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4 Main findings/Executive summary

The research concerning implementation of six EU Directives in Poland leads to general conclusion that **none of the EU Directives under this research have been fully and properly implemented to Polish law**. Although, there are remarkable differences in the number and gravity of shortcomings that refer to each of Directives, certainly, some general inferences can be identified.

First, a differentiation should be made between deficiencies of structural character, negatively affecting transposition of several directives for the same reason, and other, that appear only in a specific context of transposition of certain directive. **The most important structural deficiency is related to a difference in understanding of the word 'suspect' in the EU and Polish law**. Under Polish law a formal definition of suspect was adopted (Article 71 § 1 CCP). According to that provision the term suspect is understood as a person to whom the charges were officially presented by the prosecutor or other investigative body. This definition is narrower than the understanding of the word 'suspect' used in EU Directives, where the formal notification is not necessary to provide a person with such status. Yet, since the Polish government refuses to take into account that fundamental difference, the transposition of the majority of suspect's rights into Polish law is only partial, as it offers no protection to suspects in the European meaning of the word, to whom charges were not officially presented (e.g. a person arrested by the Police under suspicion of committing an offence). That is an issue in relation to suspects rights granted by the Directive 2010/64/EU (in respect of the right to translation and interpretation), 2013/48/EU (in respect of the right of access to a lawyer), 2016/800 (in respect of the right of access to legal aid), 2016/1919 (in respect of the right of access to a lawyer), as well as Directive 2016/343 (in respect to right to remain silent and right not to incriminate oneself).

Other structural deficiency refers to **the lack of explicit transposition of provisions of several directives referring to particular needs of vulnerable suspects or accused persons**. There are no legal provisions nor other measures that aim at acknowledging special needs of such suspects and effective protection of their rights. This concerns in particular the right to information (Directive 2010/64/EU), the right of access to a lawyer (Directive 2013/48/EU) and the right to legal aid (Directive 2016/1919). In case of the right to interpretation (Directive 2010/64/EU) the national implementation also did not result in adoption of any specific provisions referring to special needs of persons with hearing or speech impediments. Moreover, the Directive 2016/800 has not been transposed to the Polish legal system. As a result, in contrary to what is claimed by the Ministry of Justice[1], Polish law is in accordance with Directive 2016/800 only to a very limited extent the existing national provisions are encompassing rights of the children who are suspects or accused persons in criminal proceedings.

Second, the shortcomings in the implementation process can also be divided on the basis of their gravity. **The deficiencies in the transposition process are related to non-transposition or incomplete transposition of the core rights (or their components) contained in the respective directives**. The good example is Directive 2016/800, as no explicit transposition of its provisions took place. In consequence, Polish law does not meet the European standard, especially in respect of key rights enlisted in the directive – right to information (both in relation to child and holder of parental responsibility), right of access to a lawyer and legal aid, right to an individual assessment, right of the child to be accompanied by the holder of parental responsibility during the proceedings as well as right to obtain special treatment in the case of deprivation of liberty. Most importantly, there is a general discrepancy between the directive, which is applied to suspects under 18 years old

[1] See: Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (U31) https://legislacja.rcl.gov.pl/docs//2/12338566/12722226/12722227/dokument468012.pdf (access 18 February 2021).

and exceptionally older, whereas a special protection in Polish law is granted only to children under 17 years old.

The other important area of transposition which is **deficient is the one related to assistance of defence counsel**. Both the right to access to a lawyer guaranteed by the Directive 2013/48/EU as well as the right to legal aid provided by the Directive 2016/800, which are essential for that directives, are not fully guaranteed in the Polish law, as they do not encompass all suspects in the meaning of both directives. In addition, the access to a lawyer before the first interrogation and the confidentiality of lawyer-client communication are also not sufficiently safeguarded in Polish law. On the opposite, the national transposition is substantially better in case of Directive 2012/13/EU which is in its vast majority fully and properly transposed. And in case of Directive 2010/64/EU and 2016/343 has been achieved only in part.

Finally, discussed directives include separate provisions regarding the rights of suspects and accused persons subjected to EAW procedure (Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, 2016/800, 2016/1919). Their implementation to the Polish legal system is in majority full and correct. However, as in the case of ordinary criminal cases, there are noticeable deficiencies of transposition also in that regard which concern among others limited access to lawyer before the first interrogation in EAW procedure, insufficient protection of the confidentiality of lawyer-client communication, lack of provisions regarding dual legal representation as well as provisions protecting the right of children subject to surrender.

Apart from the identified differences in the transposition of analysed directives it can be observed that **the quality of implementation process is visibly deteriorating**. It can be noticed that the first two adopted directives (2010/64/EU, 2012/13/EU) were relatively correctly transposed to the Polish legal system. On the other hand, in case of other four adopted by EU much later the transposition was seriously flawed or even non-existent. This may be considered as partially resulting from approach of the current right-wing government leading Poland since 2015 reluctant in adopting the EU law and accepting EU standards. It is however achieved indirectly e.g. by conscious

misinterpretation of the word 'suspect' as used in the directives. By adopting the Polish understanding of this term and disregarding its autonomous meaning the Polish government makes the transposition of the EU directives seriously flawed. Unfortunately, the critique raised in that regard by the Ombudsman, NGO's and scholars are completely ignored by the government and turned out to be futile.

More recently, another severe backslide in transposition of Directives can be noticed in Polish system. Awkwardly some provisions that were either directly or indirectly implementing Directives have been revoked. A good example may be Directive 2012/13/EU in respect of the right of a detained person to access to case file which was fully transposed until 14 April 2016. On that date the Polish law was amended and significant restrictions on access to case file by suspect were introduced that were not provided for in the Directive 2012/13/EU. The amendment also unduly restricted the right to be present at trial making the transposition of the Directive 2016/343 improper. Likewise, the most recent amendments of the CCP which was introduced by the end of 2019, has provided for a possibility of conducting trial during a justified absence of an accused willing to participate at trial, which is incompatible with the standard established by the Directive. **This all makes the evaluation of transposition of EU Directives to Polish system generally unsatisfying by not providing effective protection to suspect and accused and requiring immediate improvement.**

5 Introduction

5.1. Constitutional and criminal justice system

The Constitution of the Republic of Poland[2] is the supreme law in Polish legal system.· The Constitutional provisions have a multidimensional effect on the criminal proceedings as provided in the Code of Criminal Procedure of 1997[3]. The Constitution sets the framework in which the CCP

[2] *Konstytucja Rzeczypospolitej Polskiej* (Constitution of the Republic of Poland) of 2 April 1997, Dziennik Ustaw 1997, Nr 78, poz. 483.
[3] *Kodeks postępowania karnego* (Code of Criminal Procedure, hereinafter; CCP) of 6 June 1997, Dziennik

provisions function and provides the guidelines for their further interpretation. On the other hand, the CCP may contain only provisions that does not remain in conflict with the constitutional rules which implies that the analysis of the law on criminal procedure is impossible without understanding the constitutional context[4].

The scope of constitutional provisions that make an impact on the framework of criminal process is vast. Besides the procedural rights remaining in the scope of this research, the Polish Constitution established the *nullum crimen sine lege* principle[5] or provides the prohibition of torture and inhuman or degrading treatment and punishment[6] which are both relevant to criminal process. Furthermore, certain provisions directly refer to rights and freedoms of participant to the proceedings (both defendant and victim) such as the protection of liberty (Article 31 of the Polish Constitution), the right to privacy in the context of personal inviolability (Article 41 (1) of the Polish Constitution), private life and family life (Article 47 of the Polish Constitution), freedom of communication (Article 49 of the Polish Constitution) and inviolability of home (Article 50 of the Polish Constitution).

Some of the fundamental rights that are enshrined in the six EU Directives are directly expressed in the Polish Constitution and further clarified in the provisions of CCP. Among such rights can be found the presumption of innocence[7] and the right of defence understood as the right to defend oneself and the right to access to a lawyer[8]. This also relates to the right to a fair and public hearing

Ustaw 1997, nr 89, poz. 555 with amendments.

[4] Paweł Wiliński, 'Konstytucjonalizacja współczesnego procesu karnego' in Piotr Hofmański (ed), *System Prawa Karnego Procesowego. Tom I – Zagadnienia ogólne. Cześć 1* (LexisNexis 2013) 690.

[5] Article 42 (1) Polish Constitution states that "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible".

[6] Article 40 Polish Constitution states that "No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited".

[7] Article 42 (3) Polish Constitution states that "Everyone shall be presumed innocent until his or her guilt is determined by the final judgment of a court". This is reflected in Article 5 § 1 CCP providing that "Accused is presumed innocent until her or his guilt is proven and determined by the final judgment of a court".

[8] Article 42 (2) Polish Constitution states that "Everyone against whom criminal proceedings are conducted shall have the right to defense in all stages of the proceedings. In particular, she or he may choose a defence counsel or, under the terms of the law, use a defence counsel ex officio". The right is repeated in Article 6 CCP

of a case, without undue delay, before a competent, impartial and independent court[9]. This is interpreted as including two rights: the right to a judicial system of justice and the right to judicial review of acts prejudicial to the constitutionally guaranteed rights and freedoms of individual[10]. Moreover, the Constitution provides for the right of parties to contest judgments and decisions issued at first instance (Article 78 of the Polish Constitution). This however does not require that all judgments and decisions be subjected to judicial scrutiny and in the context of criminal justice system the CCP specifies which decisions may be appealed in the light of principle of proportionality[11].

Besides Polish Constitution and CCP the main sources that play a major role in the Polish criminal justice system encompasses five other Codes that relates in turn to the substantive criminal law (Criminal Code[12]), execution of penalties (Criminal Enforcement Code[13]), the law of petty offences (Petty Offences Code[14] and Petty Offences Procedure Code[15]) and the fiscal law (Fiscal Code[16]). Additionally, some of the provisions of Act on Proceedings in Juvenile Cases[17] relate to the criminal proceedings conducted against juvenile offenders prosecuted in criminal courts. In the criminal context of substantive importance are acts issued by the Minister of Justice. Even though

providing that "The accused is entitled to the right of defence, including the right to be assisted by a defence counsel, of which he must be informed".

[9] Article 45 (1) Polish Constitution.

[10] Judgment of the Constitutional Court of 12 May 2003, SK 38/02, OTK-A 2003 Nr 5 poz. 38.

[11] See more by Maciej Fingas, Sławomir Steinborn and Krzysztof Woźniewski, 'Poland' in Silvia Allegrezza and Valentina Covolo (eds), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies* (Wolters Kluwer Italia 2018) 382.

[12] *Kodeks karny* (Criminal Code, hereinafter; CC) of 6 June 1997, Dziennik Ustaw 1997, nr 89, poz. 553.

[13] *Kodeks karny wykonawczy* (Criminal Enforcement Code, hereinafter: CEC) of 6 June 1997, Dziennik Ustaw 1997, Nr 90, poz. 557.

[14] *Kodeks wykroczeń* (Petty Offences Code) of 20 May 1971, Dziennik Ustaw 1971, Nr 12, poz. 114.

[15] *Kodeks postępowania w sprawach o wykroczenia* (Petty Offences Procedure Code) of 24 August 2001, Dziennik Ustaw 2001, Nr 106, poz. 1148.

[16] *Kodeks Karny Skarbowy* (Fiscal Code) of 10 September 1999, Dziennik Ustaw 1999, Nr 83, poz. 930.

[17] *Ustawa z dnia 26 października 1982 r. o postępowaniu w sprawach nieletnich* (hereinafter: Juvenile Act), Dziennik Ustaw 1982, Nr 35, poz. 228.

they are not equal to the parliamentary acts and serve only an auxiliary role they are considered as binding sources of law as rules of clarifying character[18].

5.2. Institutional framework

Polish law operates under the Continental law system and follows an inquisitorial model of investigation and trial[19]. As a classic inquisitorial system, Polish criminal proceedings can be divided into long and formal criminal investigation and court proceedings during which the evidence gathered at the first stage of proceedings is reproduced with the court playing a leading role during the trial. The criminal investigation is conducted pursuant to the principle of legality[20]. The collection of evidence is performed under formal rules and recorded carefully in the dossier (case file) so the court will be able to rely on these findings during trial. The parties to the criminal investigation, that is suspect and the victim, are generally allowed to actively participate in criminal investigation by taking part in witness' interrogations and permitted to demand additional investigative measures to be undertaken by the police[21].

In theory, the prosecutors, whose operations are governed by the Prosecution Service Act of 2016[22], conduct or supervise every criminal investigation[23]. But in practice the powers of the prosecutor in that regard seems to be limited by the criminal justice agencies which is especially

[18] Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 55-56.
[19] Note that between July 1, 2015 and March 16, 2016 Poland experimented with an idea of enhanced adversariality in the criminal proceedings. See Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 48-49, Wojciech Jasiński, 'Polish criminal procedure after the reform' (2015) https://www.hfhr.pl/wp-content/uploads/2015/07/hfhfr_polish_criminal_process_after_the_reform.pdf (accessed 28.01.2021) and Karolina Kremens, 'The new wave of penal populism from a Polish perspective' in Elisa Hoven and Michael Kubiciel (eds), *Zukunftperspektiven des Strafrechts: Symposium zum 70. Geburstag von Thomas Weigend* (Nomos Verlagsgesellschaft 2020) 126-129.
[20] Article 10 CCP. See broadly Celina Nowak and Sławomir Steinborn, 'Poland' in Katalin Ligeti (ed) *Toward a Prosecutor of the European Union, Volume 1: A Comparative Analysis* (Hart Publishing 2013) 500-501.
[21] Article 167 CCP and Article 315 CCP.
[22] *Ustawa Prawo o prokuraturze* [Prosecution Service Act] of January 28, 2016, (Dziennik Ustaw 2016, poz. 177).
[23] Article 298 § 1 CCP and Article 326 § 1 CCP.

visible in cases concerning less serious crimes[24]. The conduct of the investigation is therefore primarily vested with police (*Policja*)[25]. Prosecutors are expected to play a dual role in criminal process: while during criminal investigation the prosecutor encompasses the role of the active criminal justice authority, at the moment when indictment has been filed with the court she becomes a party to the proceedings, assuming all functions of a public prosecution authority. This also means that the prosecutor is ultimately a major prosecuting authority in Poland (Article

The proceedings before the court are initiated after investigation is closed by filing with a court a formal charging instrument that is indictment supplemented with the full dossier of the pretrial findings. The prosecutor often chooses to file a different charging document that is motion to resolve a case out of trial which is the result of plea bargain alike proceedings (Article 335 § 1 and 2 CCP). The latter by allowing to proceed during an informal hearing and not the trial substantially speeds up proceedings and makes it a popular way of disposing criminal cases. If the case reaches the trial stage proceedings are conducted publicly and by rule in adversarial way although the power of the court to call and examine evidence are substantially guaranteed as the obligation to establish the truth is incumbent upon the court. The judgment in all cases is delivered by the court and both parties to the proceedings (prosecutor and defendant) are granted broad power to appeal it.

During the criminal investigation the independent judicial oversight of measures interfering with rights and freedoms of individual is secured. The Polish law does not provide for a judge for preliminary investigation as is known from German or Italian systems. However, the use of the most severe coercive measures during criminal investigation such as pretrial detention and secret

[24] Investigations can be conducted in two separate forms: inspection (*śledztwo*) and inquiry (*dochodzenie*). Inspection is usually conducted in more complicated cases, i.e. in case of all felonies and some misdemeanors, e.g. those in which the suspect is a judge or prosecutor. See Doris De Vocht, 'Poland' in Ed Cape, Zaza Namoradze, Robert Smith, Taru Spronken (eds) *Effective Criminal Defence in Europe* (Intersentia 2010) 429.
[25] Police operates under the Police Act (Ustawa o Policji) of 6 April 1990, Dziennik Ustaw 2020, poz. 360. Some other agencies possess additional investigative powers e.g. as well as other agencies such as the Border Guard (*Straż Graniczna*), Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne*) or even the Hunting Guard (*Straż Łowiecka*) - see broadly Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 29-36.

surveillance may be imposed only by the court (Article 250 § 1 and Article 237 § 1 CCP). Although the law does not provide for a prior judicial scrutiny of every investigative action that may interfere with rights of individual, which means that search, seizure and arrest warrants are issued by the prosecutor (Article 220 § 1 CCP and Article 247 § 1 CCP), the independent judicial oversight is secured by the right to judicial review of each undertaken measure (Article 236 CCP and Article 246 CCP). It should be however noted that recently the judicial independence is considered as substantially breached[26] which potentially may also have an impact on the impartiality of the court when deciding on the use of coercive measures during criminal investigation.

5.3. Towards implementation of EU Directives in Poland

More detailed analysis on the compliance of specific rules provided in the EU Directives with Polish national rules will be provided below. At this point, however, it is important to point out the main problem which allows to generally evaluate the implementation for the most part as unsuccessful. This results from the adopted understanding of who can be called the suspect in Polish criminal procedure. This may be considered as translation problem, although not involuntary, that affects in disturbing way the desired application of all rights to the suspect at the very early stage of criminal proceedings.

Generally, the Polish law provides for a formal procedure by which the person is preliminarily charged with a crime (Article 313 CCP). This was incorporated in the course of investigation, with a primary aim to guarantee such person the information about the content of the

[26] See details in the Report of the Stefan Batory Foundation Legal Expert Group on the impact of the judiciary reform in Poland 2015-2018. See also Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Europe' (2018) 7 German Law Journal, https://ssrn.com/abstract=3216482 (access 11 April 2021); Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/084/27/PDF/G1808427.pdf?OpenElement (access 11 April 2021) and Adam Bodnar – Commissioner for Human Rights, "Plowing up the courts", 19 July 2017, https://www.rpo.gov.pl/en/content/%E2%80%9Cplowing-courts-adam-bodnar-onetpl-changes-judicial-system (access 11.04.2021).

charges as adopted by the investigating authority[27]. It resulted in setting a formal point in time when the rights that the person is provided with actually do attach to her. Therefore, only a person presented with preliminary charges during criminal investigation is granted the status of *podejrzany* and provided with rights associated with that status including such as the right to access a defense counsel, the right to remain silent, the right to legal aid.

As a result, the Polish law makes a very strict distinction between the status of *osoba podejrzana* and *podejrzany*[28]. The latter term has been normatively defined as a person, with regard to whom a decision initially charging a person with a crime has been issued, or who, without the issuance of such a decision, has been informed about charges in connection with the initiation of the person's interrogation in such capacity (Article 71 § 1 CCP). The former term has no legal definition although *osoba podejrzana* can be nevertheless defined as a person on whom the attention of criminal justice authorities focuses due to suspicion that she has committed a crime, but who has not yet been initially charged with an offense[29]. Most importantly, *osoba podejrzana*, because of the lack of formal preliminary charging procedure launched against her, remains unprotected by the rights that are normally attached to *podejrzany*[30]. And only when *osoba podejrzana* becomes arrested some rights, although not all that belongs to those initially charged with a crime, will be granted to her. At the same time when searched or interrogated *osoba podejrzana* is deprived even of limited rights.

The lack of adequate protection of the individual before the preliminary charging takes place, has been criticized in the literature[31]. Moreover, it should be also made clear that the Polish

[27] Janusz Tylman and Tomasz Grzegorczyk, *Postępowanie karne* (Lexis Nexis 2014) 669.
[28] See more broadly on the preliminary charging process and the status of *podejrzany* and *osoba podejrzana* in: Doris De Vocht, 'Poland' in Ed Cape, Zaza Namoradze, Robert Smith, Taru Spronken (eds) *Effective Criminal Defence in Europe* (Intersentia 2010) 435; Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 221-222.
[29] Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 202.
[30] Karolina Kremens, *Powers of the Prosecutor in Criminal Investigation. A Comparative Approach* (Routledge 2021) 223.
[31] See e.g. Feliks Prusak, 'Faktycznie podejrzany w procesie karnym' (1971) 3 Palestra 32; Andrzej Murzynowski 'Faktyczny podejrzany w postępowaniu przygotowawczym' (1971) 10 Palestra 36; Sławomir Steinborn, 'Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de

Constitution confer the right to defend oneself to anyone against whom the criminal proceedings are conducted (Article 42 (2) Polish Constitution) which also includes a person before her formal designation as *podejrzany*. Therefore, the formalistic approach as adopted in the CCP does not even comply with the constitutional standard[32]. And in the context of the standard provided by the EU Directives this issue becomes particularly problematic.

