The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation

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This study examines the content of the right of access to a lawyer, as established in Directive 2013/48/EU, which was adopted on 22 October 2013. After noting the significance of this right, it lays out the reasons that led the European legislator to opt for uniform legislation for its protection and presents the obstacles that had to be overcome until the compromise text of the Directive could be adopted. It highlights the vagueness of certain rules of this Directive and attempts to use the non-regression clause (Article 14) in conjunction with the Recitals in order to clarify the content of the most basic provisions of the Directive. The article concludes that in this way the text of the Directive can, at least on its key points, be interpreted in such a way as to guarantee a level of protection that will not be inferior to that provided by international instruments and the jurisprudence of the ECHR.

I. The right of access to a lawyer as a fundamental right

The right to legal assistance in criminal proceedings is established as a fundamental right and a prerequisite for ensuring the principles of fair trial in the most important international and European legal instruments. Article 6 § 3 (c) of the European Convention on Human Rights (ECHR), for example, entitles "everyone charged with a criminal offence … to defend himself in person or through legal assistance of his own choosing….". In Article 47 of the Charter of Fundamental Rights of the European Union, it is also noted that "Everyone shall have the possibility of being advised, defended and represented", while in Article 48 § 2, it is clarified that "respect for the rights of the defence of anyone who has been charged shall be guaranteed". Similar provisions are found in Article 14 § 3 of the International Covenant on Civil and Political Rights, which entitles "everyone charged with a criminal offence…. (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing… (d) to defend himself in person or through legal assistance of his own choosing; … (g) not to be compelled to testify against himself or to confess guilt".

The importance of this right is also clearly described in a significant number of judgments of the European Court of Human Rights (ECHR), which states that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial[2]and the condition for ensuring the effectiveness of the rest of the envisaged

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guarantees of Article 6 of the Convention, that cannot otherwise be adequately protected[3]. The lawyer is considered the only person who can help to ensure that the suspect or accused person exercises all of his or her rights in a criminal process that is becoming more and more complicated.

II. The right to legal assistance in national legislations and the need for an intervention at European level

The wide recognition of the significance of the right to legal assistance in criminal proceedings, its establishment in international instruments of binding nature as well as the existence of a rich relevant ECHR case law, which is also binding for member states, could lead to the conclusion that this right is already adequately protected in a uniform way in the European countries.

However, this is not the case. Research has shown that there are significant differences in individual states regarding the content of the right and the way it can be exercised[4], while often the protection provided is significantly lacking in comparison with the standards shaped in international texts, resulting in a steady rise in the number of complaints concerning violations of the right on the one hand[5] and in hampering mutual recognition of decisions in criminal matters, as well as questioning the safeguarding of principles of a fair trial in member states, on the other.

These findings led the Council of the European Union, when adopting the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings in November 2009[6], to include the right to legal advice in the first measures that should be adopted[7], assigning the Commission the task of preparing the relevant legislative framework.

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[2] *Bandaletov v. Ukraine*, decision of 31.10.2013, para. 53.

[3] *Pishchalnikovv. Russia*, decision of 24.9.2009, para. 78: «The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention….».

[4] *T.Spronken*,EU Policy to Guarantee Procedural Rights in Criminal Proceedings: An Analysis of the first Steps and a Plea for a Holistic Approach, EuCLR 2011, p. 227 onwards.

[5] See relevant observations to a directive proposal of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and the right of communication upon arrest, COM (2011) 326 final, pp. 4/5: "The number of complaints on the right of access to a lawyer has steadily grown in recent years. Without the correct application of ECHR jurisprudence, member states may incur substantial costs as a result of damages awarded by the ECHR to the successful litigants".

[6] OJ C 295 / 4.12.2009, p. 1.

[7] Taking a step- by-step approach, the Roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).

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III. The 2011 Directive proposal and the adoption of Directive 2013/48/EU

The Directive proposal submitted by the Commission in June 2011[8], with references to international instruments and jurisprudence of the ECHR, actually offered a framework with important safeguards for suspects and accused persons. Thus, major bar associations and human rights organisations welcomed the Commission's proposal as an important step towards the creation of a European area of liberty and justice.

However, important objections were raised by states at the Council of the European Union, where the proposal was submitted for discussion in September 2011. Five countries – the United Kingdom, Belgium, France, Ireland and the Netherlands – expressed in a Joint Note "serious reservations about the Commission's approach", arguing that the proposal goes far beyond the ECHR case law, setting serious limitations on the work of law enforcement, hampering the detection of crime and significantly increasing the cost of criminal proceedings[9].

After discussions and further processing, a new text was finally presented by the Council on 8 June 2012, as a "compromise" proposal that would form the basis of negotiations with the European Parliament within the procedure envisaged in Article 294 of the Treaty on the Functioning of the European Union (TFEU)[10]. This proposal significantly limited the right of access to a lawyer in criminal proceedings and caused strong reactions from lawyers' unions, bar associations and human rights organisations[11], while the European Parliament opted for a more liberal approach[12]. Finally, after tripartite negotiations between the Council, the Parliament and the Commission that lasted about 18 months, a compromise text was adopted in October 2013[13].

IV. The content of the Directive's provisions: The lack of detailed description

The text of Directive 2013/48/EU, although clearly improved compared with the interim Council's proposal, falls short compared with the original,

[8] COM (2011) 326 final.

[9] Document of the Council of the European Union of 22 September 2011, 14495/11.

