ to decide.

⁹ OJ 2012, C 326/391.

¹⁰ *Salduz v. Turkey*, 27 November 2008, 36391/02.

¹¹ *Aleksandr Zaichenko v. Russia*, 18 February 2010, No. 39660/02, p. 42.

¹² *Brusco v. France*, 14 October 2010, No. 1466/07.

2. Article 3: the right of access to a lawyer in criminal proceedings

In ECtHR's case law the right to counsel is an essential feature of a fair trial.¹³ Article 6 (3) c of the ECHR states that everyone charged with a criminal offence has the right '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.' In *Salduz* case the ECtHR recognised the importance of providing suspects with early access to counsel upon their arrest by stating:

*'[T]he Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see Can v. Austria, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see Jalloh v. Germany [GC], no. 54810/00, § 100, ECHR 2006-IX, and Kolu v. Turkey, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, mutatis mutandis, Jalloh, cited above, § 101). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see paragraphs 39-40 above), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment.'*¹⁴

In *Dayanan v. Turkey* the ECtHR complemented the list of tasks of a lawyer upon person's arrest stating that lawyer's duties reach far beyond attending interrogation of a suspect. More specifically, counsel should be able to discuss the case with the suspect, organise defence, collect exculpatory evidence, prepare for questioning, support the suspect in distress and check conditions of detention.¹⁵ When it comes to the performance of counsel in criminal proceedings, in the *Artico* case the ECtHR has clearly articulated that rights under the ECHR have to be 'practical and effective', not 'theoretical and illusory'.¹⁶ Nevertheless, it can be concluded that in cases accused persons complain that their right to counsel has been breached because of counsel's failure to perform her duties, the ECtHR most probably refuses to

¹³ See *Poitrimol v. France*, 23.11.1993, No. 14032/88, p. 34.

¹⁴ *Salduz v. Turkey*, 27 November 2008, 36391/02, p. 54.

¹⁵ 13.10.2009. No. 7377/03, p. 32.

¹⁶ *Artico v. Italy*, 13.05.1980, No. 6694/74.

satisfy such claim by referring to the principle of independence of the profession.¹⁷ According to the case law of the ECtHR, formal¹⁸ or serious procedural errors¹⁹ constitute violations of the right to counsel, unlike professional errors.²⁰ In any case, systematic restrictions, e.g. allowing passive presence of a lawyer at the interrogation without any possibility at all to intervene to ensure respect for the suspect's rights, concerning effective performance of counsel are not tolerated by the ECtHR.²¹

The scope and content of the right of access to a lawyer arise from Article 3 of Directive 2013/48/EU. As the content of basic provisions of the directive is not very clear, it has been suggested that they should be interpreted by taking into account the structure of article, the recitals and the non-regression clause of Article 14 of the Directive.²² However, this could be done only if such interpretation does not limit or contradict the rights stipulated in actual provisions of the directive.²³

Pursuant to Article 3 (1) it has to be ensured that 'suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.' Article 3 (2) obliges the Member States to provide the suspects and accused persons with access to lawyer without undue delay, and in any event from the following point of the proceedings:

- before questioning by the competent authority (Article 3 (2) a);²⁴
- upon carrying out by the competent authority of identity parade, confrontation, or reconstruction of the scene of a crime (Article 3 (2) b);
- without undue delay after deprivation of liberty (Article 3 (2) c);
- in due time before they appear before the criminal court (Article 3 (2) d).

Concerning the authorities' responsibility to guarantee the right of access to a lawyer the directive differentiates between situation where the person is not deprived of liberty and situation she is deprived of liberty. More specifically, recital 27 states that in cases person's liberty is not deprived she should be

¹⁷ W.A. Schabas. *The European Convention on Human Rights. A Commentary.* Oxford: Oxford University Press, 2015, p. 311.

¹⁸ For instance, absence of the counsel from the proceedings like in *Artico v. Italy*, 13.05.1980, No. 6694/74.

¹⁹ For instance, in *Czekalla v. Portugal*, 10.10.2002, No. 38830/97, where lawyer failed to include submissions in the pleadings.

²⁰ For instance, in *Kamasinski v. Austria*, 19.12.1989, No. 9783/82, where the central issue was the lawyer's adequate performance at the trial.

²¹ *Aras v. Turkey (No. 2)*, 18.11.2014, No. 15065/07.

²² E. Symeonidou-Kastanidou. *The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation.* *European Criminal Law Review* 2015 (1), p. 85.

²³ *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*, 24 November 2005, C-136/04, p. 32.