The EU Directives use the term "suspect" which can be easily and directly translated into Polish as *podejrzany*. This causes a serious misinterpretation as to the rights that attach to individual that the Directive intended to name as suspect. As discussed above, *podejrzany* is indeed guaranteed of the rights provided for the suspect by Directives while *osoba podejrzana* (which can be translated as "suspected person") that also seems to remain within the scope of protection of EU Directives is not given the same status. Despite the criminal investigation being already directed against *osoba podejrzana* the lack of notification of charges against her in the formal procedure described above she is stripped of her rights that EU Directive attach to her.

However, taking the translation of the term "suspect" into Polish law completely literally, allowed the Polish government to claim that the implementation of EU Directives has been successful or even unnecessary since the Polish law provided a sufficient standard of protection for *podejrzany* before the EU Directives were even adopted[33]. Although this belief has been undermined by the Polish Ombudsman who addressed the government on numerous occasions indicating the improper

lege ferenda)' in Piotr Kardas, Tomasz Sroka, Włodzimierz Wróbel (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla* (Wolters Kluwer 2012) 1781; Ryszard A. Stefański, 'Prawo do obrony osoby podejrzanej' in Tomasz Grzegorczyk, Jacek Izydorczyk, Ryszard Olszewski (eds), *Z problematyki funkcji procesu karnego* (Wolters Kluwer 2013) 305; Andrzej Sakowicz, 'Prawo do milczenia w polskim procesie karnym' (Temida2 2019) 236.

[32] Karolina Kremens, *Powers of the Prosecutor in Criminal Investigation. A Comparative Approach* (Routledge 2021) 224.

[33] See for example the answer of the Minister of Justice of 14 August 2019 in response to the Intervention No. 32684 filed by the Member of the Polish Parliament concerning the lack of transposition to Polish law the Directive 2016/1919 https://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=BF7HE5 (access 25 February 2021).

implementation of Directives[34] the Ministry of Justice refused to admit that the Polish law demands corrections to embrace *osoba podejrzana* with the desired protection. Therefore, because the government has been made aware of who should be covered by the minimum standard of EU Directives and why the term suspect should cover also *osoba podejrzana*[35] the erroneous interpretation should be considered as intentional.

Therefore, it must be argued that the Polish law generally does not remain in compliance with six EU Directives in question. In order to assume that the EU directives are properly and fully implemented in Poland the guarantees provided for the suspect should be extended also to those individuals who acquired the status of a suspected person through measures aimed at them such as arrest or taking samples, and are not yet preliminarily charged with a crime.

[34] See e.g. the Statement of the Polish Ombudsman to the Minister of Justice of 5 June 2017 concerning lack of implementation of Directive 2013/48 (II.5150.9.2014) https://www.rpo.gov.pl/sites/default/files/Wystąpienie%20do%20Ministra%20Sprawiedliwości%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf (access 25 February 2021). This was repeated also on 4 July 2018 https://www.rpo.gov.pl/sites/default/files/Wystąpienie%20RPO%20do%20Prezesa%20Rady%20Ministrów%20ws.%20wprowadzenia%20dyrektywy%20gwarantującej%20m.in_.%20prawo%20zatrzymanego%20do%20adwokata.pdf (access 25 February 2021).

[35] See also other works publicly presenting similar arguments, for example by the Chief Justice of the Polish Supreme Court – Pierwszy Prezes Sądu Najwyższego, Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie, Warszawa 2017, p. 86-88 http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2017.pdf (access 25 February 2021); Helsinki Foundation on Human Rights – Wzmacnianie praw osób podejrzanych i oskarżonych. Rola krajowych instytucji ochrony praw człowieka, Warszawa 2019 54 https://www.hfhr.pl/wp-content/uploads/2020/04/Wzmacnianie-praw-os%C3%B3b-podejrzanych-i-oskar%C5%BConych-NHRI-krajowy-web.pdf (access 2 March 2021); Barbara Grabowska-Moroz (ed), Prawo dostępu do obrońcy w świetle prawa europejskiego, Warszawa 2018 https://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dostępu-do-obroncy-w-swietle-prawa-UE-20180410.pdf (access 4 March 2021).

6 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

6.1. Introduction

The official position of the Polish government is that the Directive 2010/64/EU has been fully transposed. This conclusion is based on two elements. Firstly, Poland reported to the EU Commission that there are five national legal instruments that implement the directive: CCP, Act of 27 September 2013 on the amendment of CCP and other acts[36], Act of 24 August 2001 – Code of Proceedings Concerning Minor Offenses, Act of 25 November 2004 on the profession of sworn interpreter (translator) and the Regulation of the Minister of Justice of 24 January 2005 regarding the model of the certificate confirming the right to act as a sworn interpreter (translator) and keeping the list of sworn interpreters (translators). Secondly, it has been stated in the Act of 27 September 2013 that it contains a partial implementation of the Directive 2010/64/EU but no later acts contain a similar notification (although the CCP has been repeatedly amended in the meantime).

However, it is doubtful whether the transposition has in fact been full and proper. First, the right to translation and interpretation is conferred by the Directive 2010/64/EU upon all persons (regardless of their citizenship or nationality) from the time they were made aware that they are suspected or accused of criminal offence until the conclusion of the proceedings. Yet, due to the fact the Polish law confers most of procedural rights only upon suspects who have formally been charged[37], Polish transposition of the Directive 2010/64/EU cannot be

[36] *Act of 27 September 2013 on the amendment of CCP and other acts* (Dziennik Ustaw 2013, poz. 1247) - hereinafter: Act of 27 September 2013.
[37] See Sect. 5.3 (Introduction).

deemed as proper[38]. Apart from that, several other issues are also questionable. Article 2 of the Directive 2010/64/EU has been mostly indirectly implemented but the transposition is not full when the right to challenge the quality of interpretation and the procedure of ascertaining the capacity to speak and understand the language of proceedings are considered. Similarly, the transposition of Article 3 of the Directive 2010/64/EU is improper due to discrepancies in the catalogue of essential documents and lack of procedures of assessing this feature.

It also crucial to underline that in Polish language there is no distinction between the words: interpreter and translator, which are both called *tłumacz.* Consequently, most of the provisions of the CCP concerning interpretation regulate translation at the same time. Certainly, this affects the structure of this chapter, since most remarks will pertain to both interpretation and translation at the same time.

6.2. Right to interpretation (Article 2)

The provision of Article 2 (1) is implemented indirectly and cannot be considered as full. The accused, who does not have a sufficient command of Polish, is entitled to the gratuitous help of an interpreter, who has to be summoned to assist in all activities with the participation of the accused (Article 72 § 1 and § 2 sentence 1 CCP). To that extent Polish law satisfies the minimum standard set by the Directive 2010/64/EU.

However, the proper implementation of Directive 2010/64/EU may be questioned with regard to those who are not officially charged with a crime. Such persons are granted the right to interpretation on the basis of separate set of provisions which on the other hand

[38] Cf. Adam Górski and Michał Toruński, 'Zmiany w treści prawa do tłumaczenia w postępowaniu karnym według dyrektywy Komisji i Rady 2010/64/UE' (2014) 15 Białostockie Studia Prawnicze 129, 135.

does not fully cover all possible scenarios. An interpreter is summoned if there is a need to examine a person, who is deaf or mute and written communication is not sufficient, or a person who has no command of Polish (Article 204 § 1 CCP). Also the arrestee is provided with the right to an interpreter free of charge (Article 244 § 2 CCP). In consequence, a person who is not yet charged with a crime is assisted by an interpreter during police questioning or when he or she is arrested. However, not all procedural actions involving such person are covered by this regulation. If he or she has not been arrested and is not being interrogated but e.g. is subjected to a personal search, there is no provision guaranteeing the right to interpreter's assistance neither during such search nor during a court hearing adjudicating on an interlocutory appeal contesting it. In that regard the provision of Article 2 (1) Directive 2010/64/EU has thus not been transposed.

Article 2 (2) of the Directive 2010/64/EU extends the right to be assisted by an interpreter to communication between suspect or accused and their defence counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications. This provision was directly transposed to Polish legal system by the Act of 27 September 2013[39] . The newly introduced art. 72 § 2 sentence 2 CCP reads as follows: Upon request of the accused or his defence counsel, the interpreter (translator) should also be summoned in order to assist in communication between the accused and defence counsel in connection with any action in proceedings, in which the accused is entitled to participate. However, the transposition is improper for the following reasons. First, Article 72 § 2 CCP does not mention communication in direct connection with lodging an appeal or other procedural applications. It is argued by legal scholars that the notion of "actions in which the accused in entitled to participate" should be interpreted as

[39] The act entered into force in relevant extent: 9 November 2014.

covering also contacts in order to decide whether any actions should be taken, including appeal measures[40]. Second, there are no precise provisions as to what particular steps should be taken by the accused or the counsel in order to execute this right. Third, due to the inconsistency between the Polish and European notion of suspect, the right is only guaranteed to suspects that have formally been charged.

It is also unclear whether Article 2 (3) of the Directive 2010/64/EU has been properly implemented. Judging by the express wording of Article 72 § 1 CCP, persons with hearing or speech impediments are not entitled to interpretation. Article 204 § 1 CCP does not fully compensate this fault as it only guarantees the right to interpretation in the course of examination of such person. However, it is argued that Article 72 CCP should be understood as covering also the right to interpretation of persons with hearing or speech impediments. Such conclusion is unanimously accepted by the academics and in practice[41]. In consequence, the transposition is not explicit but does not create serious problems in exercising the right, which leads to the conclusion that Article 2(3) of the Directive 2010/64/EU has been indirectly transposed.

[40] Sławomir Steinborn,'Commentary to Article 72' in Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, (2016) LEX < https://sip.lex.pl/#/commentary/587696233/493673/steinborn-slawomir-red-kodeks-postepowania-karnego-komentarz-do-wybranych-przepisow?cm=URELATIONS > (access 5 March 2021). However, such creative interpretation does not affect the conclusion that the transposition is improper and the wording of Article 72 § 2 CCP shall be amended – see Maciej Fingas, 'Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r.' (2019) 6 Przegląd Sądowy 107.

[41] Sławomir Steinborn,'Commentary to Article 72' in Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, (2016) LEX < https://sip.lex.pl/#/commentary/587696233/493673/steinborn-slawomir-red-kodeks-postepowania-karnego-komentarz-do-wybranych-przepisow?cm=URELATIONS > (access 5 March 2021).

In turn, Article 2 (4) of the Directive 2010/64/EU has not been transposed. There is no procedure or mechanism of ascertaining whether the accused speaks and understands the language of the criminal proceedings. These facts are only informally determined by the police, prosecutor or the court depending on the stage of proceedings with the use of any available data, especially in direct contact with the accused (suspect)[42]. It is thus doubtful whether the provision has been transposed at all.

The lack of implementation of Article 2 (4) seems troublesome in the light of the indirect and improper implementation of Article 2 (5) of the Directive 2010/64/EU[43]. Polish law does not provide for a separate remedy against the decision on refusal of the right to interpretation. Such refusal does not even take the form of a written decision but is rather communicated tacitly – by not appointing an interpreter. Although during investigation the

[42] However, in 2013 the Polish Prosecutor General issued guidelines ordering the prosecutors to assess the knowledge of Polish language by any suspect who is not a Polish citizen during an interview prior to the interrogation. The guidelines issued by the Prosecutor General are binding for all the prosecutors. They are not publicly available, neither there is any information whether they are still in force. See the FRA Report 'Rights of suspected and accused persons across the EU: translation, interpretation and information, (2016) 33 < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf >, (access 5 March 2021).

[43] Maciej Fingas proposes that a separate remedy heard by the court is introduced in order to properly transpose Article 2 (5) of the Directive 2010/64. See Maciej Fingas, 'Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r.' (2019) 6 Przegląd Sądowy 107; Maciej Fingas 'O konieczności poszerzenia zakresu kontroli zażaleniowej nad niektórymi decyzjami dotyczącymi praw oskarżonego – wybrane problemy implementacji unijnych dyrektyw w polskim procesie karnym' (2018) 23 (1) Białostockie Studia Prawnicze 47, 53-54. The lack of sufficient remedies is also noted in FRA Report 'Rights of suspected and accused persons across the EU: translation, interpretation and information, (2016) 57 < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf >, (access 5 March 2021); Wojciech Jasiński, 'Prawo dostępu do adwokata oraz tłumacza w trakcie Postępowania przygotowawczego, in Jacek Kosonoga (ed), *Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolości. Komentarz Orzeczniczy za rok 2019* (Elipsa 2020), 83; and by Adam Górski and Michał Toruński, 'Zmiany w treści prawa do tłumaczenia w postępowaniu karnym według dyrektywy Komisji i Rady 2010/64/UE' (2014) 15 Białostockie Studia Prawnicze 129, 137.

remedy against such decision is available (Article 302 § 2 CCP), it is reviewed by the public prosecutor and not by the court. Yet, initiating an indirect judicial control of such decision may be available by lodging an interlocutory appeal against any formal decision which is subject to such remedy (e.g. decision on pre-trial detention) and contest procedural fairness of proceedings that led to its issuance due to the lack of the interpreter's assistance. At the later stage of criminal process held before the court such remedy is also unavailable which leads to the conclusion that an unjust refusal may only be contested in the appeal from the judgment.

The law also does not provide for the quality of interpretation to be contested. However, the parties are generally entitled to file for any procedural actions any time in the course of proceedings (Article 9 § 2 CCP). This way they may ask for replacement of the appointed interpreter due to insufficient quality of interpretation. The interpreter may also be excluded due to lack of impartiality (Article 196 § 3 CCP in conjunction with Article 204 § 3 point e)[44]. If the motion is refused, there is no available remedy apart from a general appeal against the judgment once it is issued[45]. Apart from that, it is difficult to prove that the quality of the interpretation was insufficient because there is no duty to record actions with participance of an interpreter[46].

[44] FRA Report 'Rights of suspected and accused persons across the EU: translation, interpretation and information, (2016) 57 < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf >, (access 5 March 2021).
[45] FRA Report 'Rights of suspected and accused persons across the EU: translation, interpretation and information, (2016) 57 < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf >, (access 5 March 2021).
[46] Compare recital 24 to the Directive 2010/64/UE. See Maciej Fingas, 'Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r.' (2019) 6 Przegląd Sądowy 107.

With regard to Article 2 (6) of the Directive 2010/64, it has to be noted that in Polish law there is no possibility of providing the interpreter's assistance on the phone, by the Internet or by videoconferencing. The interpreter always has to be physically present either at the location of the accused or in courtroom. Even if in particular situations the accused is interrogated by videoconference, the interpreter has to be present either in courtroom or wherever the accused is present (Article 250 § 3g CCP, Article 374 § 4 CCP and Article 517b § 2d CCP). The provision of Article 2 (6) did not need any transposition.

The right to interpretation of the persons subject to proceedings for the execution of a European arrest warrant (hereinafter: requested persons) as required by the Article 2 (7) of Directive 2010/64 has been fully transposed. As provided in the landmark case of Polish Constitutional Tribunal, the persons subject to proceedings for the execution of a European arrest warrant fully enjoy the rights of the accused[47] which extends to the right to interpretation. This right has been additionally strengthened by separate provision obliging the authorities to inform the requested person of the right to interpretation (Article 607l § 4 CCP)[48].

6.3. Right to translation of essential documents (Article 3)

Article 3 (1) and (2) of the Directive 2010/64/EU is the example of provision that has been improperly transposed. As it has been mentioned above, there is no linguistic differentiation between interpretation and translation in Polish. The right to translation is guaranteed to suspects and accused persons by the same provisions of Article 72 § 1 and 2

[47] Judgment of the Constitutional Court of 5 October 2010, SK 26/08, OTK-A 2010 Nr 8 poz. 73.
[48] The quoted provision was introduced by the Act of 27 September 2013 which entered in that part into force on the 2nd of June 2014, that is 6 months after the expiry of the term for implementation of the Directive 2010/64.

CCP that have already been analysed and – to some extent – to persons that have not yet been formally charged by Article 204 § 1 and 2 CCP. Further analysis will thus be limited to the differences as to scope of the right and the level of implementation.

The most serious ambiguity concerns the notion of "essential documents" and criteria upon which it is to be decided if a particular document falls within this category. It is only provided in Article 72 § 3 CCP that: "The decision presenting, supplementing or changing charges, an indictment, as well as a judgment which may be subject to an appeal or which ends the proceedings must be served upon the accused referred to in § 1 with a translation. With the consent of the accused, it is sufficient to provide the interpretation of an announced judgment if it ends the proceedings but is not subject to appeal". Such wording of this provisions leads to the conclusion that the transposition of Article 3 (2) of the Directive 2010/64 is improper. The national provision does not guarantee that the suspect or accused is served with a written translation of the appeal court's decision to uphold a pretrial detention order. Such decision deprives a person of one's liberty, but it is not subject to further appeal and does not end proceedings. The main difficulty is that decisions depriving a person of liberty as such are not mentioned among essential documents, but the provision only refers to decisions which end proceedings or are subject to appeal. It does not seem that Article 204 § 2 CCP (which obliges the authorities to call the translator whenever there is "a need" to translate a document) is a sufficient solution since it would still be necessary to directly apply the Directive's provision in order to justify the existence of this need. Of course, the authorities are always entitled to call the translator if they acknowledge such need. The parties are also entitled to apply for any admissible procedural action (Article 9 § 2 CCP), which seems to fulfil the requirement of Article 3 (3) of the Directive 2010/64/EU (indirect

implementation)[49]. However, there is no provision that would oblige the authorities to *ex officio* conduct an assessment of the documents in order to determine which are essential to the defence. What is more, it is assumed in the case law that the requirement to provide the translation of the decision only covers the decision itself and the authorities are not obliged to translate its written statement of reasons[50]. Such interpretation undermines the effectiveness of the right to translation and to appeal the decision, which leads to the conclusion that the transposition is improper[51].

With regard to the right to challenge the refusal of translation or its quality (Article 3 (5) of the Directive 2010/64/EU) the remarks concerning interpretation remain valid, i.e. the provision is indirectly and improperly transposed.

In turn, the right to translation of the European Arrest Warrant (Article 3 (6) of the Directive 2010/64) has been explicitly and properly transposed by the Act of 27 September 2013, which added § 1a to Article 607l CCP[52]. This provision states that an EAW has to be translated into the language understood by the requested person. However, "the court may limit itself to the notification of the requested person of the contents of the European warrant

[49] Some scholars point out that it is desirable that Article 72 CCP would be amended so as to provide an express legal basis for the defendant's motion to translate a specific document. See Maciej Fingas, 'Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r.' (2019) 6 Przegląd Sądowy 107. The author suggests including in the catalogue of essential document (Article 72 § 2 CCP) written statements of reasons for decisions and appeal filed by a party other than the accused.

[50] Judgment of the Court od Appeal in Szczecin of 7 November 2016, II AKa 94/16, LEX no. 2292445; Judgment of the Supreme Court of 19 January 2011, IV KK 312/10, LEX no. 1312735.

[51] See Maciej Fingas, 'Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r.' (2019) 6 Przegląd Sądowy 107; Maciej Fingas, 'The Right to Interpretation and Translation in Criminal Proceedings – Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/6EU' (2019) 9 (2) EuCLR 175, 179-180.

[52] The new provision entered into force on 9 November 2013.

if it does not hinder the realisation of this person's rights" (Article 607l § 1a sentence 3 CCP). The cited part has to be perceived in the light of Article 3 (7) of the Directive, which allows that an oral translation or even summary may be provided instead of a written translation if it does not prejudice the fairness of the proceedings. The only other provision in Polish Code of Criminal Procedure that allows to replace a written translation with an oral interpretation is Article 72 § 3 CCP, applicable with the consent of the accused and with regard exclusively to the judgments that end proceedings but are not subject to appeal or other remedy. That indirectly but fully meets the standard of the Article 3 (7) of the Directive 2010/64/EU.