[10] See the Document of the Council of the European Union of 8 June 2012, 10908/12.

[11] See in relation to this the Joint Statement of: Open Society Justice Initiative, Fair Trials International, JUSTICE, European Criminal Bar Association, Greek Helsinki Monitor, Hungarian Helsinki Committee, Irish Council for Civil Liberties, Polish Helsinki Foundation, Human Rights Monitoring Institute, of 7.5.2012, Position Paper of APT on the Proposal for a directive on the right of access to a lawyer in criminal proceedings, 10.7.2012, Gemeinsame Erklärung der Strafverteidigervereinigungen (Deutschland), des Forum Strafverteidigung (Schweiz), der Vereinigung Österreichischer Strafverteidiger/innen sowie der Nederlandse Vereniging van Strafrechtadvocaten zum Richtlinie des Europäischen Rates zum Recht auf Rechtsbeistand (Maβnahme C), 21.6.2012, Bundesrechtsanwaltskammer, Stellungnahme Nr. 39/Juli.

[12] See the relevant press release in www.europarl.europa.eu/news

[13] OJ L 294 / 6.11.2013, p. 1. For a more detailed presentation see *I. Anagnostopoulos,* The Right of Access to a Lawyer in Europe: A Long Road Ahead?, EuCLR 2014, pp. 6 – 9.

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ambitious proposal presented by the Commission in 2011. The vagueness of certain rules of particular importance, as well as the silence of the European legislator in contentious issues, in which a position should have been taken, leave significant room for abuse and for undermining the principles of fair criminal proceedings.

However, as has been rightly observed, the rights of suspects and accused persons *must be described in detail* to achieve the effective protection of their fundamental rights[14]. Only in this way individual rules will not be given a different meaning by member states. Recitals may help to a certain extent, but they do not always provide sufficient answers. For this reason, the non-regression clause, which is included in Article 14 of the Directive, is of particular interest. According to this clause, "nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law…".

If this clause were to be regarded as a simple general principle, it would certainly be unnecessary, because it is well known that both the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights, as its content is specified by the ECHR jurisprudence, are binding for member states, while additionally, on the basis of Article 6 of the Treaty on European Union (TEU), the Union itself both recognises all the rights, freedoms and principles set out in the Charter and declares that it will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, stressing that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to member states, shall constitute general principles of European Union law. Moreover, according to Article 52§ 3 of the Charter, in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Thus, it is not even conceivable to adopt a European Directive which diverges from or restricts fundamental rights or procedural safeguards that guarantee the aforementioned texts.

The non-regression clause, which is present in all three Directives on the suspect's safeguards[15], can therefore only be seen as an *interpretive tool* which has to be used, when vague terms or ambiguous rules could allow for more than one interpretation. Given also that the content of the international instruments referred to in Article 14 of the Directive 2013/48/EU is generally quite broad, it is important to aim mainly at the case law of judicial or other bodies set up to interpret and implement them. The ECHR in particular has developed a rich case law with regard to the scope of the right of access to a lawyer in criminal proceedings. Moreover, as already stated, the need for compliance with this very case law constituted one of the main reasons

[14] *T.Spronken*, EU Policy to Guarantee Procedural Rights in Criminal Proceedings: An Analysis of the first Steps and a Plea for a Holistic Approach, EuCLR 2011, p. 229.

[15] Art. 8 of the Directive 64/2010/EE, art. 10 of the Directive 13/2013/EE and art. 14 of the Directive 48/2013.

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for legislative initiatives at European Union level[16]. Even the opposition of certain states to the initial Commission's proposal was mainly due to the assumption that the proposal went beyond the current requirements of the ECHR and the Court's case law. None have questioned its importance and binding power.

Thus, where the provisions of the Directive are not sufficiently clear, while judicial or other bodies set up for the implementation of binding international instruments – and in particular the European Court of Human Rights – have developed specific rules on the right of access to a lawyer, it is imperative, according to Article 14 of the Directive, to make use of these rules to clarify the content of the relevant provisions, during their transposition and incorporation into national legislations. This interpretive approach is attempted with reference to certain main issues of the Directive, while Recitals are also used as a basis for the clarification of its content.

V. Issues in dispute concerning the right of access to a lawyer

1. The scope of the right of access to a lawyer

According to Article 2 § 1, 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". However, in practice, very often people examined by the authorities as witnesses may at some point become suspects, without being informed about this change. And the question that was raised was if the aforementioned notification is necessary again or if access to a lawyer should be guaranteed even at an earlier stage. Article 2 § 3 of the Directive provides of course that "this Directive also applies, under the same conditions as provided for in paragraph 1, 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", but it does not provide what actions are to be taken nor does it define the exact time for their adoption.

Still, according to Recital 21 of the Directive, if in the course of a questioning a person other than a suspect or accused person becomes a suspect or accused person, *questioning should be suspended immediately* and may be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in the Directive. This provision is also in line with ECHR's jurisprudence, according to which, the right to legal assistance must always be guaranteed to all people *from the moment that their position is significantly affected,* even if they have not been declared suspects or accused persons[17].

[16] See above footnote 4.

[17] *Zaichenko v. Russia***,** decision of 28.6.2010, para. 42: «The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he

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More specifically , the Court has held that it is immaterial whether the person has been informed in any way by the authorities that he or she is suspected or accused of having committed a punishable act, *provided that there is evidence showing that the authorities treat it as such*. In the case Shabelnik v. Ukraine, for example, the Court held that the right of access to a lawyer is "born"from the moment someone confesses that he or she has committed an offence, even if the authorities typically charge the offence after ten days. This is because, from that time onwards, it cannot be said that the investigating authorities do not suspect the person's involvement in the crime[18] /[19].