²⁴ Recital 20 specifies that 'questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified.'

free to contact, consult and be assisted by a lawyer, but authorities do not have to take active steps to ensure that she is assisted by a lawyer if she herself does not arrange it. In cases person's liberty is deprived, authorities should make the necessary arrangements to ensure that she is in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the detained person does not have one (unless she waives the right) (Article 3 (4), recital 28). Recital 28 further explains that such arrangements could mean that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the detained person could choose, and could include legal aid if applicable.

The right to counsel itself contains following aspects in the directive. First, the suspects and the accused persons have a right to meet in private and communicate with the counsel, including prior to questioning by competent authority (Article 3 (3) c).²⁵ Second, according to Article 3 (3) b the suspects and the accused persons have a right for 'their lawyer to be present and participate effectively when questioned.' During the questioning, the lawyer may, in accordance with procedural rules, ask questions, request clarification and make statements, which should be recorded in accordance with national law (recital 25). Third, the suspects and accused persons have a right for their lawyer to attend at least to the identity parades, confrontations, and reconstructions of the scene of a crime (Article 3 (3) c).

3. Article 8: conditions for applying temporary derogations

According to ECtHR's case law the right of access to a lawyer can be temporarily derogated due to compelling reasons in exceptional circumstances based on individual assessment of the case. Here the Court considers whether the decision to restrict legal advice was based on domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.²⁶ In *Ibrahim and the others v. the UK* the ECtHR concluded that an urgent need to avert serious adverse consequences for life, liberty or physical integrity might amount to compelling reasons depending on specific facts of the case in contrary to general risk of information leaks, which does not measure up to compelling reasons.²⁷

In Directive 2013/48/EU it is allowed to derogate the right of access to counsel temporarily under exceptional circumstances to the extent justified in the light of the particular circumstances of the case and only at the pre-trial stage. The directive gives three justifications for such derogation. First, the suspect's right to a lawyer upon deprivation of liberty can be temporarily derogated, where the

²⁵ Member States have an obligation to respect confidentiality of this communication according to Article 4. Recital 33 explains that respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality.

²⁶ *Salduz v. Turkey*, 27 November 2008, 36391/02, p. 54–55; *Ibrahim and the others v. the UK*, 13.09.2016, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, p. 259.

²⁷ *Ibid.*

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 (Article 3 (5)). Recital 30 explains that during such a temporary derogation, the competent authorities should not question the detained person or carry out any of the investigative or evidence-gathering acts provided for in the directive. If possible, Member States should arrange for communication via telephone or video conference. Second, situations where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person is considered compelling reason for derogation of the right of access to counsel Article 3 (6) a. Third, a situation where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings is also considered as compelling reason for such restriction Article 3 (6) b.²⁸ Recitals 31 and 32 specify that in these cases questioning by the authorities is allowed, but the suspect or the accused should be informed about the right to remain silent and they should be allowed to exercise that right respectively, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. In any case, questioning may be carried out for the sole purpose and to the extent that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person or to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Both recitals 31 and 32 emphasise that any abuse of this derogation would in principle irretrievably prejudice the rights of the defence. Temporary derogation from the right of access to counsel should always be proportionate, limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings Article 8 ((1)). According to Recital 38, the grounds and criteria for any temporary derogation should be clearly set out in national law of the Member State.²⁹ Temporary derogations 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 (Article 8 (2)).

4. Article 9: waiver

ECtHR requires the waiver of the right to counsel to be voluntary (expression of suspect's own free will), established in an unequivocal manner, and knowing and intelligent.³⁰ Similarly, the directive provides conditions under which a suspect or an accused person may waive the right to counsel. The waiver must

²⁸ Recital 32 states that in particular these are the cases in which it is necessary to derogate the right of access to counsel to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. However, because of the wording of the recital, this should be considered only as an indicative list.

²⁹ From the directive it could be seen that the European Parliament and the Council have acknowledged sensitivity of derogations as Article 16 obliges the Commission to submit a report to the European Parliament and to the Council, assessing the extent to which the Member State have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3 (6) in conjunction with Article 8 (1) and (2), accompanied, if necessary, by legislative proposals.

³⁰ *Pishchalnikov v. Russia*, 24.09.2009, 7025/04, p. 77; *Dvorski v. Croatia*, 20.10.2015, 25703/11, pp. 100–101.

be informed³¹, voluntary, and unequivocal Article 9 (1) b. It is not compulsory to give the waiver in writing; however, it should be in accordance with recording procedure of the Member State's law (Article 9 (2)). The waiver could be revoked any time by the suspect or accused person (Article 9 (3)).