Polish law does not provide any legal basis for waiving the right to translation (Article 3 (8) of the Directive). Delivering a translation is required by law and always remains a duty of the investigating authority or the court.

6.4. Costs of interpretation and translation (Article 4)

The issue of costs of interpretation and translation is not directly addressed in Polish CCP. Certainly, in the course of proceedings the assistance of an interpreter or translator is provided free of charge. The general rule is that if the accused is convicted, he or she also has to pay all the expenses relating to the course of proceedings borne by the State Treasury (Article 627 CCP). However, it is unclear whether the accused is obliged to bear the costs of the interpretation or translation accordingly since Article 4 of the Directive 2010/64/EU has not been transposed explicitly. makes. However, the issue has been resolved in favour of the right to free interpretation and translation by the Supreme Court that ruled on annulment of a judgment charging a convict with such costs[53]. The Supreme Court argued that Article 72 § 1 CCP excludes the application of general rules of bearing costs of proceedings. In

[53] Judgment of the Supreme Court of 13 September 2016, V KK 36/16, OSNKW 2016/11/77.

consequence it is not possible to charge a convicted defendant with costs of interpreter's or translator's assistance provided to him or her. In consequence, the Article 4 of the Directive 2010/64/EU can be considered as indirectly but fully transposed.

6.5. Quality of interpretation and translation (Article 5)

The quality of interpretation and translation is ensured in Poland by scattered provisions aiming to implement the Directive 2010/64/EU, that is: Article 204 CCP, the Act of 25 November 2004 on the profession of sworn interpreter (translator) and the Regulation of the Minister of Justice of 24 January 2005 regarding the model of the certificate confirming the right to act as a sworn interpreter (translator) and keeping the list of sworn interpreters (translators).

The legal position of interpreter (translator) in criminal proceedings is set by reference to provisions concerning expert witnesses (Article 204 § 3 CCP). This means that the authorities may call either so-called sworn interpreter (translator) who has accredited by the state to serve in such capacity, or so-called “ad hoc” interpreter (translator) who can be any person with expert knowledge of a language. Only with regard to sworn interpreters (translators) a separate act contains several provisions aimed at guaranteeing high quality of their services which include the requirement of personal qualifications, university degree and passing a state examination, as well as the duty to keep in secret all the facts and circumstances disclosed during interpretation (translation)[54]. There are no such requirements concerning the ad hoc interpreters (translators) whose qualifications are assessed only by the

[54] Maciej Fingas, ‘The Right to Interpretation and Translation in Criminal Proceedings – Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/6EU’ (2019) 9 (2) EuCLR 175, 184-185.

investigating authority without any guidance. The transposition of Article 5 of the Directive 2010/64/EU is indirect and proper with regard to sworn interpreters (translators) but has not been done at all with regard to ad hoc ones.

6.6. Training (Article 6)

Article 6 of the Directive 2010/64 has not been implemented. The training programme for judges and prosecutors does not cover the issue of difficulties of communication with the party assisted by an interpreter.

6.7 Record-keeping (Article 7)

In turn, Article 7 of the Directive 2010/64 is fully although indirectly implemented. According to Article 148 § 1 CCP the minutes of a court hearing, interrogation or another procedural action shall contain among others: statements and conclusions of participants thereto; any decisions and orders issued in the course of the procedure; reference for any decision or order issued separately; a description of other circumstances in the course of procedure, if necessary.

7 Directive 2012/13/EU: Right to information in criminal proceedings

7.1. Introduction

The provisions of the Directive 2012/13/EU **of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings** (hereinafter: Directive 2012/13/EU) can be considered as generally implemented to Polish legal system. That process entailed introduction of respective provisions in the Code of Criminal Procedure as well as delegated legislation issued by the Minister of Justice[55]. Some of the rights included in the Directive 2012/13/EU were already guaranteed by the Polish law, before the entry into force of that legal act. There has been, however, a few important deficiencies in the transposition process, that can be identified and will be described below in a detail. The remarks in that regard will be divided into five parts referring to each of the rights covered by Directive as well as remedies provided by the national law in cases of their violation (Article 8 Directive 2012/13/EU).

So far, Polish courts were not referring directly or indirectly to Directive 2012/13/EU in interpreting the domestic legal provisions implementing that EU law or other relevant contexts.

7.2. Right to information about procedural rights (Article 3 Directive 2012/13/EU)

Before the expiry of the deadline for transposition of the Directive 2012/13/EU (2.06.2014) Polish law was partly in compliance with Article 3(1) Directive 2012/13/EU.

[55] For the full list of legal sources implementing the Directive see: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32012L0013

According to Article 300 CCP in each criminal case, before the person is officially charged during investigation, he or she has to be given information about basic procedural rights. From the entry into force of the CCP in 1998 the Letter of Rights included rights enlisted in Article 3(1)a, c and e Directive 2012/13/EU. To that extent Polish standard satisfies the minimum threshold established by the Directive 2012/13/EU. The information about rights provided in Article 3(1)b and d Directive 2012/13/EU was introduced to Polish law, by amendment of Article 300 § 1 CCP, on 2 June 2014[56]. On the basis of Article 300 § 3 CCP the Minister Justice issued regulation containing a Letter of suspect's rights in criminal proceedings[57]. Article 300 § 1 CCP even before the entry into force of the Directive 2012/13/EU guaranteed that the information must be provided in writing. Yet, as to its content, Polish Letter of Rights mostly restates the wording of relevant CCP's provisions, so it is questionable whether that can be even qualified as simple and accessible. While these rights are not complicated, so their essence should be understood by the person who is not a professional lawyer, the language used is formal and based on impersonal forms which is different than indicative model Letter of Rights annexed to the Directive 2012/13/EU[58].

Importantly, there is no provision in Polish law that directly guarantees taking under consideration the special needs of vulnerable suspects or vulnerable accused persons in that regard. It is the role of the investigating authority or the judge to identify such needs and provide necessary accommodation. It is, however, underlined that the information given to the suspect should be comprehensive and clear, taking under consideration *inter alia* his or

[56] Act of 27 September 2013.
[57] Regulation of 30 May 2014 establishing a letter of suspect's rights in criminal proceedings (Dziennik Ustaw 2014, poz. 761), later replaced by Regulation of 13 April 2016 (Dziennik Ustaw 2016, poz. 512).
[58] See English version of Letter of Rights - https://pk.gov.pl/dzialalnosc/wspolpraca-miedzynarodowa/tlumaczenia-wzorow-pouczen/tlumaczenia-wzorow-pouczen/ (access 5 March 2021).

her specific features (e.g. age, mental state, level of education[59]). If the situation of the suspect does not indicate any deficiencies in understanding of procedural rights and the suspect is not asking for additional explanations there is no reason to conclude that the instructions given were not clear[60]. Moreover, the Article 79 CCP provides for mandatory assistance of the defence counsel during the proceedings which also concerns assistance in understanding the meaning of information provided to the person in question. It must be done if: 1) the suspect has not attained eighteen years of age; 2) the suspect is deaf, mute or blind; 3) there is a justified doubt whether his ability to comprehend the meaning of his act or to control his behaviour was not, at the time of committing the offence, excluded or significantly reduced; 4) there is a justified doubt whether the condition of his mental health allows him to participate in the proceedings or to conduct his defence in an independent and reasonable manner. That, to some extent, may be considered a measure that allows to take into account particular needs of vulnerable suspects or accused persons. Nonetheless, the transposition in that regard can hardly be assessed as full and satisfactory. The respective provisions are tacit about such obligation and vulnerable suspects and accused persons are dependent in fact on investigating authorities and court attitude towards their deficiencies.

7.3. Right to information in case of arrest or detention (Article 4 and 5 Directive 2012/13/EU)

In cases of arrest conducted for the purpose of criminal proceedings in Poland the right to obtain a Letter of Rights existed before the entry into force of the Directive

[59] Jakub Kosowski, *Zasada informacji prawnej w polskim procesie karnym w świetle art. 16 k.p.k.*, (Wolters Kluwer 2011) 253-260.
[60] Cf. Monika Zbrojewska, Amadeusz Małolepszy, 'Obiektywna podatność podejrzanego na pokrzywdzenie w procesie karnym', 5 (2014) Przegląd Sądowy 63, 68 and the cited case-law.

2012/13/EU. However, at that time Article 244 § 2 CCP provided that the arrested person should be immediately informed only about the reasons for the arrest and his or her rights, including the right to be assisted by the counsel. Apart from the latter right there was no statutory catalogue of them. Therefore, the CCP has been amended with an aim to fully transpose the Directive 2012/13/EU[61]. Additionally, the detailed catalogue of rights given to the arrestee were introduced and the Minister of Justice issued a Regulation specifying the form of the Letter of Rights for the arrested person[62]. The attempts to reach the state of full implementation cannot be considered as full and proper although the deficiencies can be considered as minor when compared with other EU Directives discussed in this volume. The shortcomings can be identified mostly in relation to the scope of right to information in case of arrest.

The Letter of Rights covers almost all rights enlisted in Article 3 and 6 Directive 2012/13/EU. It lacks the notification on a right to legal aid and the conditions for obtaining it and the right to access the case file. The first lacuna seems to be related to the fact, that the arrested person is not formally a suspect in Polish law[63] and therefore he or she does not have a right to be assisted by the defence counsel (*obrońca*). Nonetheless Polish CCP provides for the possibility of being assisted by a legal counsel (*pełnomocnik*), who can be appointed *ex officio* by the president of the district courts free of charge if an arrested person proves that he or she is unable to bear the costs of legal representation without prejudice to the necessary maintenance of himself or herself or his or her family (Article 78 § 1 CCP, read in connection

[61] This took place on 2 June 2014 (by the Act of 27 September 2013) and subsequently on 1 July 2015 (by the Act of 20 February 2015 on the amendment of Criminal Code and other acts (Dziennik Ustaw 2015, poz. 396)
[62] Regulation of 27 May 2014 on the Letter of Rights for the arrested person in criminal proceedings (Dziennik Ustaw 2014, poz. 737), later replaced by Regulation of 3 June 2015 on the Letter of Rights for the arrested person in criminal proceedings (Dziennik Ustaw 2015, poz. 835).
[63] See on the definition of suspect under Polish law in Sec. 5.3 (Introduction).

with Articles 87 § 2 and 88 § 1 CCP). Yet, the Letter of Rights is silent on this possibility. The information about the access to case file is also absent in the Letter of Rights. The latter contains only an information about the right to obtain a copy of a detention report (Article 244 § 3 CPP).

On the other hand, the transposition of the Directive 2012/13/EU is full in relation to Letter of Rights given to a person arrested for the purpose of executing EAW. The relevant provisions of the CCP entered into force on 2 June 2014[64]. Article 607l § 4 CCP empowers Minister of Justice to issue a Regulation on the Letter of Rights for the arrested person. The Letter of Rights covers all the rights indicated in the Article 5(1) Directive 2012/13/EU[65]. The transposition is also full in relation to the persons detained on remand. The necessary amendments were introduced at the same date as these related to EAW. Article 263 § 8 CCP empowers the Minister of Justice to issue a regulation with the content of the Letter of Rights. The latter cover all rights enlisted in Article 3 and 6 Directive 2012/13/EU[66].

Polish law guarantees that the Letter of Rights is handled to the arrested or detained person promptly. In case of arrest the Letter of Rights is handled after the transfer to the Police station. In case of detention, according to Article 250 § 3 CCP, the Letter of Rights is given to the person by the prosecutor sending a motion for detention on remand to court during investigation or by the court before the decision on detention on remand during trial.

[64] Amendment by Act of 27 September 2013.
[65] Regulation of 27 May 2014 on the Letter of Rights for the arrested person on the basis of European Arrest Warrant (Dziennik Ustaw 2014, poz. 740), later replaced by Regulation of 11 June 2015 on the Letter of Rights for the arrested person on the basis of European Arrest Warrant (Dziennik Ustaw 2015, poz. 874),
[66] Regulation of 27 May 2014 on the Letter of Rights for the person detained on remand (Dziennik Ustaw 2014, poz. 738), later replaced by Regulation of 11 June 2015 on the Letter of Rights for the person detained on remand (Dziennik Ustaw 2015, poz. 885) and replaced by Regulation of 13 April 2016 on the Letter of Rights for the person detained on remand (Dziennik Ustaw 2016, poz. 513).

As in case of Letter of Rights given to the suspect, the one given to the arrested or detained person restates the wording of relevant CCP's provisions. As discussed above in 7.2, it might be disputed that it can be considered as simple and accessible. The Helsinki Foundation for Human Rights also expressed ambiguous opinion on that topic, indicating that it is hard to assess the accessibility of the information provided in the Letter of Rights[67].

There are no provisions in the CCP providing that the suspect or accused person receives a translation of Letter of Rights. However, Polish Police on its website[68] published translations of Letter of Rights covered by the Directive 2012/13/EU into 26 languages (21 EU languages). If there is no possibility of giving a person a translated Letter of Rights the interpreter called by the investigating authority or judge should inform the suspect or accused person orally about the rights and later prepare written translation. The latter is however a matter of practice and it is not expressly guaranteed by the law. Similarly, as in the case of suspects there is no provision in Polish law directly providing that the particular needs of vulnerable suspects or vulnerable accused persons will be taken under consideration[69].

7.4. Right to information about the accusation (Article 6 Directive 2012/13/EU)

In case of person officially charged with committing a criminal offence Article 313 CCP since its entry into force in 1998 provides that he or she is informed orally by the interrogating authority (e.g. police, prosecutor) about the scope and nature of the charge. The content of a charge is documented either in a separate decision or in written records of the

[67] *Jak informować w postępowaniu karnym. Polskie prawo i praktyka a standardy europejskie*, (Warsaw 2016) 57 and 69 - http://www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa_ca%C5%82o%C5%9B%C4%871.pdf (access 5 March 2021).
[68] https://isp.policja.pl/isp/do-pobrania/8103,Wzory-pouczen-w-postepowaniu-karnym-w-26-jezykach.html, (access 5 March 2021).
[69] See Sect. 7.2.

interrogation, which is accessible to the suspect. If the person to be charged cannot be reached, it is possible to issue a charging decision and a "wanted" warrant. In that case, after the person is seized, the prosecutor is obliged to officially charge a person during the interrogation after his or her presence has been secured[70]. Information about charges includes the detailed information regarding the committed prohibited act, including the nature of participation by the suspect, as well as the legal classification. To that extent Polish law provides for even more stringent standard then Article 6 (2) Directive 2012/13/EU, which allows greater flexibility in the scope of information given to the suspect.

Apart from the right to information about charges Article 6 (3) Directive 2012/13/EU encompasses a right to obtain, at the latest on submission of the merits of the accusation to a court, detailed information on the accusation. The information includes the nature and legal classification of the criminal offence, as well as the role of the person in commitment of a crime. To that extent Polish is fully in compliance with the standard introduced by the Directive 2012/13/EU. That was the case even before the Directive 2012/13/EU was adopted. According to Article 338 § 1 CCP, if the indictment[71] has been lodged to the court and it meets all necessary formal requirements, the president of the court or the court referendary orders without undue delay that a copy be served upon the accused. The indictment contains full information on the nature of the prohibited act subject to adjudication and its legal classification. Moreover, the trial begins with a concise presentation of charges by the public prosecutor or in his absence by presiding judge (Article 385 § 1 and 1a CCP).

[70] Ryszard A. Stefański 'Commentary to Article 279 in Ryszard A. Stefański, Stanisław Zabłocki, *Kodeks postępowania karnego. Tom II. Komentarz do art. 167-296* (Wolters Kluwer 2019) 1198.
[71] Or any other motion initiating proceedings conducted before the court of law – see: Wojciech Jasiński, Karolina Kremens *Criminal Law in Poland* (Wolters Kluwer 2019) 241-249.

The assessment of compliance with the Directive 2012/13/EU requirement is more challenging in case of penal order proceedings[72]. A penal order is issued by a single judge on a sitting held in camera without prior notification given to accused. An attested copy of the penal order is served on the accused person and his defence counsel as well as the prosecutor, after it was issued together with the act of the indictment and information on how to appeal against penal order. The accused person and his or her defence counsel may lodge objection (*sprzeciw*) to the penal order within a time-limit of seven days of its service. Such objection automatically quashes the penal order and the case is reheard on regular basis. If confronted with the wording of Article 6(3) Directive 2012/13/EU, which provides that detailed information on the accusation should be given to the accused at the latest on submission of the merits of the accusation to a court, Polish regulation regarding penal order proceedings do not satisfy that standard. The right to defence, however, is fully guaranteed by a simplified way of challenging penal order. In case an accused person or defence counsel lodges an objection there is a new trial conducted on a regular basis and before it starts the accused person obtains a copy of the indictment, where the full information about accusation is included. Therefore, it can be asserted that the standard of protection set by the Directive 2012/13/EU is met.

Article 6 (4) Directive 2012/13/EU guarantees that the information about accusation is updated, where this is necessary to safeguard the fairness of the proceedings. To that extent Polish law was in compliance with that standard even before the entry into force of the Directive 2012/13/EU. According to Article 314 CCP if in course of the investigation it transpires that the suspect should be charged with an offence not included in the decision to

[72] For more on penal order proceedings see e.g. Wojciech Jasiński and Karolina Kremens *Criminal Law in Poland* (Wolters Kluwer 2019) 47-249.

bring charges already issued, with an offence in the significantly modified form or that the offence should be qualified under a more severe legal provision, new charges should be communicated to suspect immediately. Moreover, if during the trial it transpires that, without exceeding the limits of the indictment, the criminal act should be classified under a different provision of law, the court notifies the parties attending the trial thereof. On a motion of the accused, the trial may be adjourned in order to enable him to prepare the defence (Article 399 § 1-2 CCP).

Article 6 (2) Directive 2012/13/EU provides that Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed. Polish law was fully in compliance with that standard before the entry into force of Directive 2012/13/EU. Article 244 § 2 CCP guarantees that the arrested person is immediately informed of the reasons for the arrest. In case of detention on remand the information about the reasons for detention, including the alleged criminal offence committed are included in the court's decision (Article 251 § 1 CCP), which is read out in the presence of the detainee. Moreover, the Article 248 § 2 CCP requires that the decision has to served to him or her.

7.5. Right of access to the materials of the case (Article 7 Directive 2012/13/EU)

Right of access to the materials of the case regulated in Article 7 Directive 2012/13/EU is only partially transposed to the Polish legal system. In respect of the documents which are essential to challenging effectively the lawfulness of the arrest or detention as prescribed in Article 7 (1) Directive 2012/13/EU the situation is complex. If a person is arrested but eventually not charged, he or she is entitled only to receive the report

of arrest. In case of other documents in the case-file Article 156 § 5 CCP provides for a right to apply for access to the file and demand copies[73]. Yet, an arrestee, has a limited access to such file not having a status of a party to the proceedings. Only in exceptional cases he or she may be granted authorisation by the prosecutor to inspect the file and to make copies (Article 156 § 5 CCP). In the light of the 7-day time-limit to file an interlocutory appeal for judicial review of the lawfulness of arrest that makes the effectiveness of the access to relevant documents illusive. Therefore, the standard set by the Directive 2012/13/EU is not met. The situation is hardly better in cases where a person gains the status of a party during the investigation (he or she is formally charged). In that case the prosecutor or other authority conducting investigation can refuse to grant access to case-file if it is necessary to safeguard the interests of the investigation or important interest of the state.