2. Access to a lawyer after the deprivation of liberty

On the basis of Article 3 § 1 of the initial Directive proposal, the right of access to a lawyer was guaranteed to suspects and accused persons *"as soon as possible"* and in any case: (a) *before the commencement of any questioning* by the police or other law enforcement authorities; (b) upon carrying out any procedural or evidence-gathering act, at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence; (c) *from the outset of* the deprivation of liberty.

The final text of the Directive (Article 3 § 2) imposes an obligation on member states to ensure that suspects or accused persons have the right of access to a lawyer *"without undue delay*", a wording that leaves room for limitations.

It is certainly positive that in any case and without any preconditions the suspects or accused persons should have access to a lawyer *before they are questioned* by the police or another law enforcement or judicial authority, in accordance with Article 3 § 2 (a) of the Directive. As regards cases of deprivation of liberty, however, access to a lawyer is not immediately guaranteed on the basis of Article 3 § 2 (c), as envisaged in the initial Commission's proposal, but "*without undue delay after the deprivation of freedom*". The term "undue", without any further clarification, is certainly too vague and leaves room for abuse against the right to legal assistance, especially if one takes into account that its content is allowed to be specified each time by the competent police authorities.

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would be prosecuted or *the date when preliminary investigations were opened*». See also *Brusco v. France*, decision of 14.10. 2010 (para. 47), in which France was condemned because a person who had already been designated as the main perpetrator of an offence was examined as a witness, without a lawyer, even though the authorities had reasonable grounds to suspect that the person was involved in the crime.

[18] *Shabelnik v. Ukraine*, decision of 19.5.2009, paras. 56 – 57: «The Court notes that from the first interview of the applicant it became clear that he was not simply testifying about witnessing a crime but was actually confessing to committing one. From the moment the applicant first made his confession, it could not be said that the investigator did not suspect the applicant's involvement in the murder. The existence of such a suspicion is confirmed by the fact that the investigator took further steps to check the credibility of the applicant's self-incriminating statements and conducted investigative procedures…».

[19] See also Joint Statement of: Open Society Justice Initiative, Fair Trials International, JUSTICE, European Criminal Bar Association, Greek Helsinki Monitor, Hungarian Helsinki Committee, Irish Council for Civil Liberties, Polish Helsinki Foundation, Human Rights Monitoring Institute, of 7.5.2012, p. 3.

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Such an indefinite limitation of the scope of the Directive does not seem to be in line with the ECHR's jurisprudence. The Court, in a series of decisions, has specifically judged that the right of access to a lawyer should in any case be guaranteed from the early stages of investigating a criminal offence[20]. The acts that are being carried out during this time, according to the European Court of Human Rights, are particularly crucial for the preparation of the criminal proceedings, as the evidence collected at this stage determine and define the framework within which the offence will be judged by the court[21]. During this stage, the person is in an extremely vulnerable position as the criminal process becomes more and more complicated, especially with regard to the rules for the collection of evidence. In most cases, the only person who can offer substantial help, ensuring equality of arms, is a lawyer who can offer protection primarily from self-incrimination[22]. Particularly in cases of deprivation of liberty, access to a lawyer must be guaranteed, as a general rule, *as soon as* the person is placed in custody or pre-trial detention[23]. This obligation also clearly derives both from the Standard Minimum Rules for the Treatment of Prisoners set by the Council of Europe[24], and from the Recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, even though these instruments are not primarily binding[25]. Thus, based on the ECHR's case – law and the aforementioned European instruments, it could be concluded that whenever access to a lawyer is not guaranteed from the first moment of deprivation of freedom, the delay is in principle unjustifiable, unless there are specific reasons that render access impossible at that particular time[26].

This interpretation is also supported by the provision of Article 3 § 5 of the Directive, whereby, in exceptional circumstances and only at the pre-trial stage,

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[20] See in relation to this *I. Androulakis*, Criteria of a fair trial in accordance with Article 6 of the ECHR *[in Greek]*, Dikaio kai Oikonomia P. N. Sakkoulas Publications, 2000, pp. 46/47.

[21] *Salduz v. Turkey*, decision of 27.11.2008, para. 52, *Pishchalnikov v. Russia*, decision of 24.12.2009, para. 69, *Shabelnikv. Ukraine*, decision of 19.5.2009, para. 53.

[22] *Salduz v. Turkey*, decision of 27.11.2008, para. 54, *Pishchalnikovv. Russia*, decision of 24.12.2009, para. 69, *Nechiporuk and Yonkalo v. Ukraine*, decision of 21.4.2011, para. 263, *Yuriy Volkovv. Ukraine*, decision of 19.12.2013, para. 62. See in detail on the importance for ensuring equality of arms throughout the investigation for solving a punishable act, *C. Prittwitz*, Waffengleichheit im Ermittlungsverfahren, zu teuer bezahlt mit der "Entleerung" der Hauptverhandlung? Zur Strafverteidigung in der verstrafrechtlichen Gesellschaft, in: G. Bemmann Festschrift, Nomos-Verlag, 1997, p. 604.