5. Article 10: the right of access to a lawyer in EAW proceedings

A requested person has a right of access to counsel from the time of her arrest in such time and in such a manner as to allow her to exercise her rights effectively and in any event without undue delay from deprivation of liberty (Article 10 (2) a). Article 10 (2) b provides the right of a requested person to meet and communicate with a lawyer. A lawyer can be present and participate during a hearing of a requested person by the executing judicial authority (Article 10 (2) c). Recital 42 clarifies that the presence means that the lawyer may ask questions, request clarification and make statements. In general terms it can be concluded that the content of the right, conditions for its waiver, and temporary derogations provided in the directive that apply to suspect and accused persons are also applied to the requested persons' cases. The aspect that makes the requested persons' situation different is that they must be also provided with an information that they have the right to appoint a lawyer in the issuing Member State whose role 'is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.' (Article 10 (4)). Recital 46 explains that if the authorities in issuing Member States are notified that the requested person wishes to appoint a lawyer from that Member State, they should provide the requested person information to facilitate the appointment of a lawyer in that Member State. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in European arrest warrant cases. Member States could, for example, request that the appropriate bar association draw up such a list. The key issue for gathering information for a requested person here is communication between authorities of executing and issuing Member State (Article 10 (5)). However, as goal of the Framework Decision 2002/584/JHA is effective co-operation between the Member States, the directive makes a reservation that the right to appoint a lawyer in the issuing Member States applies without prejudice to the time-limits set out in Framework Decision 2002/584/JHA (Article 10 (6)).

6. Article 12: remedies

In *Salduz v. Turkey* the ECtHR stated that '[e]ven where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the

³¹ According to Article 9 (1) 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.' Recital 39 further explains that when providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition.

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.³² From this finding it could be concluded that if the statements received from the suspect during interrogation while she was not provided with access to lawyer, no matter if for compelling reason or not, are used for her conviction, her rights to defence are irretrievably prejudiced. This finding gave a reason for scholars to believe that *Salduz* created an exclusionary rule for evidence received in violation or by lawful restriction of the right of access to a lawyer.³³ However, in *Ibrahim and others v. the UK* the ECtHR changed its case law on the right of access to a lawyer by creating the following two-step test. First, it must be assessed whether there were compelling reasons for restricting the right of access to a lawyer. Irrespective of whether there were compelling reasons, the second stage consists in an evaluation of whether the restriction of the right of access to a lawyer prejudiced the rights of the defence. Therefore, the test requires an examination of the impact of the restriction on the overall fairness of the proceedings.³⁴ The only difference in application of the 'proceedings as a whole' test to the cases in which the right of access to a lawyer was derogated lawfully compared to those in which it was restricted unlawfully is the burden of proof. As the ECtHR summarised: 'Where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. [...] The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.'³⁵ In p. 274, the ECtHR introduced a non-exhaustive list of factors that determine fairness of the proceedings, including vulnerability of the accused; opportunity to challenge the authenticity of the evidence; and the weight of the public interest in the investigation. Therefore, *Ibrahim* has done away with the automatic exclusion of statements received in a context of unlawful restriction of the right of access to a lawyer.

According to Article 12 (1) of Directive 2013/48/EU it is the obligation of the Member States to 'ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.' The directive is silent on the conditions a remedy has to meet in order to be considered effective, which means that in future the ECJ has a great role to play here.³⁶ Article 12 (2) states that '[w]ithout 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'. Therefore, based on the wording of Article 12 (1) and (2) it cannot be

³² *Salduz v. Turkey*, 27 November 2008, 36391/02, p. 55.

³³ F. P. Ölcer. The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights, in S.C. Thaman, ed. *Exclusionary Rules in Comparative Law*. New York-London: Springer, 2013, p. 390; V. Costa Ramos. The right of the Defence According to the ECtHR. An Illustration in the Light of A.T. v. Luxembourg and the Right to Legal Assistance. *New Journal of European Criminal Law* 2016 (7), p. 414.

³⁴ *Ibrahim and the others v. the UK*, 13.09.2016, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, pp. 257-262.

³⁵ *Ibid.*, p. 265.