The transposition status is slightly different in cases of access to the case file for the purpose of questioning **detention on remand in pre-trial proceedings. In that respect the** Directive 2012/13/EU was fully transposed until 14 April 2016. Until that date Article 249a CCP[74] provided that the evidence serving as a ground for detaining a person on remand have to be revealed to that person. Article 156 § 5a CCP[75] provided that during investigation, the suspect and his or her defence counsel is immediately granted access to case files in the part containing evidence indicated in the request for application or extension of detention on remand. These provisions were changed on 15 April 2016[76]. Article 250 § 2b was added to CCP and introduced a restriction on access to relevant documents. In case of a justified concern of a danger to the life, health, freedom of a witness or his or her next of kin, their

[73] That provision was in force even before the Directive 2012/13/EU entered into force.
[74] Introduced by the Act of 27 September 2013. Article 249a CCP entered into force on 1 July 2015.
[75] Amended by the Act of 27 September 2013, entered into force on 1 July 2014.
[76] *Act of 11 March 2016* on the amendment of CCP and other acts (Dziennik Ustaw 2016, poz. 437).

testimony cannot be revealed to the accused or his defence counsel. Since the Article 7(1) Directive 2012/13/EU does not provide any possibility of introducing limitations regarding access to relevant documents Polish law is currently not in compliance with it.

In cases of **detention on remand during trial before court there was no need to transpose the standard set in Article 7 (1)** Directive 2012/13/EU**.** To that regard the right has been fully transposed in indirect way. **Article** 156 § 1 CCP even before the entry into force of the Directive 2012/13/EU provided that accused and defence counsel have free access to case file at that stage of criminal proceedings.

Article 7 (2-4) Directive 2012/13/EU for the most part can be considered as transposed to Polish law. The relevant domestic provisions of CCP even before the entry into force of the Directive 2012/13/EU provided that the suspect has unlimited access to case file at the end of investigation (Article 321 CCP). This right is limited during the investigation since the access may be refused if it may prejudice ongoing investigation or impair important state interest[77] . However, the transposition is only partial since not in all cases the refusal to provide an access to the case file is subjected to judicial review. If it the decision was issued by the Police or other investigating authority it is verified only by the public prosecutor who supervises the investigation (Article 465 § 3 CCP).

The access to case file, as regulated in Articles 156 § 1 and § 2 CCP, is free of charge. To that regard the Polish law was in compliance with the Directive 2012/13/EU standard before its entry into force.

7.6. Verification and Remedies (Article 8 Directive 2012/13/EU)

[77] Legal grounds for limitation introduced by the Act of 27 September 2013 and entered into force on 2 June 2014.

Polish law is in compliance with the obligation to have a recording procedure mentioned in Article 8 Directive 2012/13/EU. In case of arrest the reception of the Letter of Rights by the arrestee is confirmed in the police report (Article 244 § 3 CCP). In case of detention on remand, the detained person in practice confirms with her signature the reception of the Letter of Rights. The same procedure is applicable in case of information provided to the suspect (Article 300 § 1 CCP). In relation to information given to the accused at trial, the proof of service of indictment is attached to the case file and any changes in relation to charges included in the indictment are indicated in a hearing record. All of the above provisions existed before the entry into force of the Directive 2012/13/EU, except for recording of information given to the person detained on remand. The latter provisions were introduced by the Act of 27 September 2013[78].

Similarly, as in case of recording procedure, Polish law provides for a remedy for failure to provide information in accordance with Directive 2012/13/EU. Article 16 CCP, which was binding before the Directive 2012/13/EU entered into force provides that the lack of information on rights or an incorrect information may not result in any adverse consequences i.a. to the suspect of accused person. That provision is uniformly understood[79] as implicating that in case of failure to provide complete information about procedural rights that may not lead to inability to exercise them, even if e.g. the relevant deadline expired. Moreover, if evidence was obtained in violation of the right to information (e.g. suspect was not informed about the right to remain silent and testified), on the basis of Article 16 CCP that results in their exclusion.

[78] Entered into force on 2 June 2014.
[79] Cf. e.g. Jakub Kosowski, *Zasada informacji prawnej w polskim procesie karnym w świetle art. 16 k.p.k.,* (Wolters Kluwer 2011) 275-298.

8 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

8.1. Introduction

The official position of the Polish government is that the Directive 2013/48/EU has been implemented in the Polish system indirectly[80]. Based on the information communicated by the government to the European Commission[81] the Directive 2013/48/EU is believed to be implemented by the Polish Constitution, Criminal Enforcement Code, Code of Criminal Procedure and Petty Offences Code and Regulation of the Minister of Justice of 11 June 2015 on the determination of the model of the information on the rights of a person arrested on the basis of a European Arrest Warrant[82].

The position of the Polish government cannot be assessed as correct. **The analysis of the standard provided by Directive 2013/48/EU and Polish law leads to conclusion that for the most part the Directive has not been transposed at all or that the transposition was improper**. Such opinion is supported by the position expressed by the Helsinki Foundation for Human Rights[83], the

[80] https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32013L0048 (acces 3 March 2021).
[81] https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=celex:32013L0048 (access 3 March 2021).
[82] Rozporządzenie Ministra Sprawiedliwości z dnia 11 czerwca 2015 r. w sprawie określenia wzoru pouczenia o uprawnieniach zatrzymanego na podstawie europejskiego nakazu aresztowania;
[83] See the Helsinki Foundation for Human Rights statement to the Ministry of Justice; https://www.hfhr.pl/wp-content/uploads/2020/01/1680_001.pdfu (access 3 March 2021). See also: Adam Klepczyński, Piotr Kładoczny, Katarzyna Wiśniewska, 'Raport na temat wdrożenia dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie prawa dostępu do adwokata w postępowaniu karnym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności', (Warszawa 2017).

Polish Ombudsman[84] and the Polish National Bar Association[85] who acknowledged that Polish law fails to conform to the EU law requirements.

Three arguments can be formed to substantiate such belief. First, the right to access to a lawyer, although granted at a later stage of investigation after official charges, does not apply to the same extent to the person that has been arrested or informally approached by the police at an early stage of investigation[86]. Second, the right to contact a lawyer before the first interrogation is not sufficiently provided. Third, during the first fourteen days of detention a prosecutor may decide that the privileged lawyer-client communication will be limited by providing some form of supervision. The recent amendments of the CCP (drafted in connection to the Covid-19 pandemic[87]) only exacerbate the perception of incompatibility of domestic law with EU law in the sphere of an access to a lawyer.

Despite the official position on implementation, the government is aware of the deficiencies of the national legislation. The report which has been delivered to the European Commission does not indicate specific provisions which implement the Directive. Moreover, the Constitution was indicated as the implementing act. The government did not explain how a legal act with a greater degree of generality (the Constitution) could implement the detailed provisions of the Directive 2013/48/EU. Despite the implementation flaws outlined above, the European Commission did not find the Polish legislation incompatible with EU law.

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[84] The Ombudsman statement of the implementation of the directive; https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf (access 3 March 2021).

[85] http://www.adwokatura.pl/z-zycia-nra/prezes-nra-interweniuje-ws-dostepu-zatrzymanego-do-adwokata/, (access 3 March 2021).

[86] See Sec. 5.3 (Introduction).

[87] *Ustawa z 19.06.2020 r. o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19,* (Dziennik Ustaw z 2020, poz. 1086*)*. Act of 19/06/2020 on interest subsidies for bank loans granted to entrepreneurs affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19.

8.2. The right of access to a lawyer in criminal proceedings (Article 3 Directive 2013/48/EU)

The Ministry of Justice considers that the national law is in compliance with the Directive 2013/48/EU and no legislative changes are necessary[88]. A suspect or accused can appoint a defence lawyer, who has a strong and autonomous position in criminal proceedings. A defence lawyer can participate in interrogations, court hearings and may question witnesses (Articles 170 and 370 CCP), all any evidence (Article 167 CCP), has a right to access to the case files (Article 156 CCP) and she or he must be informed about the time when any procedural act will be taking place (Article 140 CCP). This also applies during investigation (Articles 315-318 CCP). However, at this early stage of criminal process the prosecutor may limit the right of a lawyer to participate in certain investigatory actions (Article 317 § 2 CCP)[89] and the right of access to the case file (Article 156 § 5 CCP) if there is the need to ensure the correct course of proceedings or protect an important state interest.

A person who has not been officially charged with a crime but who has been summoned for interrogation may request the presence of a lawyer. The prosecutor may however refuse such request if in the prosecutor's opinion it is not necessary for the protection of the interests of that person (Article 87 § 3 CCP). If during such interrogation the situation of a person being questioned changes and she becomes formally charged with a crime, there is no obligation to stop the interrogation and allow the suspect to contact with a lawyer. The same rules apply with other acts of criminal proceedings – other than arrest – in which a person who has not been officially charged with a crime is involved, such as search and seizure (Article 217 and 219 CCP), or an identity parade (Article 173 CCP).

[88] Barbara Grabowska-Moroz (ed), *Prawo dostępu do obrońcy w świetle prawa europejskiego* (Warszawa 2018); https://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf (access 4 March 2021).

[89] But see Article 315 § 2 CCP. See broadly Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 219.

A situation of an arrested person is different if she has not been officially charged with a crime. The arrestee must not be refused contact with a lawyer and should have a possibility to speak with him or her directly (Article 244 § 2 and 245 § 1 CCP). However, the research shows that police try to discourage arrested persons from using the assistance of a lawyer and sometimes make it difficult to establish such contact[90]. Moreover, there is no provision that obliges police or prosecutors to stop questioning and wait for a lawyer's presence. The general rules of participation in procedural actions allow interrogation of an arrested person without the presence of a lawyer, despite the request made by the suspect[91]. If the prosecutor decides to question the arrested suspect person as a witness the presence of a lawyer may be considered unnecessary under Article 87 § 3 CCP. Moreover, even if during such interrogation prosecutor decides to formally charge a person with a crime, according to Article 301 CCP, the lawyer's failure to appear does not impede the course of the activity and the questioning may continue.

The right to access to a lawyer appears to be more secured after formal charges have been brought against a person. In such case a suspect is informed about the right to be assisted by a defence counsel and the right to have a court appointed defence counsel under the principles set out in Article 78 CCP[92]. However, the law does not specify the nature of a lawyer-client contact. It is again up to the discretion of the questioning authority to provide whether the suspect will be able to consult with a defence counsel. A suspect may declare that he or she will remain silent until his or her defence counsel appears. However, in the result of at the instigation of the interrogator or simply because he/she is tired of waiting for his defence counsel to appear, the suspect may start answering to the

[90] The Helsinki Foundation report, *Wzmocnienie praw procesowych w postępowaniu karnym - skuteczne wdrożenie prawa do obrońcy i pomocy prawnej na podstawie Programu Sztokholmskiego,* 12, https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Wzmocnienie-praw-procesowych-w-postepowaniu-karnym-29-03.pdf (access 4 March 2021).
[91] Article 117 § 2 CCP. Interrogation of a detained person is not regulated separately in CCP. The only relevant rule provides that immediately after the arrest, the data concerning the arrestee should be gathere and the prosecutor should be notified (Article 244 § 4 CCP).
[92] Article 300 § 1 CCP.

questions and giving statements of a potentially incriminating nature[93]. Moreover, even if the defence counsel appears for the interrogation, and the prosecutor agrees to talk to the defence counsel before the interrogation, it may be ordered that such conversation is held in the presence of a police officer or other designated person[94].

Accordingly, in the light of the above analysis **the transposition of Article 3 must be considered as improper**. Only when the case reaches a trial stage the accused is guaranteed the right of access to a lawyer as provided by the Directive 2013/48/EU. In all earlier scenarios the right of access to a lawyer either depends upon the discretion of investigating authority and the privacy of contact with a lawyer may be limited. There are also no rules that force the investigating authority to interrupt the interrogation to allow the suspect to consult with a lawyer. Most importantly, the position of an arrested person who is not yet charged with a crime remains mostly unsecured.

8.3. Confidentiality (Article 4 Directive 2013/48/EU)

As a rule, a lawyer-client contact is confidential although this does not follow directly from any provision of the Polish CCP. Some reference to that principle can be derived from Article 178 (1) CCP providing that a defence counsel cannot testify as a witness with regard to facts while he or she learned while giving legal advice or conducting a case.

Certainly, the privilege also applies when the suspect or accused is deprived of liberty whether for the short time (arrest) or much longer (pre-trial detention). General rules provide that the detained person is granted the right to communicate with his or her lawyer in the absence of other persons (Article 215 CEC and Article 73 § 1 CCP). This extends to the exchange of mail between lawyer and detainee (Article 217b § 1a CEC) as well as by phone. However, the confidentiality of communication is not fully respected. According to Article 73 § 2 CCP[95], the prosecutor while

[93] See also point 1.1.7. about the waiver od directive rights.
[94] See also point 1.1.3 about the confidentiality of lawyer-client contact.
[95] Article 73 CCP was controlled twice by the Constitutional Court. In the first judgment from 2004, it was argued, that the possibility to limit the privacy of the lawyer-client contact does not prejudice the rights of the

allowing the meeting between the lawyer and detainee, "may, in a particularly justified case, make a restriction that he or she personally, or another person authorised by him, will be present at the time". This applies to mail communication accordingly (Article 73 § 3 CCP) and can last only up to 14 days from the time of imposing the pretrial detention (Article 73 § 4 CCP)[96]. Allowing an arrested person to have a conversation with a lawyer, the prosecutor may specify that another person designated by him or her will be present during the conversation. Thus, in reality, the arrested person's contact with his lawyer is not guaranteed to be confidential, as whether the conversation with the lawyer will be private is at the discretion of the prosecutor (Article 245 § 3 CCP). The limitations imposed on the confidentiality of communication between suspect or accused and her lawyer are not subjected to judicial review. The request for review is lodged only with the prosecutor (Article 302 § 2 CCP).

However, **it is difficult to unequivocally state that the national law is incompatible with the Directive 2013/48/EU**. Article 4 Directive 2013/48/EU does not introduce an absolute obligation to respect the privacy of contact with defence counsel. The Directive merely provides that the Member States "shall respect" the confidentiality of conversations and correspondence. It, therefore, appears that this formulation does not exclude - in particularly justified and exceptional circumstances - the possibility of interference with privacy[97]. However, the principle should be that lawyer-client contact should be confidential, particularly when a person is deprived of his or her liberty. Polish law enables a number of exceptions to the confidentiality of contact with a lawyer in "particularly justified cases", but this is a very vague concept. In fact, in investigation, it is the prosecutor who decides whether

defence – Judgment of the Constitutional Court of 17 February 2004, SK 39/02, OTK-A 2004/2/7. In a second judgment from 2012 the Constitutional Court stated that article 73 § 3 CCP was incompatible with Constitution, because it did not specify the conditions under which the public prosecutor may order the control of correspondence. (Judgment of the Constitutional Court of 10 December 2012, K 25/11, OTK-A 2012/11/132). The law since than has been amended and the condition ("particularly justified cases") allowing for limiting the privilege was introduced.

[96] The rules on supervision of communication also applies to contact with a lawyer when a person who was not officially charged with a crime was arrested and he or she awaits the interrogation (article 245 CCP).

[97] Recital 34 Directive 2013/48/EU.

contact with an attorney will be confidential, and the decision to interfere with the privacy of contact with a defence counsel is not subject to judicial review.

8.4. The right to have a third person informed of the deprivation of liberty (Article 5 Directive 2013/48/EU)

With regard to the right to have a third person informed of the deprivation of liberty as provided by **Article 5 Directive 2013/48/EU it has been fully although indirectly implemented**. The Polish law clearly provides that if an arrested person requests so, the third party (relative or another person) will be informed of the arrest (Article 245 § 3). The right applies also in case of pretrial detention (Article 261 CCP). Despite the fact that the Directive allows for a temporary limitation of the obligation to inform about the deprivation of liberty of the accused or a person who was not officially charged with a crime (Article 8 of the Directive 2013/48/EU), the national law does not provide for derogations to this obligation.

8.5. The right to communicate, while deprived of liberty, with third persons (Article 6 Directive 2013/48/EU)

An arrested person does not have a right to communicate with third persons. There is no provision neither in CCP nor in Regulations for arrested persons[98] which allows allow contact and a conversation with other person than a lawyer. To the contrary during pretrial detention, a suspect or

[98] Rozporządzenie Ministra Spraw Wewnętrznych z dnia 4 czerwca 2012 r. w sprawie pomieszczeń przeznaczonych dla osób zatrzymanych lub doprowadzonych w celu wytrzeźwienia, pokoi przejściowych, tymczasowych pomieszczeń przejściowych i policyjnych izb dziecka, regulaminu pobytu w tych pomieszczeniach, pokojach i izbach oraz sposobu postępowania z zapisami obrazu z tych pomieszczeń, pokoi i izb, Dziennik Ustaw 2012, poz. 638 (The Regulation of the Minister of Internal Affairs of 4 June 2012 on rooms intended for arrested persons or persons brought in for the purpose of sobriety, transitory rooms, temporary transitory rooms and police children's rooms, the rules of stay in these rooms, rooms and the manner of handling recordings from these rooms).

accused can communicate with a third party. Various forms of contact are permissible; detainee may send and receive mail, make phone calls or conduct personal meetings in the detention facility.

Specific rules of contact of the detainee with another person depend on the specific rules adopted for each detention facility, e.g. how long phone calls can last, at what hour the phone is allowed to be used. However, the Code of Enforcement Proceedings provides for general conditions concerning contact between an arrested person and the third party. A detainee may be allowed to see another person only upon the permission issued by the authority at whose disposal the person remains (Article 217 § 1 CEC). During investigation a decision is made by the prosecutor, and during the trial stage – by the court. A detainee has a right to be visited by a relative at least once a month (Article 217 § 1a CEC) and such meetings are supervised by the prison service or other authority upon the decision of the prosecutor or court. However, the relevant authority may refuse to permit a visit if there is a justified risk that the visit will be used: 1) for the purpose of unlawfully obstructing criminal proceedings; 2) to commit a crime, in particular, incitement to commit a crime (article 217 § 1b CEC). A refusal of a visit may be challenged by the detainee or a relative with whom a detainee has wanted to meet. Correspondence with relatives or other people is controlled and censored by the authority at whose disposal the detainee remains (prosecutor or court) unless the authority orders otherwise or by the director of the prison (Article 217a § 1 and 2 CEC).

Therefore, **the implementation of Article 6 Directive 2013/48/EU can be considered only as partial** since the contact with a third person is allowed only in case of detained persons and, besides lawyer-client communication, not for the arrestee.

8.6. The right to communicate with consular authorities (Article 7 Directive 2013/48/EU)

The right of arrested person to communicate with consular authorities is guaranteed by provision that demands the competent consular authority (or diplomatic mission) to be notified immediately, at the request of its citizen, of the imposition of detention on remand on such a person (Article 612 CCP). The arrested person, at his or her request, is also allowed to contact a consular

authorities (or diplomatic mission). An arrested person as well as a person upon whom a pretrial detention has been imposed must be notified about these rights[99]. Additionally, a person who was deprived of liberty can communicate in private with consular authorities and such visits are not supervised and correspondence between them remains uncensored[100]. **Thus, the Directive 2013/48/EU has been implemented fully although indirectly**.

8.7. Temporary derogation (Article 8 Directive 2013/48/EU)

The Polish CCP does not provide for any rules according to which the right to access of a lawyer at the initial stage of the proceedings may be temporary derogated under Article 3 (5) or (6) or under Article 5 (3). The only existing restriction concerns the right to communicate privately with a lawyer which can be limited by the presence of designated person during meetings with a lawyer during first 14 days of detention (Article 73 § 3 and 4 CCP). But this is not the type of derogation that Article 8 Directive 2013/48/EU refers to.

This could suggest that Poland did not make a use of a power provided by the Directive to temporary limit the right to contact with a lawyer and by doing so remain in compliance with the Directive. It is true for the accused and suspect as from the moment when he or she has been officially charged with a crime under Polish law. No temporary derogations are also provided in case of arrestee who is not yet officially charged with a crime since he or she has a broad right to meet and communicate with a lawyer (Article 244 § 2 and 245 § 1 CCP). However, the right of access to a lawyer also entails the right for the lawyer to be present and participate effectively when questioned (Article 3 (3) (b) Directive 2013/48/EU). And, as discussed above, the execution of this particular right is not secured for a person who has been arrested and not yet charged with a crime and depends

[99] Article 244 § 2 CCP and the regulation the Minister of Justice of 3 June 2015 on the determination of the model of the instruction on the rights of a detainee in criminal proceedings (Dziennik Ustaw 2015, poz. 835) – in case of arrest. Article 263 § 8 CCP and the regulation the Minister of Justice of 13 April 2016 on the determination of the model of the instruction on the rights of a pretrial detainee in criminal proceedings (Dziennik Ustaw 2016, poz. 513) – in case of pre-trial detention.