[23] *Dayanan v. Turkey*, decision of 13.10.2009, paras. 31- 32: «The Court considers that the fairness of criminal proceedings against accused persons requires as a general rule, for the purposes of Article 6 of the Convention, that they be able to obtain legal assistance as soon as they are placed in custody or pre-trial detention», *Zaichenko v. Russia*, decision of 28.6.2010, para. 42.

[24] See Rule 93 of the Resolution (73) 5 of the Committee of Ministers of the Council of Europe: "An untried prisoner shall be entitled, *as soon as* he is imprisoned, to choose his legal representation".

[25] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Standards (2002) 1 – Rev. 2011, p. 15: «The CPT must therefore reiterate the recommendation that all persons deprived of their liberty by the law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted *as from the outset of their custody* the right of access to a lawyer».

[26] Similarly, see ECHR: *Aleksandr Vladimirovich Smirnov v. Ukraine*, decision of 13.3.2014, para. 69: «access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it can be demonstrated in the light of the particular circumstances of each case that there were compelling reasons to restrict this right», *Pakshayev v. Russia*,decision of 13.3.2014, para. 28.

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states are allowed to "temporarily derogate from the application of point (c) of paragraph 2 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", as for instance is the case "when the State undertakes or participates in military operations outside its territory"[27]. However, if guaranteeing the right of access to a lawyer is "impossible", then certainly the delay cannot be "undue". Conversely, this provision becomes meaningful if any access to a lawyer *after* the deprivation of liberty and not already from its outset is understood as "unduly" delayed. In this case, the geographical isolation of the suspect is considered by the European legislator as a sufficient reason to justify the delay, provided that all the conditions set in Article 8 of the Directive are met. In particular, the delay in this case should be proportionate and not go beyond what is necessary, be strictly 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. It must also be approved by duly reasoned case-by-case decision, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. Moreover, according to Recital 30 of the Directive, during such temporary derogations, "the competent authorities should not question the person concerned or carry out any of the investigative or evidence-gathering acts provided for in this Directive. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, member states should arrange for communication via telephone or video conference unless this is impossible".

The same rules – according to the proportionality principle – must certainly be applied in *all* cases where immediate access to a lawyer is not feasible.

3. Content of the right of access to a lawyer

Based on Article 3 § 3 of the Directive, the right of suspects and accused persons to legal assistance includes: i) 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, ii) the right for their lawyer to be present and participate effectively when questioned, and iii) the right for their lawyer to attend the investigative or evidence-gathering acts if the suspect or accused person is required or permitted to attend them.

However, none of these rights is established in an absolute manner. More specifically:

(a) According to Article 3 § 6 of the Directive, in exceptional circumstances and only at the pre-trial stage, member states may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling

[27] See Recital 30 of Directive 2013/48/EU.

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reasons: (i) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (ii) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

The latter exception in particular creates ample opportunity for limiting the right of access to a lawyer, since the Directive does not specify the content of "substantial jeopardy" to a criminal proceeding. In the Recitals of the Directive it is only specified that temporary derogation from the right of access to a lawyer may be justified in particular if it is necessary in order to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses[28]. However, the "list" is *indicative* and therefore the scope of the derogations is open to abuse, while it is not clear how access to a lawyer in general can jeopardise the investigation and evidence gathering procedure[29].

It is true of course that the recognition of exceptional circumstances which might justify temporary derogations from the right of access to a lawyer is subject to the guarantees stipulated in Article 8 of the Directive, but this does not negate the insecurity created by the fact that ultimately the authorities are basically free to interpret the term "substantial jeopardy" in any way they wish, thus restricting the defence rights of suspects and accused persons[30], *who may eventually be examined, even cross-examined, by the police or be invited to participate in a reconstruction of the scene of the crime without the presence of a lawyer.*

Still, one must take into account that the exceptions to paragraph 3 of Article 3 do not refer to paragraph 1 of the same article. According to this paragraph in conjunction with Article 2§ 1 of the Directive, member states are obligated to ensure – without exceptions – that the right to defence be exercised "*practically and effectively*" at *all stages*, from the moment a person becomes a suspect until the conclusion of the proceedings against him/her. Moreover, Recital 23 provides that member states may make practical arrangements concerning the communication between suspects or accused persons and their lawyers, but these arrangements should not prejudice the *effective* exercise or *essence* of their right. It is rather obvious that when someone may even be cross-examined without the presence of his/her lawyers, while their presence is feasible and desirable, it is the very essence of defence rights that is offended.

It is worth noting that ECHR steadily considers that Article 6 of the European Convention of Human Rights is violated when the accused who have sought legal assistance are examined by the authorities without the presence of a lawyer, unless *they themselves initiate further communication*, exchanges, or conversations with the

[28] Recital 32 of Directive 2013/48/EE.

[29] As CCBE rightly pointed out "Lawyers are not enemies of an efficient investigation. On the contrary, their timely and full involvement in investigative proceedings not only prevents abuse and miscarriages of justice but also contributes to establishing the true facts following fair procedures" (CCBE Position of 22.1.2013, p.3: www.ccbe.eu).

[30] See similar caveats in *G. Arcifa*, Access to a Lawyer : a new EU-wide procedural right in criminal proceedings (http://free-group.eu)

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police or prosecution[31]. The Court has also held that any exception to the right of access to a lawyer should be *clearly defined*[32].

The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) has also repeatedly stressed that the possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment, adding that in the cases where, as an exception, it is necessary to delay the access of a person to a lawyer of his or her choice, in order to protect the legal interests of the police investigation, access to *another independent lawyer* who can be trusted not to jeopardise the legitimate interests of the investigation should be ensured[33].