³⁶ S. Cras, *op.cit.*, p. 40.

concluded that evidence gathered in breach of the directive's rights or by lawfully derogating directive's rights (especially the right to access to a lawyer) cannot be used for person's conviction. Initially,³⁷ Article 12 (that time Article 13 (2)) included a stipulation that a remedy has to have the effect of placing the suspect or accused person in the same position in which she would have found herself had the breach not occurred. In an explanatory memorandum, a reference to the ECtHR case law was made when arguing that the most appropriate form of redress for breaching the ECHR right to a fair trial is to ensure that a suspect or accused person is put, as far as possible, in the position in which she would have been had her rights not been so breached.³⁸ From the final text of the directive, paragraph 2 was left out, leaving scholars and practitioners to wonder whether the obligation to guarantee an effective remedy without further explanation provides adequate remedies for violations of the right to counsel.³⁹

In the proposal an exclusionary rule was also incorporated to Article 12, stating that statements made by the suspect or accused person or evidence obtained in breach of her right to a lawyer or in cases where a derogation to this right was authorised in accordance with the directive, may not be used at any stage of the procedure as evidence against her, unless the use of such evidence would not prejudice the rights of the defence (that time Article 13 (3)). In the directive in force, the wording of Article 12 (2) is much more vague. From recital 50 of the directive it can be concluded that although the case law of the ECtHR 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, the Member States do not have obligation to alter existing evidentiary rules. Further, according to the same recital, these statements could be used for other purposes defined by national law, such as 'the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime.'

³⁷ 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, COM(2011) 326 final, 8.06.2011.

³⁸ P. 30 of the explanatory memorandum of the proposal (Explanatory Memorandum of the 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, COM(2011) 326 final, 8.06.2011). Here the reference is made to the ECtHR's case *Salduz v. Turkey* (27 November 2008, No. 36391/02). This principle arose also from recital 26 of the proposal. The impact assessment of the same date explains that 'to stipulate that Member States must set up legal remedies in case of violations of the right to a lawyer will boost trust among judicial authorities as they will be aware that internal remedies exist (and not just the possibility of an application to the ECtHR upon exhaustion of internal remedies) whenever a breach of the right to a lawyer has occurred. This will greatly contribute to improved judicial cooperation across EU.' Impact assessment accompanying the 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, SEC(2011) 686 final, 8.06.2011, p. 33.

³⁹ Fair Trials International, Report on Defence Rights in Europe, October 2012. Available at https://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf, p. 18; E. Symeonidou-Kastanidou, *op.cit.*, p. 83.

The substantial change in wording of Article 12 was caused by objections from number of Member States that claimed that judges should be free in evaluating the evidence.⁴⁰ After the change was made, there were voices among Member States and in the Commission doubting whether Article 12 in its final wording has any added value at all. The Presidency explained that incorporation of Article 12 to the directive ensures that ‘the issue of assessing the value of statements obtained in breach of the right of access to a lawyer is addressed, which will contribute to enhancing mutual trust among judicial authorities.’⁴¹ The final wording of the directive was strongly objected to by number of international organisations in their joint briefing on the directive based on reasoning that Article 12 contradicts case law of the ECtHR. They claimed that in this wording, the Member States can actually decide if and what kind of value should be attached to statements obtained by violation of the right to counsel in the case at hand. Such approach is, however, against standard laid down in *Salduz v. Turkey*.⁴² Therefore, it contradicts the non-regression clause provided in Article 14 of the directive. As *Salduz* case law required the statements that had been given in violation of the right of access to a lawyer to be left out from the body of evidence, it was proposed that the principle according to which a person should be put to the same position in which she would have been if violation had not occurred, should not be discarded from discussions over the meaning of the notion of ‘effective remedy’ in Article 12.⁴³

Directive 2013/48/EU was drafted when the *Salduz* case law was still was in force. Therefore, it can be the directive should be interpreted in conjunction with standpoints expressed in *Salduz* judgment, which means that statements made in restriction or violation of the right of access to a lawyer cannot be used for one’s conviction. Future case law of the ECJ will show how the ECJ deals with a situation in which the ECtHR has suffered regression in the meaning that it has limited person’s Convention rights.⁴⁴

⁴⁰ Progress report from Presidency to the Council on 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, 17159/11, 5.12.2011, p. 10.

⁴¹ Progress report, p. 11.

⁴² Joint Briefing on the Directive on the Right of Access to a Lawyer in Criminal Proceedings and the Right to Inform a Third Party upon Deprivation of Liberty; Amnesty International, European Criminal Bar Association, Fair Trials International, Irish Council for Civil Liberties, JUSTICE and Open Society Justice Initiative, 15 April 2013. Available at http://www.ecba.org/extdocserv/20130415_jointNGObriefindMeasureC.pdf, p.6 referring at *Salduz v. Turkey*, 27 November 2008, No. 36391/02, p. 55.

⁴³ A. Soo. Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel. *European Journal of Crime, Criminal Law and Criminal Justice* 2017 (4), p. 50.

⁴⁴ See further discussion in this respect at A. Soo. Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. The UK* (13th of September 2016). *European Journal of Crime, Criminal Law and Criminal Justice* 2017 (25), pp. 327–346.