[100] Article 215 § 1a and 217b CEC.

upon the discretionary decision of the prosecutor[101]. Moreover, if the prosecutor refuses the lawyer to be present and participate during questioning of an arrestee (Article 87 § 3 CCP). Such decision is only subject to judicial review if an interlocutory appeal is filed against the decision to arrest a person and cannot be challenged independently as such. Therefore, **the standard provided by the Directive 2013/48/EU should be considered as not met**.

8.8. Waiver (Article 9 Directive 2013/48/EU)

The suspect shall be informed in writing of his rights, including the right to contact a lawyer and the right to court-appointed lawyer (Article 300 § 1 CCP). A prosecutor should explain to the suspect the consequences of not exercising the right of access to a lawyer (Article 16 § 2 CCP). In one case the Supreme Court revoked a verdict and referred the case for retrial because the regional and district courts had convicted the defendant based on statements given in the absence of a lawyer, while the defendant - due to his illness - was not able to read the Letter of Rights[102]. Yet, national case-law accepts that it is possible to implicitly waive the right to be assisted by a lawyer simply by answering questions during interrogation[103]. Therefore, **Article 9 Directive 2013/48/EU should be considered as indirectly implemented**.

8.9. The right of access to a lawyer in European arrest warrant proceedings (Article 10 Directive 2013/48/EU)

All provisions concerning the suspect or accused right to access to a lawyer should apply accordingly to requested person who enjoys the same scope of rights during European arrest warrant proceedings[104].

[101] See Sect. 8.2. above.
[102] The Judgment of the Supreme Court of 27 May 2020, V KK 545/18, unpublished.
[103] The Judgment of the Court of Appeal in Katowice of 6 April 2017 r., II AKa 15/17, LEX no 2343419.
[104] The Judgment of the Constitutional Tribunal of 5 October 2010, SK 26/08, OTK-A 2010/8/73.

8.10. Remedies (Article 12 Directive 2013/48/EU)

The Directive 2013/48/EU requires that there is an effective remedy in national law if the right of access to a lawyer is breached. There is a right to judicial review if suspect or accused was not able to contact a lawyer during his or her arrest or detention (Article 246 § 1 in connection with Article 245 § 1 CCP; Article 252 CCP). In so doing, he or she may challenge, for example, the restriction of confidentiality of contact with a lawyer, if such a decision was taken in accordance with article 73 § 2 or 3 CCP. However, it is necessary to prove that the limiting or depriving of contact with a lawyer had an impact on the content of the decision.

As a rule, CCP does not require the elimination of statements made by the suspect in the absence of a lawyer or before he or she had a chance to consult with a lawyer. Statements may not be used as the grounds for a conviction if during the proceedings the suspect will prove that he was subjected to compulsion, illicit threat, or statements were made in coerced circumstances (Article 171 § 5 and 7 CCP) or if it turns out that he or she was not able to understand the letter of rights (Article 300 § 1 CCP in connection with article 16 § 1 CCP).

Polish courts are reluctant to implement the European standard. On one occasion the Court of Appeals in Katowice stated that "it is not possible to conclude that ECtHR intended to introduce a general requirement to ensure the presence of defence counsel during the first interrogation of every suspect which could result in inadmissibility of the use of incriminating statements during trial. The ECtHR is only concerned with the necessary presence of the defence counsel in situations of the objectively existing vulnerability of the suspect, for example because of his or her age or his or her helplessness as a result of social factors or state of health (including drug or alcohol addiction)"[105]. However, it must be admitted that the Appeals Court did not take into consideration the rules of Directive 2013/48/EU and did not consider if the accused waived his rights willingly and intentionally.

[105] The Judgment of the Court of Appeal in Katowice of 6 April 2017, II AKa 15/17, LEX no. 2343419.

According to the case law, self-incriminating statements of the suspect made in the absence of a lawyer should be excluded as inadmissible if the suspect was coerced to make the statement or the suspect was objectively vulnerable[106]. Notably, the case law recognizes specific needs of vulnerable persons. Although it can be admitted that the case law is gradually changing and evolving to take account of Strasbourg standards, it is too slow to guarantee a "European" level of protection of the rights of the accused.

9 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

9.1. Introduction

The official position of the Polish government is that the Directive 2016/800 has been fully transposed. The national transposition measures were communicated by Poland to EU Commission by the time of the transposition deadline and consist of seven separate legal acts[107]. The list contains: Code of Criminal Procedure, Criminal Enforcement Code, Family and Guardianship Code[108], Regulation of the Ministry of Justice of the 11 June 2003 on the procedure for community interviews and the model questionnaire for such interviews[109], Regulation of Minister of Justice of 16 August

[106] The Decision of the Supreme Court of 4 April 2013, III KK 327/12, OSNKW 2013, nr 7, poz. 60. See also: the Judgment of the Court of Appeal in Wrocław of 28 July 2018, II AKa 169/18, LEX no. 2532130; the Decision of the Supreme Court of 27 June 2017 r., II KK 82/17, LEX no. 2338030.

[107] https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0800&qid=1564557316182 (access 18.02.2021).

[108] *Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy*, Dziennik Ustaw 1964, Nr 9, poz. 59, (Family and Guardianship Code*).*

[109] Rozporządzenie Ministra Sprawiedliwości z dnia 11 czerwca 2003 r. w sprawie regulaminu czynności w zakresie przeprowadzania wywiadu środowiskowego oraz wzoru kwestionariusza tego wywiadu (Dziennik Ustaw 2003, Nr 108, poz. 10); *Regulation of the Minister of Justice of 11 June 2003 on the rules of procedure for community interviews and the model questionnaire for such interviews.*

2001 on the detailed rules and procedures for the individual assessment of minors[110], Regulation of the Minister of Justice of 22 December 2016 on the organizational and administrative rules governing the detention on remand[111] and Regulation of the Minister of Internal Affairs of 13 September 2012 on the medical examination of persons detained by the police[112]. Note that the majority of these acts (6) came into force even before the date of the adoption of Directive which means that the transposition has been presumed as foremost indirect.

The valid transposition of Directive 2016/800 has been officially questioned by the Polish Ombudsman. On the 11th of March 2019 the Ombudsman has forwarded communication to the Minister of Justice requesting information when and in what form the transposition will take place[113]. The Ombudsman has identified changes that should be adopted to successfully transpose the Directive. First, the Ombudsman highlighted the necessity to raise to the 18 year of age the procedural guarantees in criminal proceedings as applicable currently only for children under the age of 17. Moreover, it was also suggested that the form of the letter of rights of the suspect should be adapted to the child's ability to understand it and that every interrogation of a child should be recorded. More generally the Ombudsman also criticized the lack of provisions in Polish system that provide for the

[110] Rozporządzenie Ministra Sprawiedliwości z dnia 16 sierpnia 2001 r. w sprawie szczegółowych zasad i trybu przeprowadzania wywiadów środowiskowych o nieletnich (Dziennik Ustaw 2001, Nr 90, poz. 101), *Regulation of the Minister of Justice of 16 August 2001 on detailed rules and procedures for conducting community interviews with juveniles.*

[111] Rozporządzenie Ministra Sprawiedliwości z dnia 25 sierpnia 2003 r. w sprawie regulaminu organizacyjno-porządkowego wykonywania kary pozbawienia wolności (Dziennik Ustaw 2003, Nr 152, poz. 14), *Regulation of the Minister of Justice of 25 August 2003 on the organizational and orderly regulations for executing prison sentences.*

[112] Rozporządzenie Ministra Spraw Wewnętrznych z dnia 13 września 2012 r. w sprawie badań lekarskich osób zatrzymanych przez Policję (Dziennik Ustaw 2012, poz. 1102), *Regulation of the Minister of the Internal Affairs of 13 September 2012 on medical examinations of persons arrested by the Police*.

[113] The Address of Ombudsman Adam Bodnar to Minister of Justice Zbigniew Ziobro of 11.03.2019, II.510.820.2018II.510.820.2018.MM https://www.rpo.gov.pl/sites/default/files/Wystąpienie%20do%20Ministra%20Sprawiedliwości%20w%20sprawie%20dyrektywy%20o%20gwarancjach%20procesowych%20dla%20dzieci%20będących%20podejrzanymi%20lub%20oskarżonymi.pdf (access 18 February 2021).

access to a lawyer at the earliest stage of investigation which is relevant regardless of the age of the suspect[114]. This address has been left with no answer.

However, in September 2020 the Ministry of Justice presented the official draft of an act that explicitly aims at partial transposition of the Directive 2016/800[115]. In the motives attached to the draft law the Ministry argues that the change in law is necessary to achieve "full and unquestionable"[116] transposition of Directive and therefore several amendments to provisions of CCP, CEC and the law on probation officers have been offered openly leading to correcting the legal state of play. The majority of proposed changes focus on adjusting the procedural rights as provided in CCP so as to extend it to persons between 17 and 18 years (see below 9.2.). The draft law has been immediately sent for consultations and has not yet reached the pertinent legislative stage[117]. Unfortunately, the fate of this legislative initiative is unknown since no further actions have been undertaken.

Summing up, **despite the position of the Polish government that the Directive 2016/800 has been fully implemented we can reach the conclusion that actually Poland did not manage to transpose the provisions of the Directive**. It should be argued that the Polish government erroneously considered as sufficient the standard so far provided for in national law[118]. The recent legislative attempts assumed by government tend to prove that the scope of protection of children suspected and accused of committing crimes is insufficient and needs improvement. No new legislation up to date has been adopted to implement the Directive. Although, as shall be discussed

[114] See more in Sect. 5.1. (Introduction).
[115] Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (U31) https://legislacja.rcl.gov.pl/docs//2/12338566/12722226/12722227/dokument468012.pdf (access 18 February 2021). The drafted law also aims at transposing Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA.
[116] Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, 6.
[117] https://legislacja.rcl.gov.pl/projekt/12338566/katalog/12722232#12722232 (accessed 16.02.2021).
[118] Maciej Fingas, 'Podmiot odpowiedzialności rodzicielskiej w procesie karnym – wybrane zagadnienia implementacji dyrektywy 2016/800' (2019) 11 Europejski Przegląd Sądowy 11, 12.

below, some provisions of the Directive 2016/800 have been de facto implemented by currently binding provisions of CCP and other laws, the general evaluation of the implementation of procedural safeguards for juvenile defendants shall be considered as incomplete and inadequate.

9.2. The definition of a 'child'

The most severe doubts regarding implementation of the Directive 2016/800 relates to the overarching concept of a 'child' defined as a person below the age of 18 (Article 3). **This concept has not been transposed to the Polish system which means that generally Polish law is inconsistent with the requirements of the Directive.**

The Polish law in the context of criminal justice system almost omits the word 'child' (*dziecko*) and gives a preference to the vaguer term – 'minor' (*nieletni*). The Criminal Code establishes the age of criminal responsibility in Poland at the 17 years[119]. However, exceptionally, in case of most serious crimes the age of criminal responsibility is lowered down to 15 years[120]. Consequently, the CC refers the term 'minor' only to those who are between 15 and 17 years old and not to those who are between 17 and 18 years old. These persons are liable as adults and, consequently, their procedural rights also correspond, in principle, to those that are possessed by adults during criminal proceedings. The law provides only for one specific rule directed at children – a suspect who is under 18 must be granted an access to a counsel (Article 79 § 1 CCP). In all other cases where CCP provides special protection for juveniles the relevant provision refers to *nieletni* which excludes those who are over 17 years old.

[119] Article 10 § 1 CC states that "an individual who commits a criminal act after the age of 17 bears responsibility under the principles set by this Code".
[120] Article 10 § 2 CC states that "a minor who after the age of 15 commits a criminal act specified in art. 134, art. 148 § 1, 2 or 3, art. 156 § 1 or 3, art. 163 § 1 or 3, art. 166, art. 173 § 1 or 3, art. 197 § 3 or 4, art. 223 § 2, art. 252 § 1 or 2 and in art. 280, may respond under the principles set out in this code, if the circumstances of the case and the degree of development of the perpetrator, his features and personal conditions speak for it, and in particular if the previously used educational or corrective measures have proved ineffective". This list consists of such crimes as attempt to assassinate the President of Poland, murder, aggravated rape, kidnapping, robbery.

The criminal justice system framework is supplemented by the parallel path concerning juveniles who are held responsible for their actions that regularly be called crimes if committed by a person over 17 years of age. Therefore, apart from the exceptional situation provided in Article 10 § 2 CC when a child between 15 and 17 committing most severe crime is treated as an adult, children are held liable upon provisions under the Juvenile Act. This act contains much more extensive procedural guarantees similar to those contained in the Directive 2016/800, which nonetheless, remain completely outside of the scope of the Directive. To make the matter even more blurred, the Act on Proceedings in Juvenile Cases also refers to the term minor (*nieletni*) who is defined as a person who committed a punishable (non-criminal) act while being at least 13 but not older that 17 years old[121]. However, the Juvenile Act also provides that some procedural rights that are regularly set for juvenile proceedings should be also applicable during the criminal proceedings held against children between the age of 15 and 17 who are suspected or accused of crimes enlisted in Article 10 § 2 CC (Article 18 of the Juvenile Act). Again, they are not available for those who are older than 17.

The above discussion confirms that the protection offered by the Directive 2016/800 is not fully transposed in Poland in case of children who are between 17 and 18 years of age and facing criminal charges. Likewise, the protection of those who are older than 15 and held criminally liable for crimes specified as most serious does not reflect the standard as provided in the Directive. Apart the abovementioned right to mandatory help of counsel during the criminal proceedings majority of rights provided by the Directive are unavailable or available only partially to juvenile defendants during criminal proceedings.

9.3. Right to information (Article 4 Directive 2016/800)

[121] Article 1 § 2 (1) of the Act on Proceedings in Juvenile Cases. The definition is also extended to those who are younger than 18 but only with reference to actions aimed at preventing their further demoralization and even those who are younger than 21 if certain educational and corrective measures are conducted against them.

There is no separate set of provisions concerning information for children on their rights applicable during criminal process going beyond the provisions of Directive 2012/13[122]. Thus, the information provided for children is identical to the one provided for adults and there is no separate Letter of Rights containing additional rights designed only for children. A good example of an omitted information is the lack of notification of the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings (Article 4 (1) (a) (iv) of Directive 2016/800). Although the holder of parental responsibility is a party to the proceedings against a minor who committed serious crimes while being between 15 and 17 years old, and in consequence has the right to take part in procedures other than hearings, such information does not appear on the Letter of Rights provided to a child. Moreover, the information on rights mostly restates the wording of relevant CCP's provisions, so it is doubtful whether that can be qualified as simple and accessible in particular for children. Therefore, **the implementation of the right to information as provided for children by the Directive 2016/800 has not been achieved**.

9.4. Right of the child to have the holder of parental responsibility informed (Article 5 Directive 2016/800)

As expected by the Directive 2016/800 the holder of parental responsibility is considered by Polish law as an important participant in proceedings against the child for whom she is responsible. However also in this case the relevant Article 76 CCP refers to a 'minor' which excludes children between 17 and 18 years of age. Even for this reason alone **the right must be regarded as not implemented**. Further provisions of CCP make also the scope of implementation incomplete[123]. For example, there is currently no provision which would guarantee that the holder of parental responsibility could receive information on the initiation of criminal prosecution against a minor since

[122] See Sect. 7.
[123] See broadly Maciej Fingas, 'Podmiot odpowiedzialności rodzicielskiej w procesie karnym – wybrane zagadnienia implementacji dyrektywy 2016/800' (2019) 11 Europejski Przegląd Sądowy 11, 14-15.

the list of documents and decisions provided in Article 140 CCP that must be served on the party to the proceedings does not include such information at all. Also in case of arresting a person, it is provided that the information about this fact will be served on a close relative only upon the request of the arrestee (Article 244 § 2 CCP) which stands clearly against the requirements of the Article 5 (1) Directive 2016/800 which demands simultaneous information provided to a child and the holder of parental responsibility.

Additional concerns raise the lack of proper implementation of Article 5 (2) Directive 2016/800 allowing a child to have another person nominated by her to be informed about the conduct of criminal proceedings against that child if certain circumstances occur. In such case, the Polish law does not provide a child with a right to nominate a person to represent her – it is a sole responsibility of the family court to appoint such representative if a child cannot be represented by any of its parents (Article 99 § 1 Family and Guardianship Code). And even though such representative is obliged to perform his activities with due diligence, as required by the welfare of the cared for and the social interest (Article 154 Family and Guardianship Code) it cannot be understood as meeting the Directive's requirement.

9.5. Right to assistance by a lawyer (Article 6 Directive 2016/800)

The scope of the right to be assisted by a lawyer in case of children is no different than in case of adults. Importantly however, every person under the age of 18 is not only entitled to be assisted by a lawyer but is obligatory provided such assistance (Article 79 § 1 (1) CCP) which is given free of charge[124]. The details of this right are provided in the Directive 2013/48 and discussed in this chapter elsewhere[125]. It should be however mentioned that although the right generally applies no provision guarantees the access to a lawyer prior the first interrogation nor the assistance is provided

[124] Regarding the scope of the right to legal aid see also comments to Directive 2016/1919 (Sec. 10).
[125] See Sec. 8.

to those that has not been officially granted a status of a suspect[126]. In result it must be concluded that **Poland has not implemented this right properly**.

9.6. Right to individual assessment (Article 7 Directive 2016/800)

The right to individual assessment **has not been transposed**. Generally, conducting individual assessment under Polish law is an option and not an obligation (Article 214 § 1 CCP). The judge or prosecutor may discretionarily decide whether such assessment is necessary with regard to the individual. Only in case of accused who is charged with felony[127] or accused who was under 21 years of age at the time of commitment of an intentional offence from a group of offences against life[128] (Article 214 § 2 CCP). This means that the right is not granted to all children since not in all cases the individual assessment will be undertaken[129].

However, with regard to the scope of the individual assessment the current law seems to remain in compliance with the requirements of Article 7 (2) Directive 2016/800. The contents of the assessment are prescribed in § 8 of Regulation of Minister of Justice of 16 August 2001 on the detailed rules and procedures for the individual assessment of minors including the behavior, state of health, educational conditions, relationship with parents or guardians, peers and others who may have an influence on the minor etc. As in all other cases involving minors, this detailed content refers only to those who are below 17 years of age. For those who are older the general rules on conducting individual assessment apply in accordance with § 5 of Regulation of the Ministry of Justice of the 11 June 2003 on the procedure for community interviews and the model questionnaire for such

[126] See Sec. 1.3.
[127] Felony is defined as an offence punishable by a penalty of not less than three years of imprisonment (Article 7 § 2 CC).
[128] See Chapter XIX of Criminal Code (Articles 148-162). See Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 111-113.
[129] Note that the draft law from September 2020 proposes an amendment to Article 214 § 2 CCP which provides for mandatory individual assessment for all accused persons who at the time of commitment of an offence was not 18.

interviews which provide considerably less detailed information. Although it may be argued that the scope of information demanded by the Directive 2016/800 is sufficiently covered also by the individual assessment conducted based on the latter Regulation.

9.7. Right to a medical examination (Article 8 Directive 2016/800)

The Polish law does not provide for any specific provisions concerning medical examination of children who are deprived of liberty with a view to assess their general mental and physical condition. General provisions regarding medical examination of persons detained by the police apply based on Regulation of the Minister of Internal Affairs of 13 September 2012 on the medical examination of persons detained by the police. Although the Ministerial Regulations provide for the general right to demand medical examination is available for every detained person (§ 1.3.1) that should be carried on immediately (§ 4) and by the medical doctor (§ 2), which are envisaged by the Directive 2016/800 it seems not enough. There are no rules that provide for taking into account the medical examination when determining the capacity of the child to be subject to questioning or other evidence-gathering acts or measures in any particular way as demanded by Article 8 (2) Directive 2016/800. Therefore, the aim of the Directive to provide children with additional protection has not been achieved and the available indirect transposition cannot be considered as successfully achieved.