Therefore, despite the fact that the wording of Article 3§ 6 is quite broad, national legislators are obliged on the one hand, to specify the content of the term "substantial jeopardy" to criminal proceedings – which of course may differ from country to country – and on the other hand to envisage that in any case suspects or accused persons can be examined without the presence of their lawyer or of another independent lawyer *only when his/her presence is not feasible*, provided that there is an *urgent need* for measures to be taken in order to prevent substantial jeopardy to criminal proceedings. Under these conditions, one must also take into account, that according to Recital 32 such questioning may not prejudice the privilege against self-incrimination and may only be held to the extent necessary to prevent the substantial jeopardy to criminal proceedings.

(b) Restrictions to the right to legal assistance have been also incorporated in the description of *individual aspects* of this right. First of all, while in the initial Directive proposal[34] the lawyer was granted the right "to be present at any questioning and hearing, to ask questions, request clarification and make statements, recorded in accordance with national law", the final text stipulates only that suspects or accused persons have the right for their lawyer to be *present* and *participate effectively* during their examination, noting that the participation should be *in accordance with procedures under national law,* provided that such procedures do not prejudice the effective exercise and essence of the right concerned[35]. In this way, yet another vague term is included in the description of the right of access to a lawyer: that of "effective" participation, which ensures of course that during the investigation the role of the lawyer cannot be restricted to that of a passive spectator, but still does not allow to have a clear perception about the exact lawyer's rights[36].

However, according to the Recitals of the Directive, "during questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such

[31] *Pishchalnikov v. Russia***,** Decision of 24.9.2009, para. 79.

[32] *Salduzv. Turkey*, decision of 27.11.2008, para. 54: "Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time".

[33] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Standards (2002) 1 – Rev. 2011, pp. 15 – 16.

[34] Article 4 § 2.

[35] Article 3 § 3 (b) of Directive 2013/48/EU.

[36] *I. Anagnostopoulos***,** The Right of Access to a Lawyer in Europe: A Long Road Ahead?, EuCLR 2014, p. 11.

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procedures, *ask questions, request clarification and make statements, which should be recorded in accordance with national law*"[37]. This goes in line with the settled case law of the European Court of Human Rights[38], according to which a fair trial can only be ensured when a lawyer is free to exercise "*the whole range of services specifically associated with legal assistance"*. The same Court has listed these rights: "*t*o ensure respect of the right of an accused not to incriminate himself, and to secure without restriction the fundamental aspects of that person's defence by, in particular, discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, and support of the accused when in distress"[39] /[40].

Therefore, despite the fact that the Directive broadly refers to the lawyer's "effective participation", national legislation must in any case establish the above rights at the very least, specifying in this way the content of the article in question. There is room for choice only with regard to the procedure that should be adhered to while the rights in question are being exercised.

(c) Limitations have also been set with regard to the right of the lawyer to be present in any interrogating act or act of collecting evidence which requires or allows the presence of the suspected or accused person, based on national legislation. While in the initial Commission's proposal this right was recognised for *all* the above acts[41], the final text of the Directive defines the presence of a lawyer as binding *only for three of those acts*: (i) identity parades, (ii) confrontations and (iii) reconstructions of the scene of a crime[42]. The restriction of the right is not only limited, however, to the *number* of the investigative or evidence-gathering acts. It is worth noting that, based on the text of both the initial Commission's proposal and the Directive, the lawyer only has the right to "attend" these acts and not to "participate effectively" to them[43].

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[37] Recital 25 of Directive 2013/48/EU.

[38] *Dayanan v. Turkey,* decision of 13.10.2009, para. 32: "Indeed, the fairness of proceedings requires that an accused be able to obtain the *whole range of services specifically associated with legal assistance*. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, *support of an accused in distress* and checking of the conditions of detention".

[39] *Bandaletov v. Ukraine,* decision of 31.10.2013, para. 57: "The Court has considered that in most cases this particular vulnerability can only be properly compensated for by the assistance of a lawyer, whose tasks are multi-faceted: *to ensure respect of the right of an accused not to incriminate himself,* and to secure without restriction the fundamental aspects of that person's defence by, in particular, discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, and support of the accused when in distress". See also *Dayanan v. Turkey,* decision of 13.10.2009, para. 32.

[40] See in this respect also the Position Paper of APT on the Proposal for a directive on the right of access to a lawyer in criminal proceedings, 10.7.2012, p. 6, as well as the Joint Statement of: Open Society Justice Initiative, Fair Trials International, JUSTICE, European Criminal Bar Association, Greek Helsinki Monitor, Hungarian Helsinki Committee, Irish Council for Civil Liberties, Polish Helsinki Foundation, Human Rights Monitoring Institute, of 7.5. 2012, p. 7.

[41] Article 4 § 3 of the Commission' s proposal (COM 2011, 326 final): "The lawyer shall have the right to be present at any other investigative or evidence gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence".

[42] Article 3 § 2 (c) of Directive 2013/48/EU.

[43] See Article 3 § 2 (c) in contrast with Article 3 § 2 (b) of Directive 2013/48/EU. Similarly *D. Brodowski*, Strafrechtsrelevante Entwicklungen in der Europäischen Union – Ein Überblick, ZIS 2013, p. 467.