9.8. Right to an audiovisual recording of questioning (Article 9 Directive 2016/800)

Under Polish law, the audiovisual recording of questioning of a suspect is generally allowed (Article 147 § 1 CCP in connection with Article 143 CCP). This is however considered as an option and never an obligation. This is completely discretionary decision of the questioning authority and the law does not provide for any reasons that should be taken into account when decision whether to audio-visually record the questioning is made. Therefore, the reasons affecting the decision whether to audio-visually record questioning or not are not expressed in CCP and do not in any way relate to proportionality or any other factor enlisted in Article 9 (1) Directive 2016/800. And because of that

the implementation of the right to an audiovisual recording of questioning should be considered as unsuccessful.

9.9. Limitation of deprivation of liberty (Article 10 Directive 2016/800)

As in case of all previously discussed rights, there are no specific rules under Polish law aimed at ensuring limitation on deprivation of liberty of a child at any stage of the proceedings. Neither the age of the child, her individual situation nor the particular circumstances of the case are enlisted as limiting the possibility to impose the deprivation of liberty over a child. It may be argued that the general provisions limiting the imposition of deprivation of liberty fully apply (Article 253 § 1, 257 § 1 CCP) and that they can be considered as sufficiently protecting all suspects regardless of their age. However, since there is no additional caution added to these rules in case of children it should be assessed that **the implementation has not been successful since the objective of the Article 10 Directive 2016/800 has not been met**.

9.10. Alternative measures (Article 11 Directive 2016/800)

The CCP enlists measures alternative to detention which are called preventive measures (*środki zapobiegawcze*)[130]. The list includes financial surety (Article 266 CCP), surety of a social organization (Article 271 CCP), surety of a trustworthy person (Article 272 CCP), police supervision (Article 275 CCP), order to temporarily leave premises (Article 275a CCP), suspension of the execution of official duties (Article 276 CCP), prohibition to leave the country (Article 277 CCP). Although none of these measures are intended exclusively for children the Directive 2016/800 **seems to be indirectly transposed** since the adoption of new alternative measures aimed solely at children has not been demanded.

[130] See on preventive measures in Polish system in Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 287-297.

9.11. Specific treatment in the case of deprivation of liberty (Article 12 Directive 2016/800)

The rules on organization of detention on remand in detention facilities are provided in the CCE. According to Article 212 § 1 of that Code those who are detained on remand should be placed in custody in a manner which prevents the mutual demoralization of detainees. For example, juveniles shall be separated from adults, unless specific educational considerations speak in favor of placing an adult with juveniles. This raises certain concerns. First, the term 'juvenile' shall be understood as a person under the age of 21. Therefore, no special treatment is provided for those who are under the age of 18 while the Directive solely addresses the latter group and demands their exceptional treatment. Second, although the Directive 2016/800 speaks about the 'child's best interest' as a reason for placing a child together with adults in detention facility, the CCE does not refer to the same values and seems to be more focused on the well-being of an adult in such case[131]. Therefore, **in a long-term detention context the aim of the Directive has not been achieved** by allowing children to be detained together with adults if it is beneficial for the latter.

The situation of those who are under 18 years of age is different when the short-term deprivation of liberty in a form of police custody is concerned. In such case the rule is rigid as persons under 18 are not allowed to be placed in a room together with adults[132]. No exceptions are provided. Therefore, **in that regard the implementation can be considered as proper although indirect**. Yet, some concerns may be raised in reference to the source that regulates this right – not in a parliamentary act but in an Attachment to the Minister's Regulation.

[131] Similar approach is undertaken (Dziennik Ustaw 2003, Nr 152, poz. 1493).

[132] § 7 do Załącznika nr 1 do Rozporządzenia Ministra Spraw Międzynarodowych z dnia 4 czerwca 2012 r. w sprawie pomieszczeń przeznaczonych dla osób zatrzymanych lub doprowadzonych w celu wytrzeźwienia, pokoi przejściowych, tymczasowych pomieszczeń przejściowych i policyjnych cel dla nieletnich, regulaminu pobytu w tych pomieszczeniach, pokojach i celach oraz sposobu postępowania z zapisami obrazu z tych pomieszczeń, pokoi i cel, (Dziennik Ustaw 2012, poz. 638), *§ 7 of the Attachment No. 1 of the Regulation of the Minister of International Affairs of 4 June 2012 on the premises intended for persons detained or brought for the purpose of sobriety, transition rooms, temporary transition rooms and police cells for children, the rules of procedure for the stay in those premises, rooms and cells and the manner in which recordings of images from those premises, rooms and cells are handled.*

9.12. Timely and diligent treatment of cases (Article 13 Directive 2016/800)

This right may be considered as almost completely avoided and not addressed by Polish law. There are no rules aimed at ensuring urgent treatment of criminal cases involving children. Cases concerning children are not treated in any exceptional way while general rule regarding disposition of a case in a reasonable time (Article 2 § 1 CCP). Similarly, no particular measures were undertaken providing special treatment of a child being a suspect or accused during criminal proceedings. There is no accommodation for children in such situation that would take into account any special needs of a child, including the communication difficulties that she might have.

9.13. Right to protection of privacy (Article 14 Directive 2016/800)

The protection of the privacy of children during criminal proceedings has not been subjected to any changes in response to the requirements of Directive 2016/800. But even if acknowledged that certain provisions referring to that issue have already been available in Polish system, **the claimed indirect implementation of the right to privacy cannot be considered as satisfactory**. This especially refers to the possibility to hold proceedings in the absence of public upon the court's decision, if at least one of the accused is a minor (Article 360 § 1 (2) CCP). However, since the cited provision refers to 'minor' it does not include those who are between 17 and 18 years of age. Moreover, in rare cases in which the trial is held against a child between the age of 15-17 accused of serious crimes the trial must be held in camera unless conducting proceedings publicly is justified by educational reasons (Article 32n (1) Juvenile Act). The other elements of the right to privacy of children are not even indirectly addressed in Polish law since the audio-visual records of questioning of a child, if it is conducted which is not a rule[133], are subject to general provisions regarding public dissemination of case files which does not provide for any limitations concerning children (Article 156 CCP).

[133] See Sec. 9.8.

9.14. Right of the child to be accompanied by the holder of parental responsibility during the proceedings (Article 15 Directive 2016/800)

The implementation of this right should be evaluated as improper and insufficient. The CCP does not provide for any provision that would allow the holder of parental responsibility to be present during the investigation against the child or her trial. Even Article 76 CCP that gives to the holder of parental responsibility to act during criminal proceedings does not refer to that right. Certainly, it can be argued that the right to participate in the procedural activities of the legal representative or guardian of a party may be deduced from the general principle that led to identifying such category of participants[134]. However, even those who make such argument, recognize the need to amend the relevant provisions of CCP that would directly refer to such right in accordance with the provisions of the Directive 2016/800[135].

As in case of Article 5 of the Directive 2016/800 the right of a child to be accompanied by another appropriate adult nominated by the child has not been implemented at all due to the lack of ability of a child to nominated such person[136]. Interestingly however, based on provisions of the Juvenile Act that are applicable only to rare cases of children between 15 and 17 and accused of most severe crimes, during Police interrogations if the presence of a parent, guardian or defense counsel cannot be secured the minor has a right to nominate individual to be present at such interrogation (Article 32f Juvenile Act). Although the latter may be called alternatively to a representative of the school of that minor or social worker etc. Therefore, even in such case the aim of the Directive seems not to be met.

[134] Maciej Fingas, 'Podmiot odpowiedzialności rodzicielskiej w procesie karnym – wybrane zagadnienia implementacji dyrektywy 2016/800' (2019) 11 Europejski Przegląd Sądowy 11, 15 quoting relevant literature.
[135] Maciej Fingas, 'Podmiot odpowiedzialności rodzicielskiej w procesie karnym – wybrane zagadnienia implementacji dyrektywy 2016/800' (2019) 11 Europejski Przegląd Sądowy 11, 15.
[136] See Sec. 9.4.

9.15. Right of children to appear in person at, and participate in, their trial (Article 16 Directive 2016/800)

The right to be present at the trial in the context of criminal proceedings in case of children are regulated in Poland in the same way as in case of adults[137]. In result, doubts concerning the recent amendment of CCP that modified rules of the presence of the accused during trial by permitting the court to conduct proceedings even during a justified absence of the defendant and her defense counsel do apply also to children. The additional set of rules regarding the participation of children is provided in the Juvenile Act. Accordingly, the participation of a minor in a trial is considered as non-mandatory and only in case of appeals hearing the court shall secure the appearance of a minor placed in a juvenile shelter as it should be also done upon a request of a party to the proceedings or the minor's defense counsel (Article 62 § 1 Juvenile Act). Moreover, even if a minor who is placed in a juvenile shelter requests to participate in a trial, the court may refuse the request, if it is considered that the presence of the defense counsel is sufficient (Article 32o § 2 Juvenile Act). **This makes the transposition unsatisfactory since no provision secure the right of a child to participate in the trial upon her request**.

9.16. European Arrest Warrant Proceedings (Article 17 Directive 2016/800)

All provisions concerning the suspect and accused persons should apply accordingly to requested person who enjoys the same scope of rights during European arrest warrant proceedings[138].

9.17. Right to legal aid (Article 18 Directive 2016/800)

The right to legal aid is the only right that in a currently binding law is attached to every person under the age of 18. As discussed above (9.2) other rights addressed toward minors apply only to those who are younger than 17. Therefore, every suspect or accused under the age of 18 will have

[137] Compare comments provided for Articles 8 and 9 of Directive 2016/343 (Sec. 2.5 and 2.6).
[138] The Judgment of the Constitutional Tribunal of 5 October 2010, SK 26/08, OTK-A 2010/8/73.

to a lawyer free of charge (Article 79 § 1 (1) CCP). However, this applies both to accused and suspect but excludes individuals who did not officially gain status of a suspect under Polish law[139]. In result, despite covering all children by the right to legal aid, excluding those who are *de facto* suspects, leads to conclusion that the right to legal aid is **only partially implemented in Polish system**.

9.18. Remedies (Article 19 Directive 2016/800)

Generally, remedies against infringement of procedural rights are covered by provisions of CCP. According to Article 438 (2) CCP the violation of any procedural provision can become a basis for an appeal if this might have affected the judgment. Additionally, the independent judicial review is also available in some cases still during criminal investigation. For example, the interlocutory appeal is available against the imposition of any preventive measure including detention on remand or financial surety (Article 452 § 1 CCP). Separate basis for remedies is granted against infringement of rights that remain in connection with executing detention on remand (Article 209 CEC in connection with Article 7 CEC). All remedies are to the same extent available to children and to adults without any differentiation in this respect. But since Directive 2016/800 does not demand providing remedies accessible solely for children the **Polish system indirectly implemented the Directive in this regard**.

10 Directive (EU) 2016/1919: Legal aid

10.1. Introduction

The official position of the Polish government is that the Directive 2016/1919/EU has been fully transposed. This conclusion is based on two premises. First, Poland reported to the EU Commission that there are four national legal instruments implementing the Directive 2016/1919/EU:

[139] See more in Introduction (Sec. 1.3). Regarding the scope of the right to legal aid see also comments to Directive 2016/1919 (Sec. 10).

CCP, Act of 6 July 1982 on attorneys-at-law, Act of 26 May 1982 on the Bar and the Regulation of the Minister of Justice of 23 June 2015 on the method of providing the accused with the right to defence counsel in accelerated proceedings. Second, the Ministry of Justice has clearly stated that it believes that the Directive 2016/1919/EU has been fully and properly transposed in several documents, including official responses of the Ministry of Justice to an interpellation of a Member of Parliament[140] and to a letter from the President of the National Council of the Bar[141].

The government's belief is unfounded. The independent entities, such as the Polish Ombudsman[142], the President of the National Council of the Bar[143] or Helsinki Foundation for Human Rights[144] expressed **serious doubts whether the transposition of the Directive 2016/1919/EU has been full and proper**. This chapter presents arguments in support of this position supported by the relevant case law and scholarly opinions presented in the debate regarding the implementation of the right to legal aid in Poland.

The most important discrepancies in transposition of the Directive 2016/1919/EU are caused by the already discussed[145] Polish formal notion of suspect that results in leaving without a right to legal aid all those who were not officially charged with a crime, i.e. arrested or searched individuals. Only for that reason it is doubtful whether the Directive 2016/1919/EU has been completely and

[140] Michał Wójcik, 'Ministry's of Justice response to the interpellation no. 32684' [2019] < https://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=BF7HE5 > (access 5 March 2021).
[141] Marcin Romanowski, 'Ministry's of Justice response to the President of the National Council of the Bar' [2020] < https://www.adwokatura.pl/admin/wgrane_pliki/file-dlpk-ii070452020-ms-do-nra-dostep-do-adwokata-dla-osoby-zatrzymanej-30198.pdf > (access 5 March 2021).
[142] The Ombudsman, 'Letter to the Minister of Justice' [2020] < https://www.rpo.gov.pl/sites/default/files/Pismo%20do%20MS%20ws.%20%20projekt%C3%B3w%20wzor%C3%B3w%20poucze%C5%84%20o%20uprawnieniach%20i%20obowi%C4%85zkach%20podejrzanego%2C%20pokrzywdzonego%20oraz%20%C5%9Bwiadka%20w%20sprawach%20karnych%2C%206%20listopada%202019.pdf > (access 5 March 2021).
[143] Jacek Trela, 'Letter to the Minister of Justice' [2020] < https://www.adwokatura.pl/admin/wgrane_pliki/file-20200812-pismo-prezesa-nra-do-ministra-sprawiedliwosci-w-sprawie-dostepu-zatrzymanego-do-obroncy-30082.pdf > (access 5 March 2021).
[144] HFHR and the Bar's 'List of proposals' regarding right of access to a lawyer [2019] < https://www.hfhr.pl/wp-content/uploads/2019/10/Lista-postulat%C3%B3w_EDP.pdf > (access 5 March 2021).
[145] See Sect. 5.3 (Introduction).

properly implemented. Thus, the level of transposition of this right in Poland has to be assessed separately for those who are accused or officially granted status of a suspect and those who are not yet officially charged with a crime. Moreover, in relation to both groups the implementation has to be assessed as unsatisfactory, mostly because Article 4 (5) understood in the light of recital 19 of the Directive 2016/1919/EU has not been transposed since there is no mandatory postponement of procedural actions until the motion for legal aid is heard by the court. Furthermore, the right to consult with a lawyer before the interrogation is not guaranteed. Both determines that the right to legal aid granted only after the first interrogation may be highly ineffective. These briefly presented arguments, that will be further expanded below, should be considered as decisive for the conclusion that **the transposition of the Directive 2016/1919/EU is not effective**. This belief is not changed by the fact that some isolated provisions of the Directive have been in fact partially or even fully implemented.

7.1.2. Right to legal aid (Article 4)

With regard to persons who have formally acquired the status of a suspect or accused Article 4 (1) of the Directive 2016/1919 has been fully although indirectly implemented. The accused who does not have a defence counsel of his or her own choice may request the legal support of the court-appointed defence counsel, if he or she can duly prove that they are unable to bear the costs of defence without prejudice to the necessary maintenance of themselves, or their family (Article 78 § 1 CCP) which also extends to the suspect (Article 71 § 3 CCP). This provision does not refer to the interests of justice and it is also irrelevant whether the accused is deprived of liberty or entitled to take part in investigative procedures as provided in Article 2 (1) a) and c) of the Directive 2016/1919/EU. The rule provides simply that every suspect and accused is entitled to legal aid as long as he or she is unable to pay for assistance of a lawyer regardless of the complexity or seriousness of the case.

The Polish law additionally provides for certain situations where assistance of a defence counsel is mandatory. This is applicable to all persons after formal presentation of charges

irrespective of their financial situation if they are unable to defend themselves due to being underage, deaf, mute or blind or because of their mental health (Article 79 § 1 CCP). It also pertains to those who are accused of felony but in such case the right to legal aid is applicable only during proceedings held before the court, that is after indictment has been filed with court (Article 80 § 1 CCP). These circumstances may be qualified as an indirect expression of the threshold "when the interests of justice so require" as referred to in Article 4 (1) of the Directive 2016/1919. However, this does not mean that only court-appointed counsel may represent a suspect (accused) in such cases. A person may appoint the lawyer of her or his choice but if he or she does not do that, a court-appointed counsel will be chosen by the relevant authority.

However, the assessment of the completeness and correctness of the Directive's implementation has to be different **with regard to persons who are not yet formally charged – in this respect Article 4 (1) of the Directive 2016/1919/EU cannot be considered as transposed at all**. Such person is not a party to proceedings and thus enjoys the right to be represented by a counsel – even of their own choice and at their own expense – only if their interest in the proceedings so requires (Article 87 § 2 CCP). What is more, such counsel may be refused to participate in proceedings if in the opinion of the authority it is not necessary for the protection of the interests of the person concerned. This means that only upon discretionary decision of the prosecutor such individual may be assisted by the counsel. Moreover, since the general right to appoint a counsel is not properly guaranteed to these persons and depends on the assessment of the authorities, also the right to legal aid has to be deemed as not entirely transposed. It obviously applies as well to persons described in Article 2 (3) of the Directive 2016/1919/EU who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority. Their legal position in terms of legal aid changes only with the formal presentation of charges.

Another possibility of appointing a lawyer opens if a person who has not yet been charged is arrested. During arrest the right to consult with the lawyer is guaranteed but such lawyer is not

officially a defence counsel (Article 245 § 1 CCP). It is, however, where the effective implementation fails the most. In this crucial moment when the person is arrested and not yet officially confirmed as a suspect, the questioning may take place and there are no rules that provide for an immediate assistance of a lawyer or for a legal aid.

This consequently leads to the conclusion that **Article 4 (5) of the Directive 2016/1919/EU has been only partially and improperly transposed**. In relation to suspects and accused persons the transposition has been to some extent direct. An *ex officio* defence counsel is appointed immediately by the court; the accused and the appointed counsel are informed in a suitable way, e.g. by telephone, if the defence shall be taken immediately (Article 81a § 2 and 3 CCP). In 2019 it was added to Article 81a § 3 CCP that in such urgent situations the suspect's motion for legal aid may be sent by the prosecutor to the court by e-mail or fax[146]. What is more, a legal counsel has to be available on duty all the time in each district for the purposes of granting legal aid to arrestees and in accelerated proceedings (Article 245 § 2 CCP and Article 517j CCP). However, the right to consult with the lawyer before questioning or any investigative acts is generally not guaranteed in Polish legal system[147]. There is no provision in Polish legal system that would oblige the authorities either to allow the suspect to communicate with the lawyer before interrogation or to postpone procedural actions until legal aid is granted. Bearing in mind the wording of recital 19 to the Directive 2016/1919/EU, introducing such obligation is necessary to properly implement the right to legal aid[148]. Furthermore, in 2019 Article 338a § 1-3 CCP has been added[149]. This provision pertains only to main proceedings

[146] *Ustawa z dnia 19 czerwca 2019 o zmianie ustawy Kodeks Postępowania Karnego i niektórych innych ustaw* (Dziennik Ustaw 2019, poz. 1694), Act of 19 July 2019 on the amendment of CCP and other acts. The Act has not been listed as implementing the Directive 2016/1919/EU by Polish government.

[147] See the subchapter on Directive 2013/48/EU.

[148] Bartosz Przeciechowski 'Regulacje krajowe a transpozycja dyrektywy Parlamentu Europejskiego i Rady (UE) 2016/1919 z dnia 26 października 2016 r. w sprawie pomocy prawnej z urzędu dla podejrzanych i oskarżonych w postępowaniu karnym oraz dla osób, których dotyczy wniosek w postępowaniu dotyczącym europejskiego nakazu aresztowania' < http://www.adwokatura.pl/admin/wgrane_pliki/file-regulacje-krajowe-a-transpozycja-dyrektywy-ue-20161919-28075.pdf > (access 6 March 2021).