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This description, however, does not guarantee an adequate defence and therefore does not seem to be in line with the basic provisions of Article 3§ 1 of the Directive, as described above. On the other hand, as already mentioned, according to the ECHR, lawyers can be assumed to perform their tasks in a manner that conforms to the principles of a fair trial when, inter alia, they may collect evidence favourable to their clients and support them when in distress. To make this possible, it is certainly not enough to attend the aforementioned investigative or evidence-gathering acts, but they must be able to actively participate by asking questions or requesting clarifications, e. g. during the cross-examination of their clients with other defendants. Thus, although it is not explicitly mentioned in the text, the lawyer's participation in these acts cannot be limited to mere presence. This conclusion can also be reached from the Recitals, which stipulate that states may make practical arrangements for the presence of a lawyer, but these arrangements "should not prejudice the *effective* exercise and essence of the rights concerned"[44]. Therefore, the concept of "efficiency" of legal assistance comes back to the fore – with the meaning given above – even though it is not included in the text itself.

(d) The Directive does not make explicit reference to the right of a lawyer to have access to the place where the suspect or accused person is detained in order to check the conditions of detention, although this right was expressly provided for in the initial Commission's proposal[45].

However, in the Recitals of the Directive it is stated that "the conditions in which the suspects or accused persons are deprived of liberty should fully respect the standards set out in the ECHR, in the Charter, and in the case-law of the Court of Justice of the European Union and of the European Court of Human Rights". It is added that "when providing assistance under this Directive to a suspect or to an accused person who is deprived of liberty, the lawyer concerned *should be able to raise a question with the competent authorities regarding the conditions in which that person is deprived of liberty*"[46]. From this statement it can be concluded that the European legislator considers monitoring the conditions of detention by the lawyer as one of his/her rights, since otherwise the lawyer could not reliably express his or her opinion on the conditions of detention. This interpretation is also consistent with the jurisprudence of the ECHR, which has held that the right of a lawyer to check the conditions of detention constitutes a "*fundamental aspect*" of the right of defence, one that should be guaranteed "*without restrictions*"[47].

4. Confidentiality of communications with lawyer

In the initial Commission's proposal, confidentiality of the communication between the suspect or accused person and his or her lawyer was ensured in an

[44] Recital 26 of Directive 2013/48/EU.
[45] Article 4 § 4 of the Directive proposal (COM 2011, 326 final).
[46] Recital 29 of Directive 2013/48/EU.
[47] *Dayanan v. Turkey*, decision of 13.10.2009, para.32 (see above footnote 36).

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absolute manner[48]. This position was in accordance with the settled case law of the ECHR, which, in a series of decisions, has held that confidentiality constitutes part of the basic requirements of a fair trial in a democratic society, adding that if lawyers were unable to confer with their clients and receive confidential instructions from them without surveillance, their assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective[49]. If the suspect or accused person cannot trust the confidentiality of communications with his or her lawyer, the Court points out that this would limit the possibility of free and frank disclosure of evidence related to the case to the lawyer, which would eventually affect the right to an effective exercise of his or her defence rights[50].

The confidentiality of communications between the lawyer and the suspect or accused person is also ensured in absolute terms in the Minimum Rules for the Treatment of Prisoners of both the UN and the Council of Europe. Specifically, Rule 93 of the abovementioned instruments clearly stipulates that "interviews between the (untried) prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official"[51]. A similar regulation can be found in the UN Basic Principles on the role of lawyers. Principle 8 states that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials". Moreover, according to Principle 22, "governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential". The UN Human Rights Commission also mentions the confidential character of the communication between lawyer and his or her client in criminal proceedings, commenting on Article 14 of the International Covenant on Civil and Political Rights. According to the Commission, the reference to the right to defense through a lawyer means, inter

[48] Article 7 of the Commission's proposal (COM 2011, 326 final): "Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer". According to Recital 24 of the proposal "Defence rights are protected by the obligation to ensure that all communications, in whatever form they take, between a suspected and accused person and his lawyer are entirely confidential, with no scope for derogations".

[49] *S. V. Switzerland*, decision of 28.11.1991, para. 48, *Cambell v. the United Kingdom,* decision of 25.3.1992, para. 45,*Sakhnovskiyv. Russia*, decision of 2.11.2010, para. 97: «If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective».

[50] *Brennan v. the United Kingdom*, decision of 16.10.2001, para. 58, *Castravetv. Moldova*, decision of 13.6.2007, paras. 49 – 50.

[51] SeeStandard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 93 and Council of Europe, Committee of Ministers, Resolution (73) 5, Standard Minimum Rules for the Treatment of Prisoners (Adopted by the Committee of Ministers on 19 January 1973 at the 217th meeting of the Ministers' Deputies), Rule93.

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alia, that the lawyer should be able *to meet his or her clients in private and communicate with them in conditions which will ensure the confidentiality of their conversation*[52].

In contrast to these internationally recognised standards, the Council's interim proposal of June 2012[53] stipulated that member states may in exceptional cases not comply temporarily with the obligation of confidentiality, when: (a) there is an urgent need to prevent a serious crime or (b) there is sufficient reason for the authorities to believe that the lawyer is involved in a criminal act with the suspect or theaccusedperson.This relativisation of the protection of confidentiality was criticized by lawyers' and human rights organisations, while the European Parliament also expressed serious objections, resulting in these exceptions being removed from the final text, where confidentiality of communication between suspects or accused persons and their lawyers is fully guaranteed[54].

It must be noted, of course, that some reservations *are* included in the Recitals[55], where it is pointed out that "this Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence. Any criminal activity on the part of a lawyer should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive". It is even added that, in any case, the Directive's provisions will not prejudice "the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Article 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Article 72 of the TFEU, pursuant to which Title V on an area of Freedom, Security and Justice must not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security".

The last reservation seems self-evident, since on the basis of Articles 4 of the TEU and 72 of the TFEU essential state functions with regard to ensuring the territorial integrity of the state, maintaining law and order and safeguarding internal security, cannot be affected by Directive provisions. The inclusion of this reservation in the Recitals is, therefore, rather confusing. On the other hand, the first reservation is worded in a broad manner, referring essentially to the Council's interim proposal, and cannot be accepted since this exact proposal was discussed during the tripartite negotiations between the Council, the Commission and the European Parliament, but ultimately not accepted. Besides, the ECHR, in a series of decisions,

[52] See C. C. P. R., General Comment Nr. 32 on the International Covenant on civil and political rights, 2007, par. 34. For the absolute nature of the confidentiality of communication between lawyer and accused, see also *A. Karras,* Criminal Prosedure Law, Nomiki Vivliothiki publications, *[in Greek],* 4. ed., *2011,* p. 384, *A. Konstantinidis,* The position of the defence lawyer in criminal proceedings, A. Sakkoulas publications *[in Greek],* 1992, p. 230.

[53] See above footnote 9.

[54] Article 4 of Directive 2013/48/EU: "Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law".

[55] See in relation to this Recitals 33 and 34 of Directive 2013/48/EU.

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does not consider surveillance as tolerable on the basis of a mere – albeit serious – risk of collusion on the part of the lawyer in committing crimes, such as e. g. influencing witnesses or removing incriminating documents[56]. Therefore, in line with the non-regression clause, member states have to solely rely on the wording of Article 4 of the Directive in this case and ensure confidentiality of communication between suspects or accused persons and their lawyers without exceptions or reservations[57].

5. Access to a lawyer during the execution of a European arrest warrant

In the initial Commission's proposal there was an attempt to improve the position of the accused during the execution of a European arrest warrant[58], recognising the right of access to a lawyer, not only in the state where the warrant is executed, but also in the issuing state[59]. This provision was deleted by the Council in its proposal of June 2012 and was reinstated in the final text of the Directive because of the reactions of lawyers' and human rights organisations[60]. Certainly, the role of the lawyer in the issuing state remains merely auxiliary, but even so the relevant provision is an important first step in the right direction.

The provisions of the Directive on the right of access to a lawyer in the executing state seem also problematic. More specifically:

(i) While the initial Commission's proposal envisaged that access to a lawyer would have to be ensured "promptly upon arrest"[61], the final text states that access should be ensured "*without undue delay*" and therefore not necessarily immediately after the arrest[62].

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[56] *Lanz v. Austria*, decision of 31.1.2002, paras. 51 / 52: «The Court observes that the surveillance of the applicant's contacts with his defence counsel lasted from 25 October until 25 December 1991 because of a risk that the applicant might influence witnesses or remove documents not yet seized. However, the Court cannot find that these reasons are sufficient to justify the measure». It has only exceptionally been accepted that it may be justified to resort to surveillance when, in particular, the suspect or accused person is considered a dangerous gang member, whose many members remain at large and the lifting of confidentiality is absolutely necessary to arrest the other members. Even then, however, the lifting of confidentiality is only considered tolerable when enough time is left for the lawyer to work unsupervised with his or her client to form their line of defence (*Kempers v. Austria*, decision of 27.2.1997: «The Commission observes further that in the present case …. several co-suspects were still at large at the time detention on remand was ordered against the applicant. This circumstance could justify surveillance at that stage. In this respect the Commission also observes that three further co-suspects were arrested on 3 June 1991»).

[57] See also the reservations of *I. Anagnostopoulos*, The Right of Access to a Lawyer in Europe: A Long Road Ahead?, EuCLR 2014, pp. 13-15.

[58] For the need to improve the system of the European arrest warrant, see Report from the Commission to the European Parliament and the Council on the implementation, from 2007, of the Council's Framework Decision of 13 June 2002 on the European arrest warrant and the procedures of handing over between member states, COM (2011) 175, of 11.4.2011.

[59] Article 11 of the Directive proposal. See more generally on the meaning of this provision, *D.Brodowski*, Strafrechtsrelevante Entwicklungen in der Europäischen Union – Ein Überblick, ZIS 2011, p. 947. Cf. Joint Statement of: Open Society Justice Initiative, Fair Trials International, JUSTICE, European Criminal Bar Association, Greek Helsinki Monitor, Hungarian Helsinki Committee, Irish Council for Civil Liberties, Polish Helsinki Foundation, Human Rights Monitoring Institute, of 7.5.2012, p. 10.

[60] See 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, ECBA, Fair Trials International, Justice, Justicia, 22 April 2013, p. 6.

[61] Article 11 § 1 of the Directive proposal.

[62] Article 10 § 2(a) of Directive 2013/48/EU.

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(ii) While the initial proposal envisaged that a lawyer could be present in any investigation or hearing, ask questions, request clarification and make statements[63], the final text states that a lawyer may be present and participate during a hearing, in accordance with procedures in national law, without even mentioning that the lawyer's participation should be "effective"[64].