[149] *Ustawa z dnia 19 czerwca 2019 o zmianie ustawy Kodeks Postępowania Karnego i niektórych innych ustaw* (Dziennik Ustaw 2019, poz. 1694), Act of 19 July 2019 on the amendment of CCP and other acts.

and obliges the accused to apply for legal aid within 7 days of being served with the act of indictment. The motion shall contain necessary evidence of the defendant's poverty. Otherwise the motion is admissible but will be heard after the next court hearing. Consequently, **Article 4 (5) of the Directive 2016/1919/EU has not been properly transposed in relation to neither accused persons and suspects, nor persons who have not yet been charged**.

When deciding on the right to legal aid of a suspect or an accused person, the means test is applied (Article 4 (2 and 3) of the Directive 2016/1919/EU). The Code of Criminal Proceedings does not precisely provide for specific criteria applied to assess if the accused (suspect) is in fact incapable to bear the costs of appointing a counsel. It is indicated in the case-law that the court is obliged to conduct the means test thoroughly, taking into account various factors. A good example of this approach is the Supreme Court's resolution of 19 March 2019, IV KS 5/19[150]. The facts of the case were as follows. The accused was represented by a defence counsel of his choice but decided to terminate the power of attorney in the course of first instance proceedings. He then applied for legal aid, stating that he lacked sufficient funds to appoint another counsel. The request was refused, and the defendant was convicted. The Regional Court heard an appeal, found that the right of defence of the accused was violated and annulled the District Court's judgment, sending the case for retrial. The prosecutor filed an appeal to the Supreme Court against the Regional Court's judgment, but it was upheld. The Supreme Court stated that the court deciding on a motion for legal aid should assess the financial situation of the accused at the time of adjudicating. The court should consider whether, because of the current financial and family situation, the accused does not have the possibility of incurring the costs of defence counsel of his or her own choice. Referring only to the fact that earlier in the course of proceedings the defendant was assisted by a lawyer of his own choice was criticised by the Supreme Court as a far-reaching simplification. In the Supreme Court's opinion it is necessary to oblige the accused to provide necessary documents if he or she failed to prove his or her poverty

[150] http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iv%20ks%205-19.pdf (access 6 March 2021).

in the motion. Otherwise, the motion may not be duly verified which may lead to the deprivation of the right to be assisted by the defence counsel.

The described approach of the judiciary strengthens the already expressed conclusion that **Article 4 (3) of the Directive 2016/1919/EU is in fact properly – although indirectly – transposed to Polish legal system**.

However, both means and merits test are applied to persons that are not yet formally charged because their right to appoint a counsel depends both on the authorities' assessment of their procedural interests and proving lack of financial resources[151]. There are no provisions that would oblige the authorities to take into account the fact that the person is arrested or brought before a competent court in order to decide on detention. The standard set by Article 4 (4) of the Directive 2016/1919/EU is not met.

Only the merits test is applied in case of mandatory defence referred to in Article 2 (1) (b) of the Directive 2016/1919/EU. **The transposition of Article 4 (4) of the Directive 2016/1919/EU is thus indirect and partial – it is proper in relation to accused and suspects who are required to be assisted by the lawyer but has not been done in case of persons who have not yet been charged**.

7.1.3. Legal aid in EAW proceedings (Article 5)

The right to legal aid of the persons subject to proceedings for the execution of a European arrest warrant (hereinafter: requested persons) as required by the **Article 5 (1) of the Directive**

[151] That view is predominant in the legal doctrine. See Małgorzata Wąsek-Wiaderek, 'Aktywność obrońcy i pełnomocnika na etapie postępowania przejściowego' in Paweł Wiliński (ed), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach* (Wolters Kluwer 2015) 226, 227-228; Sławomir Steinborn,'Commentary to Article 72' in Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów* (2016) LEX < https://sip.lex.pl/#/commentary/587696233/493673/steinborn-slawomir-red-kodeks-postepowania-karnego-komentarz-do-wybranych-przepisow?cm=URELATIONS > (access 5 March 2021); Tomasz Grzegorczyk, 'Obrońca i pełnomocnik z urzędu w postępowaniu karnym po 1 lipca 2015 r., in Paweł Wiliński (ed), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach* (Wolters Kluwer 2015) 47, 49.

2016/1919/EU has been fully transposed. As provided in the landmark case of Polish Constitutional Tribunal, the persons subject to proceedings for the execution of a European arrest warrant fully enjoy the rights of the accused[152] which extends to the right to legal aid. This right has been additionally strengthened by separate provision obliging the authorities to inform the requested person of the right to legal aid (Article 607l § 4 CCP).

The Polish law does not contain any provision that would directly or indirectly refer to the situation described in **Article 5 (2) of the Directive 2016/1919/EU**. Bearing in mind the wording of recital 21 of the Directive, this provision entitles the requested person to achieve legal aid in both issuing and executing Member State. General rules apply which means that the requested person may apply for legal aid in Poland regardless whether it is the issuing or executing Member State. The fact that he or she has already been granted legal aid in another Member State is of no importance. It may be argued in the motion that the legal aid is necessary to ensure effective access to justice although no national provision explicitly refers to this premise. That leads to the conclusion that the provision **is indirectly transposed**[153].

7.1.4. Decisions regarding granting legal aid (Article 6)

Article 6 of the Directive 2016/1919/EU has been indirectly and partially transposed. The defence counsel is immediately appointed by the president of the court, the court or the court referendary (Article 81a § 2 CPP, Article 88 § 1 CCP). Moreover, Article 81a § 4 obliges the Minister to take into account the necessity of ensuring a correct course of proceedings, as well a correct realisation of the right to defence, while regulating the issue of access to legal aid in accelerated proceedings and for arrestees. The court's decision on granting the legal aid or refusing it, takes the form of an order which is served to the applicant, subject to interlocutory appeal heard by another

[152] Judgment of the Constitutional Court of 5 October 2010, SK 26/08, OTK-A 2010/8/73.
[153] See Michał Hara, 'Wpływ dyrektywy 2016/1919 na postępowanie dotyczące europejskiego nakazu aresztowania' (2018) 1-2 Kwartalnik o Prawach Człowieka 27.

panel of the same court (Articles 81 § 1 a, 93 § 2 and 100 § 4 CCP). However, the level of transposition of Article 6 is weakened by the already discussed Article 338a CCP which allows to postpone adjudication on a motion for legal aid in main proceedings until next court hearing ends. This provision prioritises efficiency of proceedings over the rights of defence.

7.1.5. Quality of legal aid services and training (Article 7)

According to **Article 7 (1-3) of the Directive 2016/1919/EU** Member States shall ensure that the legal system is effective, legal aid services are of sufficient quality and adequate training regarding the issue of legal aid is provided to both judiciary staff and counsels. **Neither of these provisions has been explicitly transposed**. Nevertheless, the system of legal aid may be assessed as generally effective. Only a barrister or an attorney-at-law[154] may become defence counsels in criminal proceedings (Article 82 § 1 CCP) and the court may appoint counsels only from such list (Article 81a § 1 CCP) which is annually provided to each court by the Regional Bar. This assures a desired standard of expertise by those providing legal aid. Nevertheless, the system is often criticised, as counsels providing legal aid upon the court's appointment are remunerated remarkably lower than the market prices for legal counselling and is paid only upon the finality of a judgment[155]. With regard to training, the institution responsible for training of the judges is the National School of Judiciary and Public Prosecution. In the training programme for future judges the issue of granting legal aid is separately mentioned only with regard to proceedings concerning minors. Barristers, attorneys-at-law and judges are all legally obliged to further training. Barristers and attorney-at-law have annual goals

[154] In Poland barristers and attorneys-at-law are separate legal professions. To become a barrister or an attorney-at-law, a law degree is necessary, as well as finishing a three-year traineeship and passing a professional exam is needed. Both barristers and attorneys-at-law are entitled to appear before courts, including criminal ones since 2015. The only difference is that attorneys-at-law can be employed as in-house lawyers whereas barristers are forbidden to conclude an employment contract.
[155] See e.g. Antoni Bojańczyk, 'Obrona na żądanie – czyżby jeszcze jeden krok w kierunku hipergwarancyjności procesu karnego?' (2015) 1-2 Palestra 197, 201.

to achieve in this respect. There is no accessible data on whether such training involves in a particular manner the issue of legal aid.

On the other hand, **Article 7 (4) of the Directive 2016/1919/EU has been indirectly and properly transposed**. Upon a justified request of the accused or the defence counsel, the court may appoint a new defence counsel to replace the former (Article 81 § 2 CCP).

7.1.6 Remedies (Article 8)

The transposition of Article 8 of the Directive 2016/1919/EU is indirect and only partial. The refusal to grant legal aid can be challenged by an interlocutory appeal heard by another panel of the court (Article 81 § 1a CCP). If during the course of proceedings, the court revokes the right to legal aid due to the change of circumstances, such decision is subject to interlocutory appeal also heard by another panel (Article 78 § 2 CCP). However, there is no provision obliging the investigating authorities to postpone a procedural action, i.e. interrogating witness, in order to wait for the appointment of a court appointed defence counsel. There is also no regulation that would allow the court to exclude the evidence obtained in violation during such period. This may lead to a breach of rights of suspects, accused persons and requested persons under the Directive 2016/1919/EU. In case of violating the right to legal aid otherwise than by refusing it or revoking a previously granted legal aid there is no specific remedy but the general remedies may be applied, e.g. by invoking the violation of the rights of defence and right to legal aid in the appeal against a judgment. Only if the defence was mandatory but no counsel took part in judicial proceedings it is expressly stated in Article 439 § 1 point 10 CCP that the judgment has to be *ex officio* quashed by the court of higher instance and the case send for retrial. The system of remedies shall thus be seen as incomplete.

7.1.7. Vulnerable persons (Article 9)

Lastly, it has to be noted that there is no provision in Polish CCP that ensures that particular needs of vulnerable suspects, accused persons and requested persons are taken into account. However,

it has to be noted that if the suspect or accused is underage, deaf, mute, blind or was insane at the time of committing an alleged offence or is unable to participate in proceedings or reasonably defend him – or herself, the assistance of the defence counsel is mandatory under Article 79 § 1 CCP. This means that if no counsel of one's own choice is appointed, the public defender will be appointed even if such request is not made by the party. In other situations that are not covered by Article 79 § 1 CCP taking into account particular needs of vulnerable persons depends solely on the approach of the investigating authorities.

11 Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial

11.1. Introduction

According to the official government position, the Directive 2016/343 is transposed to the Polish legal system[156]. The rights included in the Directive 2016/343 are guaranteed by the following legal acts: Prosecution Service Act; Act on the use of direct coercion measures and firearms[157]; Code of Criminal Procedure, Petty Offences Proceedings Code, Civil Code[158], Police Act, Criminal Code, Criminal Enforcement Code, Fiscal Code.

These conclusions were questioned by the Helsinki Foundation and JUSTICIA European Network[159] and the Polish Ombudsman[160]. Two major problems in the implementation process were identified. First, the Polish law is incompatible with the EU *in dubio pro reo* rule. Second, the right

[156] https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0343; (access 5 March 2021).
[157] Ustawa z dnia 24 maja 2013 r. o środkach przymusu bezpośredniego i broni palnej, (Dziennik Ustaw 2001, Nr 106, poz. 1148), *Act of 24 May 2013 of on measures of direct coercion and firearms.*
[158] *Ustawa z dnia 23 kwietnia 1964 - Kodeks cywilny,* (Dziennik Ustaw 2013), poz. 628; Act of 23 April 1964 – Civil Code.
[159] https://www.hfhr.pl/list-justicia-european-rights-network-ws-nowelizacji-kodeksu-postepowania-karnego/; https://www.hfhr.pl/wp-content/uploads/2019/08/Justicia-Pre-Trial-statement_EN.pdf (access 4 March 2021).
[160] https://www.rpo.gov.pl/pl/content/dyrektywa-niewinnosciowa-nadal-nie-wprowadzona-do-polskiego-prawa; https://monitorkonstytucyjny.eu/archiwa/7603 (access 4 March 2021).

of the accused to be present at trial is not sufficiently guaranteed. Despite that, the Ministry of Justice has recently informed that no legislative actions are intended as a response to identified shortcomings[161]. The implementation of the Directive 2016/343 was also criticized by the European Commission, however, on different grounds. On 18 February 2021, the Commission called on Poland, Finland and Estonia to eliminate the shortcomings related to public statements of guilt and the availability of appropriate remedies in such situations[162].

11.2. Presumption of innocence (Article 3 Directive 2016/343)

Right to be presumed innocent until proven guilty is a constitutional principle in Poland. According to Article 42 (3) of the Constitution everyone is presumed innocent until proven guilty by a final court judgement. This principle is repeated in Article 5 § 1 CCP, which provides that the accused is presumed to be innocent until his guilt is proven and affirmed by the final judgment of the court. A judgment becomes final, if there are no ordinary measures of appeal, e.g. when the judgment of a court of the first instance has not been appealed, the appeal has been withdrawn or the judgement has been delivered by a court of the second instance. Polish law is in this respect fully in compliance with Directive 2016/343.

11.3. Public references to guilt (Article 4 Directive 2016/343) and presentation of suspects and accused persons (Article 5 Directive 2016/343)

Assessment of transposition of Articles 4 and 5 Directive 2016/343 to Polish legal system is a difficult task. Polish law does not contain any explicit provision precluding statements implicating the guilt of suspect or accused person made by public authorities. However, presenting such an opinion during a criminal process may be considered as a reason to disqualify a judge (or investigating

[161] https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2018.10.2018_0.pdf (access 4 March 2021).
[162] https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441; (access 4 March 2021).

authority) as potentially biased on the basis of Article 41 § 1 CCP[163]. Premature attribution of guilt in decisions taken while the proceedings is ongoing (e.g. on detention on remand) are also treated as expression of potential bias and serve as basis for disqualification, depending however on their content and context of the case[164]. Judges should also be disqualified if they explicitly or implicitly prejudged the guilt of the suspect or accused in statements made publicly (e.g. for the press)[165]. The obligation to respect the presumption of innocence is applicable to all public authorities as well as the media. In the latter case Article 13(1) of the Press Law[166] provides that it is forbidden to express opinions in the press on the outcome of court proceedings before the decision at first instance. In case of public officials there is no similar provision. However, it is not questioned that public officials during their public statements are obliged to respect the presumption of innocence[167]. Public authorities may disclose to the public information about ongoing criminal proceedings. Only in case of prosecutors there is an explicit legal basis for such disclosure. In relation to other public bodies the right to inform about ongoing criminal proceedings should be treated as an emanation of the principle of transparency of public authorities' functioning. Article 12 (2) of the Prosecution Service Act provides that the Prosecutor General and heads of organisational units of the prosecution service may provide the media personally, or by authorising another prosecutor for this purpose, with information from the ongoing pre-trial proceedings or concerning the activities of the prosecution service, excluding classified information, having regard to an important public interest. However, it must be noted that decision to provide information to the media might be taken without consultation or consent of the prosecutor conducting investigation[168]. Taking into account that the Prosecutor General is also

[163] The Judgment of the Supreme Court of 16 January 2008, IV KK 392/07, LEX no. 346551.
[164] See: Wojciech Jasiński, *Bezstronność sądu i jej gwarancje w polskim procesie karnym* (Wolters Kluwer 2009) 328-333. See also: *Garycki v. Poland* app no. 14348/02 (ECtHR, February 6, 2007).
[165] Judgement of Court of Appeals in Rzeszów of 11 March 1994, II AKr 23/94, LEX nr 21259.
[166] *Ustawa z dnia 26 stycznia 1984 Prawo Prasowe* (Dziennik Ustaw 2018, poz. 1914), Act of 26 January 1984 Press Law.
[167] See facts of case *Garlicki v. Poland,* § 38-42. *Garlicki v. Poland* app no. 36921/07 (ECtHR June 14, 2011).
[168] Article 12 (3) Prosecution Service Act.

the Minister of Justice, who is an active politician, this provision offers no protection against instrumental use of the right to information for the ad hoc political aims of the governing majority[169]. According to a statement made by the Ministry of Justice and the Government, Poland has introduced legislation to ensure that the accused will be presented in court in accordance with the principles set out in Article 5 Directive 2016/343. The Government claims that the matter is covered by the Act on direct coercion measures and firearms. However, none of its provisions (or provisions of any other legal act) refer to public presentation of the accused in courtroom[170]. In practice, it is the responsibility of the adjudicating panel to adopt measures of security (e.g. handcuffs) in order not to stigmatise the accused. In the Communication to the Polish government dated 18 February 2021[171], the European Commission pointed out the lack of regulations implementing Article 5 Directive 2016/343. The government has not yet responded to the European Commission's objections.

11.4. Burden of proof (Article 6 Directive 2016/343)

The provision of Article 5 § 2 CCP provides that doubts which cannot be limited in the course of the proceedings shall be resolved in favour of the accused. The legal doctrine considers that the provision should be understood as referring to doubts which cannot be eliminated due to the objective reasons. It means that either the parties of the court *ex officio*[172] conducted all available evidence and that did not result in eliminating doubts as to the circumstances of the case. According to the Polish Ombudsman the current wording of Article 5 § 2 CCP is incompatible with Directive 2016/343 and

[169] See criticism in: Wojciech Jasiński, 'Transparentność działania prokuratury' in Michał Mistygacz (ed) *Konieczne i pożadane zmiany ustroju prokuratury w Polsce* (Difin 2020) 62-65. See also *Garlicki v. Poland* app no. 36921/07 (ECtHR June 14, 2011) for an example of well-known Polish case where the public statements of the Minister of Justice exceeded permissible limits.
[170] Although the Act on coercive measures and firearms defines rules for using handcuffs, batons, etc it does not cover that issue in relation to presentation of the accused in courtroom.
[171] https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441; (access 4 March 2021).
[172] Since Polish criminal procedure is based on the principle of substantial (material) truth (Article 2 § 2 CCP) the court is obliged clarify all circumstances of the case by conducting ex officio evidence, even if the parties, particularly the prosecutor, failed to do that (Article 366 § 1 CCP).

it is necessary to modify this provision[173]. However, taking into consideration the wording of recital 23 of the Directive 2016/343, it might be disputed whether, because of the difference in wording, Article 5 § 2 CCP is incompatible with Article 6 Directive 2016/343. The latter provision of the Directive 2016/343 is very general and should be interpreted in the context of general acceptance for the powers of the court to act ex officio as regulated in national law. The Polish law is in fact strict in defining doubts that may lead to acquittal, but obviously the aim of the Directive 2016/343 was not to allow any doubt whatsoever to be interpreted automatically in favour of the accused. In the Polish court's practice it can be noted that the Directive 2016/343 is referred to in the context of in dubio pro reo rule. In one of the judgments of the Court of Appeals in Wroclaw, it ruled that since the Directive 2016/343 provides that any doubt as to the question of guilt is to benefit the suspect or accused person the court is not obliged to verify whether they could be eliminated or not [174].

11.5. Right to remain silent and right not to incriminate oneself (Article 7 Directive 2016/343)

In the Code of Criminal Procedure, the right not to incriminate oneself and the right to remain silent in criminal proceedings are fully guaranteed to suspects and accused persons. He or she is informed about both these rights before the first interrogation in the investigation (Article 300 § 1

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173 https://www.rpo.gov.pl/pl/content/dyrektywa-niewinnosciowa-nadal-nie-wprowadzona-do-polskiego-prawa; https://monitorkonstytucyjny.eu/archiwa/7603 (access 5 March 2021).

174 The court noted "The Appeals Court indicated, that in accordance to the Article 6.2 of the Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, any doubts to the accused's guilt should be resolved in his favour, including the situation when the court decides whether to acquit a person. Not only those doubts which cannot be removed but all doubts to the accused guilt must be resolved in his or her favour. In accordance with the Article 6.1 of the Directive 2016/343, the burden of proof rests on the prosecutor (accusation) and his or her obligation is to eliminate any doubts to the accused guilt. This obligation of the prosecution does not exclude the possibility of taking evidence ex officio by the court (see: article 9 § 1 and article 167 CCP). The fact that the Directive 2016/343 has not been implemented into Polish law does not constitute an obstacle to its application in criminal proceedings. The need to apply the Directive and interpret the provisions of Polish law in accordance with its provisions results from the Article 91 section 2 of the Polish Constitution". See: the Judgment of the Court of Appeal in Wrocław of 15 May 2019, II AKa 131/19, LEX no. 2704602

CCP). Moreover, the presiding judge informs the accused of his or her right to refuse to give statements at the beginning of the trial[175].

However, similarly as in case of the right of access to a lawyer, the right to remain silent is not fully guaranteed to a person who is not officially charged with a crime[176]. Only a suspect who has been arrested is informed of the right "to make statements or to refuse to make statements". However, that formula is flawed because it does not emphasize right to silence and the arrestee is not explicitly informed about the consequences of making statements, which might be used against him[177]. A suspect who has not been arrested or officially notified about charges may be questioned as a witness. In such a case he or she is informed about the obligation to tell the truth and criminal liability for giving false testimony or concealing the truth (Article 233 § 1 of the CC). Suspect questioned as a witness is not informed explicitly about a right to silence, as in case of suspect who were officially charged. Instead, he or she is offered a right to refuse to answer a question if the answer could expose the witness or a next of kin to criminal responsibility. Giving false testimony, even motivated by fear of criminal liability is penalised (Article 233 § 1a CC).

Right not to incriminate oneself is not applicable to evidence which has an existence independent of the will of the suspect or accused person. He or she is obliged to submit to among others an external examination of the body, medical examination not infringing his or her bodily integrity, psychological and psychiatric tests as well as bodily examinations involving medical procedures, with the exception of surgical ones (Article 74 § 2 CCP)[178]. If the accused or suspect

[175] In accordance with Article 74 § 1 CCP, the accused is not obliged to prove his innocence or provide evidence to his disadvantage, and Article 175 § 1 CCP provides that the accused has the right to give statements; however, he or she may - without reasons - refuse to answer any questions or to give statements. A suspect and accused are informed of these rights (see: Articles 300 § 1, 386 § 1 CCP).
[176] See Sect. 5.3 (Intoduction).
[177] Dominika Czerniak and Wojciech Jasiński, 'Pouczenia osoby podejrzanej oraz podejrzanego o uprawnieniach i obowiązkach procesowych po nowelizacji Kodeksu postępowania karnego' (2015) 100 (2) Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 53, 59-60.
[178] Article 74 § 2. The accused is however obliged to submit to:
1) an external examination of the body and other tests not infringing his bodily integrity, in particular fingerprints and photographs of the accused may be taken to present the accused to other persons for the

refuses to cooperate, he or she may be arrested, as well as forced to fulfil any obligation prescribed by Article 74 § 2 CCP (Article 74 § 3a CCP).

Polish law fully guarantees that the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned. Although it is not expressly confirmed in any written provision of law, it is treated as an questionable principle in the legal doctrine[179] and in case-law[180].

In the Polish law, there is no provision allowing competent authorities not to interrogate a suspect, even in case of minor offences. In the investigation the charges has to be presented to the suspect and he or she has to be interrogated. It is impossible to bring a case before the court without fulfilling that condition.

According to Article 53 § 2 CC the behaviour of the defendant after the commission of a criminal offence, including a cooperative one, is taken into consideration by court when sentencing. Moreover, in the scope of plea bargaining alike procedures, the cooperative approach is also a factor influencing a decision on application of criminal sanctions. Although CCP does not provide for any fixed reductions of sentence in such situations, it is accepted that defendant's willingness to avoid full trial should be rewarded[181]. Nonetheless, there is no explicit guarantee that a reduction on

purposes of identification,
2) psychological and psychiatric tests and bodily examinations involving treatment, with the exception of surgical procedures, provided that they are carried out by an authorised health service employee in accordance with medical principles and without risk to the health of the accused and that such examinations are necessary; in particular, if the above conditions are fulfilled, the accused subjects himself to the collection of blood, hair and bodily secretions, subject to point 3,
3) collection by a Police official of a buccal mucosa smear, if it is indispensable and does not pose a threat to the heath of the accused or other people.

[179] See e.g. Jerzy Skorupka in Jerzy Skorupka (ed.), *Proces karny*, (Wolters Kluwer 2020) 219.

[180] The Judgment of the Supreme Court of 25 April 2019 r., II KK 214/18, LEX no. 2650222.

[181] Wojciech Jasiński, 'Porozumienia procesowe w znowelizowanym kodeksie postępowania karnego', (2014) Prokuratura i Prawo 10 23-26.

sentence will be applied in practice. It is therefore a matter of how the bargaining process will look like in each case.

11.6. Right to be present at the trial (Article 8 Directive 2016/343)

The accused has a right to be present at trial before first and second instance court (Articles 374 § 1, 451 CCP). He or she is informed about detailed rules related to participation at trial twice. First instruction takes place before the trial begins, when a copy of the act of indictment is delivered to the accused (Article 338 § 1a CCP). Instruction is provided to the accused for the second time when a notification of the date of the first hearing is served to him or her (Article 353 § 4 CCP). Such a notification has to be delivered to the accused personally (Article 132 § 4 CCP), unless he or she is absent under given address. In that case the accused is informed of a failure to deliver a notification and is obliged to collect it in 14 days time. Non-appearance of the accused, if correctly notified of the date of the trial, does not prevent the case from being heard and the judgment from being given. The defendant is informed about the possibility of concluding the case in his or her absence (Article 353 § 4 CCP). An accused, who is deprived of liberty, may request to be brought to the court hearing within 7 days from the date of delivery of the notice of the date of the trial. In accordance with Article 353 § 3 CCP, he or she should be informed of above-mentioned right to request to bring him or her to the trial. These general provisions of Polish law are fully in compliance with Article 8(1-3) Directive 2016/343. However, amendments to the Code of Criminal Procedure introduced in 2019[182] allowed exceptionally for conducting a trial (and taking evidence) in the absence of the accused or his or her lawyer, even if it is justified (article 117 § 3a and 378a CCP). According to article 378a § 3 and 5 CCP, if the court has taken evidence in the absence of the accused or his defence counsel, they are entitled to submit a motion for retaking evidence presented *in absentia*. However, that

[182] *Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw,* (Dziennik Ustaw 2019, poz. 1694), Act of 19 July 2019 on amending the Act - Code of Criminal Procedure and some other acts.

remedy is not effective. For the request to be granted, the applicant has to prove that the way in which the evidence was taken violated his or her right to defence. However, the sole and crucial fact that the proceedings was conducted in absentia, regardless of justified reasons, cannot serve as a ground for retaking evidence. In the explanatory memorandum to the draft law amending CCP, the importance of concluding the case in reasonable time and taking necessary measures to prevent the accused from obstructing the proceedings was emphasized as rationales for introducing the discussed provision[183]. It should however be emphasised that quick conclusion of trial should not be achieved at the cost of sacrificing procedural fairness. In conclusion, the overall assessment of transposition of the accused's right to be present at trial into Polish law is negative, since it allows the trial *in absentia* even in cases where the accused is willing to appear in courtroom.

11.7. Right to a new trial (Article 9 Directive 2016/343)

If the defendant did not know that there were criminal proceedings against him or her, he or she has the right to apply for reopening of the proceedings. According to Article 540b § 1 CCP judicial proceedings concluded with a final and binding court judgment may be reopened at the request of the accused, submitted within one month from the day on which he or she learns of the judgment issued against him, if the case was heard in the absence of the accused, who was not served a notification of the date of the hearing, or such a notification was not served on him personally and he or she is able to prove that he or she was not aware of the date and the possibility of a judgment being delivered in his absence. The Article 9 of the Directive 2016/343/EU has been fully implemented.

11.8. Remedies (Article 10)

[183] Explanatory memorandum to the government bill to amend the act - Code of Criminal Procedure and certain other acts, druk sejmowy 3251, 45-46; http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3251, (access 5 March 2021).

The Directive 2016/343 does not indicate what specific remedies should be introduced in the domestic legal system. The only explicit condition is that these measures must be effective. Depending on which right of the Directive 2016/343/EU has been breached, the accused is given several remedies. In case of infringements of the rights of Article 4 and 5 Directive 2016/343, a person whose presumption of innocence was breached can lodge a private accusation before criminal court (see Article 487 CCP) for slander (Article 212 Criminal Code) or insult (Article 206 Criminal Court) Moreover a civil action for violation of personal interests of a human being (Article 23 and 24 of the Civil Code) could be brought before the court[184]. The breach of the presumption of innocence can also serve as a ground for disqualifying a judge or investigating authority (Article 41 CCP). Breaches of the right not to incriminate oneself (Article 7) result in exclusion of evidence obtained in that way. Under Article 171 § 7 CCP depositions made in circumstances precluding uncoerced expression or obtained by prohibited methods of interrogation[185] are inadmissible. Also, where the suspect (accused person) has not been informed of his right to remain silent (Article 175 § 1 CCP), his depositions are according to Article 16 § 1 CCP[186] excluded.

In case of the right to participate at trial (Article 8) there are several remedies available. Failure to bring an accused person deprived of liberty to trial, despite his or her request, is a serious infringement of the right of defence and may be a ground for appeal if it affected the outcome of the trial. (Article 438 point 2 CCP). Therefore, depending on the circumstances of the case, the judgment may be corrected or reversed, and the case referred for retrial[187]. In case an accused person was not duly informed about the date and place of the trial and did not participate in it, he or she can demand

[184] See: the Judgment of the Court of Appeal in Warsaw of 16 November 2017, V ACa 177/17, LEX no 2418153.
[185] Article 171 § 5 CCP states that it is prohibited to: 1) influence the statements of the testifying person by means of force or illicit threat, 2) use hypnosis, chemical substances or technical means in order to influence psychical processes in the body of the testifying person or allow control of the unconscious reactions of the body in connection with the examination.
[186] Article 16 § 1 CCP provides that lack or flawed instruction on the rights and duties of among others suspect and accused person results may not result in any adverse consequences to that person.
[187] The Judgment of the Supreme Court of 31 October 2016, IV KK 175/16, LEX no. 2151439.

retrial (in part in which he or she could not participate). However, there are no remedies allowing retrial if the evidence was presented in the justified absence of the accused and his defence counsel (Article 378a CCP)[188]. The lawmaker has established that taking evidence in such a situation does not prejudice the rights of the defence, unless the way in which the evidence was taken was prejudicial. Polish CCP thus reverses the principle established by the Directive 2016/343 and the ECtHR case law that the accused person willing to participate at trial should be given that opportunity and permissible limitations should not exceedingly restrict the right of defence[189].

12. Concluding remarks

Directive 2010/64/EU

The right to translation and interpretation, being the core right in the Directive 2010/64/EU, is only partially transposed to Polish law. According to the Polish CCP this right is granted exclusively to the suspect as defined in that legal act. This definition, however, is narrower than the one adopted in the EU law. In consequence, suspects who were not officially charged according to domestic provisions cannot fully enjoy the right to translation and interpretation guaranteed by the Directive. It is possible only to a limited extent, on the basis of general provisions referring to need for interpretation of interrogation and translation of documents in the course of proceedings.

The transposition of the right to interpretation is also flawed, because of the absence of procedure of ascertaining the capacity of the suspect or accused person to speak and understand the language of proceedings as well as lack of specific measure allowing to challenge the quality of interpretation. In addition, the wording of the relevant provisions of the CCP do not expressly secure the right to interpretation for persons with hearing or speech impediments. The implementation of the

[188] See 2.6.
[189] „In the light of the Strasbourg standard, it is already unacceptable to reverse the burden of proving a breach of the rights of defence to the accused or his defence counsel"; Barbara Nita – Światłowska, Wojciech Hermeliński, 'Orzekanie pod nieobecność oskarżonego a przepisy rangi ponadustawowej', (2019) Palestra 9 31.

right to interpreter's assistance in communication between suspected or accused persons and their legal counsel is also deficient, because the respective provisions do not offer any guidance on how to apply and obtain such assistance.

The right to translation is not fully transposed to Polish legal system. Contrary to the Directive provisions Polish CCP does not guarantee that the suspect or accused is served with a written translation of the appeal court's decision to uphold a pretrial detention order, which is undoubtedly a decision depriving a person of his liberty covered by Article 3(2) Directive 2010/64/EU. Similarly as in case of right to interpretation, there is no special procedure allowing to challenge the refusal of translation or its quality.

The right to translation and interpretation is fully guaranteed in the EAW procedure.

The quality of interpretation is guaranteed at the domestic level mostly by the statutory provisions establishing professional requirements for sworn translators and interpreters. Nonetheless, in criminal proceedings a translation or interpretation can also be done by the *ad hoc* translators and interpreters. In that case, there is no formal mechanism of verifying their professional skills.

Directive 2012/13/EU

The right to information about basic procedural rights provided by the Directive 2012/13/EU is fully implemented in Polish law. However, it is debatable whether the information given to suspects and accused persons is simple and accessible language, as the Letter of Rights mainly restate the wording of relevant provisions of the CCP. Moreover, there is no provision in Polish law that directly guarantees that the particular needs of vulnerable suspects or vulnerable accused persons will be taken under consideration.

Right to information in case of arrest or detention is also almost fully implemented in Polish law. The notification about the right to legal aid and the conditions for obtaining it as well as the right to access the case file are, however, missing. The transposition of the Directive 2012/13/EU is full in relation to Letter of Rights handed to a person arrested or detained for the purpose of executing EAW.

The right to information about the accusation is also fully transposed to Polish legal system.

The right that has not been implemented correctly is the right of access to case file. The transposition is insufficient in relation to arrestee and detained person during investigation, because the relevant CCP's provisions allow the prosecutor or other investigating authority to deny access to documents essential to challenging the lawfulness of the arrest or detention. Moreover, there is also no judicial review over decisions to refuse access to case file issued by Police or other investigating authority.

Directive 2016/343

The presumption of innocence regulated in Article 2 Directive 2016/343 is fully guaranteed in Polish law. There are also several mechanisms in Polish law preventing public officials from claiming guilt of persons not convicted by the court (in judicial decisions or public statements). However, the appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint, has not been introduced.

The transposition of the burden of proof provision is controversial. Polish law clearly states that the burden of proof is on the prosecutor, but at the same time CCP provisions allows in the vast majority of criminal cases for the absence of prosecutor at trial. In such situations the burden of proof is *de facto* shifted on court, which might be perceived as contrary to Article 6(1) Directive 2016/343. Moreover, Polish law is not compatible with the EU *in dubio pro reo* rule provided in Article 6(2) Directive 2016/343.

The right to remain silent and right not to incriminate oneself is also not fully transposed. That is due to the structural problem with the divergence in understanding of the word 'suspect' in the EU and Polish law. As a result, the right to remain silent and right not to incriminate oneself are not fully guaranteed to suspects to whom charges were not officially presented.

Until recently, the right to be present at trial was fully transposed to Polish legal system. However, in the end of 2019 r. the amendment to the CCP introduced a possibility of conducting trial during a justified absence of an accused willing to participate at court hearing. In consequence, the accused person's presence at trial is not fully safeguarded by domestic provisions. On the opposite, the right to a new trial guaranteed in Article 9 Directive 2016/343, as well as right to effective remedy regulated in Article 10 Directive 2016/343 are fully implemented in Polish law.

Directive 2016/800

Although the draft law transposing the Directive 2016/800 had been proposed by the government, it was not so far enacted. As a consequence Polish law is in compliance with the Directive 2016/800 only to a limited extent the existing provisions either directly or indirectly refer to the special needs of suspects and accused persons under 18 years old. The core rights provided by the Directive, however, are not implemented or at least not fully implemented.

In case of right to information the transposition is seriously flawed. The Letter of Rights handed to children suspected or accused of committing criminal offence lacks all specific information enlisted in Article 4 Directive 2016/800 designed to offer them enhanced protection based on their vulnerability. The same conclusion should be reached in regard of the right to information of the holder of parental responsibility. The children who are suspects or accused persons in criminal proceedings are also not offered effective right of access to a lawyer and right to legal aid. That, however, is a side-effect of flawed transposition of Directive 2013/48/EU and Directive 2016/1919. A very important tool aiming at identifying special needs of suspects and accused persons under 18 years old – right to an individual assessment – is also not fully implemented to Polish law. The same conclusion refers to right to medical examination. The Polish CCP does not also provide for audiovisual recording of questioning of children suspected or accused of committing criminal offence. Decision on that point is left to a complete discretion of criminal justice bodies. Other aspects related to the protection of privacy are also not implemented in a satisfactory way. Additionally,

deficiencies could be identified in case of specific provisions related to deprivation of liberty of children. Although Polish law acknowledges the rule that detention is an *ultima ratio* (albeit in general and without any special emphasis on situation of persons under 18 years old), the specific rules on treatment pending deprivation of liberty are insufficient from the perspective of Directive 2016/800 standards. Another important lacuna is related to only partial de facto implementation of the right of the child to be accompanied by the holder of parental responsibility during the proceedings. The situation looks better in case of right to be present in the course of proceedings. However, even in that case, the implementation is not full.

Directive 2013/48

The transposition of the Directive 2013/48/EU into the Polish legal system is seriously flawed. The most important deficiency is related to the fact, that the suspects to whom charges were not officially presented are not offered a right of access to lawyer to the extent provided in the Directive 2013/48/EU. The right to contact a lawyer before the first interrogation is also not fully guaranteed in the Polish CCP. In addition, the privileged lawyer-client communication is not sufficiently protected, because during the first fourteen days of detention a prosecutor may decide that it is supervised. The additional rights guaranteed in the Directive 2013/48/EU are correctly transposed. That refers to the right to have a third person informed of the deprivation of liberty, the right to communicate with consular authorities as well as the right to communicate, while deprived of liberty, with third persons. Nonetheless in the latter case it might be questioned whether the implementation is full, since there are no domestic provisions related to the communication with third persons of the arrestee.

As opposed to right of access to lawyer in domestic criminal proceedings, the same right is more accessible in the EAW proceedings. In that case, however, there are also deficiencies related to access to lawyer before the first interrogation in EAW procedure, insufficient protection of the

confidentiality of lawyer-client communication and lack of provisions regarding dual legal representation.

Directive 2016/1919

Accordingly, as in case of Directive 2013/48/EU, the transposition of Directive 2016/1919 into the Polish legal system must be evaluated as flawed, because **the suspects to whom charges were not officially presented are not offered a right to legal aid to the extent provided in the EU law**. Moreover, there is no provisions in Polish law that guarantee free communication of the suspect with his or her lawyer before interrogation and postponement any procedural action until legal aid is granted. The transposition of right to legal aid is better in case of EAW proceedings. In that respect, legal aid is secured for all persons subject to surrender. However, assistance of a lawyer faces similar challenges as mentioned in case of Directive 2013/48/EU. There are deficiencies related to access to lawyer before the first interrogation in EAW procedure and protection of the confidentiality of lawyer-client communication.

The Directive 2016/1919 obliges the Member states to organise an effective legal aid system and guarantee that legal aid services are of sufficient quality Neither of these provisions has been explicitly transposed to Polish law. Taking into account the low remuneration paid to *ex officio* lawyers, as well as lack of any dedicated procedures allowing to verify the quality of legal aid, the transposition of these requirements seems deficient. That, of course, does not need to mean that the legal aid services themselves function ineffectively. But there is no national mechanism to verify that issue.

Polish law offers a possibility to challenge the refusal to grant legal aid. However as mentioned above, there is no obligation to postpone procedural acts (e.g. interrogation) for the time the ex officio lawyer will be appointed, as well as for example exclude evidence obtained before ex officio lawyer was appointed. To that extent Article 8 Directive 2016/1919 referring to obligation of

Member states to offer effective remedies for the breach of rights guaranteed by the Directive 2016/1919 has not been implemented in the domestic legal order.

The Directive 2016/1919 has not been also transposed in part referring to the need to take into account particular needs of vulnerable suspects, accused persons and requested persons. It should be noticed that Polish law provides for mandatory defence if the suspect or accused is under 18 years old, deaf, mute, blind or suffered mental disorder at the time of committing an alleged offence as well as is unable to participate in proceedings or reasonably defend himself of herself. However, apart from these situations the special needs of vulnerable suspects, accused persons and requested persons are not anyhow formally recognised.