However, what has been said above with regard to the content of the right to common criminal procedures is in force in its entirety here too: therefore access to a lawyer should be ensured from the moment of arrest, unless specific reasons are given as to why this is not feasible, while the involvement of a lawyer during the examination should certainly also be "effective". This second conclusion follows also from the Recitals of the Directive, which state that "where a lawyer participates in a hearing of a requested person by an executing judicial authority, that lawyer may, inter alia, in accordance with procedures provided for under national law, ask questions, request clarification and make statements"[65]. The lawyer has, therefore, the same rights as in any other questioning of his or her client.

6. Remedies

The Commission's initial proposal envisaged that member states should make an effective legal remedy available to suspects or accused persons in case of violation of their right of access to a lawyer, stating that this should have the effect of placing them in the same position in which they would have found themselves had the breach not occurred. It also stated that member states should ensure that statements made by the suspects or accused persons or evidence obtained in breach of the right to a lawyer may not be used at any stage of the procedure as evidence against them, unless the use of such evidence *would not prejudice the rights of the defence*[66].

In the final text, these clear rules have been eliminated. Article 12 notes only that states should ensure that suspects and accused persons in criminal proceedings as well as the requested persons in proceedings under the European Arrest Warrant are given an *effective legal remedy*, without specifying the content of that remedy. In addition, in terms of the evidence collected in violation of the right to a lawyer, it is only noted that, without prejudice to national rules and systems on the admissibility of evidence, member states should 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",* without specifying the exact content of specific terms. In this way, the Directive displays a significant degree of vagueness[67].

[63] Article 11 § 2 of the Directive proposal.
[64] Article 10§ 2(c) of Directive 2013/48/EU.
[65] Recital 42 of Directive 2013/48/EU.
[66] Article 13§§ 2 and 3 of the Directive proposal.
[67] Similarly, *G.Arcifa*, Access to a Lawyer : a new EU-wide procedural right in criminal proceedings (http://free-group.eu).

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The European Convention on Human Rights, however, seems to have developed a clearer legal framework. Interpreting Article 6 of the Convention, ECHR has specifically concluded, that the incriminating statements made by the suspect or accused person while access to a lawyer has been illegally denied *can never be used for his or her conviction*, adding that the most convenient way of restoring the breach of the right to a fair trial is *bringing back* the suspect or accused, as far as possible, to the position where he or she would have been if his or her rights would not have been violated[68]. According to the Court's case law, it is not crucial if incriminating statements are the sole evidence that has been used for the conviction, provided that they constitute at least a significant element on which the conviction is based[69]. Based on these positions, it could be concluded that, despite the broad wording of Article 12 of the Directive, a remedy could be characterised as "efficient" only if it ensures the restoration to the previous situation or if it has a content of similar strength.

As for evidence, it can be deduced both from the Directive and its Recitals[70] that the relevant stipulations do not affect national legislation and systems as regards the acceptability of evidence, despite efforts being made for this evidence not to be even accepted, so that the court's judgment cannot be influenced in any way. To the extent, however, that according to the wording of Article 12 of the Directive, member states have to ensure in any case that "the rights of the defence and the fairness of the proceedings are respected", this evidence cannot be used for the conviction of the person concerned. This position is also supported by Recital 50 of the Directive, where it is clearly noted that: "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". Admittedly, this wording appears to cover only incriminating statements and not other evidence collected in violation of the right to a lawyer. However, taking into account on the one hand that in Article 12 of the Directive no distinction is made between statements made by suspects or accused persons and other evidence and, on the other hand that an incriminating statement that has been made in violation of the right of access to a lawyer does not differ from any other evidence,

[68] *Salduz v. Turkey*, decision of 27.11.2008, para. 55 («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») and para. 72 («The Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded»).

[69] *Pishchalnikov v. Russia*, decision of 24.9.2009, para. 90: "the Court notes that although the applicant's statements made on 15 and 16 December 1998 were not the sole evidence on which his conviction was based, it was nevertheless decisive for the prospects of the applicant's defence and constituted a significant element on which his conviction was based. The Court therefore finds that the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that the statements made to the police on 15 and 16 December 1998 were used for his conviction". Similarly, *Panovitsv. Cyprus*, decision of 11.12.2008, para. 76.

[70] Recital 50 of Directive 2013/48/EU: "national rules or national systems concerning the admissibility of evidence should not be affected and member states should not be prevented from maintaining a system which provides for the production of all the evidence before a court or judge, without separate or prior assessment of admissibility evidence".

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the acquisition of which could be affected by the presence of a lawyer, it should generally be accepted that such evidence should not be used for incriminating the suspect or accused person.

VI. Conclusions

Directive 2013/48/EU, as the result of a compromise, contains in some of its most basic provisions conditions with quite unclear or broad content. If these provisions are transposed with the same wording into national law, according to the usual practice of national legislators, there is real risk of keeping essentially different rules in each member state. In this way, the main objectives of the Directive, e. g. enhanced mutual recognition of judgments and other decisions of judicial authorities and necessary approximation of legislation, which would facilitate cooperation between competent authorities and the judicial protection of individual rights[71], could not be achieved.

This risk could be mitigated if, already during the transposition of the Directive into national law, an effort is made to clarify the content of its basic provisions, taking into account its whole structure, the Recitals and the non-regression clause of Article 14 of the Directive. By taking advantage of these interpretive tools, as attempted above, it could ultimately be ensured that a common minimum level of protection of the right to legal assistance in criminal proceedings is reached throughout the European Union, which shall not be inferior to that guaranteed by relevant international and European instruments.

[71] See Recital 2 of Directive 2013/48/EU.

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