COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

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Mr
Didier Reynders
European Commission
DG Justice and Consumers
cab-reynders-contact@ec.europa.eu

Dear Commissioner Reynders,

It is my duty, as Commissioner for Human Rights of the Republic of Poland, to safeguard the human rights and freedoms set out in the Constitution of the Republic of Poland and other acts of law[1]. The latter certainly includes secondary legislation of the European Union.

In the course of my duties I found that Polish national legislation does not meet the requirements of binding provisions of European directives setting minimum standards of procedural rights of suspected and accused persons in criminal proceedings, adopted in the course of the realisation of the Roadmap on procedural rights of 2009[2].

This failure to meet the required standard occurs in particular with respect to three acts of EU secondary legislation:

- directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and

[1] Article 2(1) of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws of 2020, item 627).
[2] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ of 4 December 2009, Series C no. 295, p. 1.

to communicate with third persons and with consular authorities while deprived of liberty[3] (hereinafter: directive 2013/48);

- directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[4] (hereinafter: directive 2016/1919);

- directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[5] (hereinafter: directive 2012/13).

The deadline for transposition of all three abovementioned directives has already elapsed, respectively, on 27 November 2016 (directive 2013/48), 25 May 2019 (directive 2016/1919) and 2 June 2014 (directive 2012/13).

1. Incompatibility of Polish law with directive 2013/48.

Article 3 of directive 2013/48 sets out the scope of the right of access to a lawyer[6] in criminal proceedings. It is further clarified in recitals 22 – 27 of the preamble. They provide, *inter alia*, that the right of access to a lawyer should take effect without undue delay, in particular before the commencement of a questioning, certain other investigative or evidence-gathering acts, as well as without undue delay after deprivation of liberty. The lawyer has to be able to effectively participate in the course of activities undertaken with the accused or suspected person. Furthermore, Article 4 provides for confidentiality of communication between suspects or accused persons and their lawyer, allowing no exceptions to this principle.

[3] OJ of 6 November 2013, Series L no. 294, p. 1.
[4] OJ of 4 November 2016, Series L no. 297, p. 1.
[5] OJ of 1 June 2012, Series L no. 142, p. 1.
[6] This letter uses the term "lawyer" in the same sense as directive 2013/48, i.e. to mean any person who is qualified and entitled to provide legal advice and assistance to suspects or accused persons (recital 15).

Despite a formal declaration constituting a footnote to the act's title[7], the Polish Act of 6 June 1997 – Criminal Procedure Code[8] (hereinafter: CPC), which regulates issues connected with access to a lawyer, does not give full effect to the rights enshrined in directive 2013/48.

To begin with, it is important to point out an important difference between directive 2013/48 and Polish law with respect to the scope of the terms "suspected person" and "accused person". In accordance with Article 2(1) of directive 2013/48, the directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. In certain situations this will include persons who have a procedural status of "suspicious person" within the meaning of the CPC. Such a person is not yet "accused" (they have not been presented with formal charges), however they are the target of actions undertaken by the prosecution which aim to eventually charge them with an offence. In this context, one must take into account that in light of the case-law of Poland's Constitutional Court, a suspicious person has the right to defence enshrined in Article 42(2) of the Constitution. The Constitutional Court agreed with the Supreme Court, that "not the formal pronouncement of charges, but rather the very first act of the authorities aiming to eventually prosecute a given person, grants such person the right to defence"[9].

Considering the above and the wording of Article 3 of directive 2013/48, it follows that on the basis of the Polish criminal procedure, the right of access to a lawyer should be available to the following persons, as soon as they attain any one of these procedural roles (Article 3(2) of directive 2013/48):

1) accused person (Article 72 § 1 CPC);
2) suspected person questioned in the role of a suspect (Article 71 § 2, Article 301 and Article 313 CPC), presented in an identity parade (Article 74 § 2 item 1 CPC) or

[7] „The present act implements the provisions of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294 of 06.11.2013, p. 1) and Directive (EU) 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 (OJ L 65 of 11.03.2016, p.1)".
[8] Journal of Laws of 2021, item 534.
[9] Judgment of the Constitutional Court of 11 December 2012, K 37/11, OTK-A 2012, no 11, item 133 – pt. III.2.3 of the justification; resolution of the Supreme Court of 26 April 2007, I KZP 4/07, OSNKW 2007, issue 6, item 45. See also: resolution of the Supreme Court of 20 September 2007, I KZP 26/07, OSNKW 2007, issue 10, item 71.

participating in an examination or reconstruction of a crime scene (Article 316 § 1 and 2, Article 317 CPC);

3) suspected person who has been deprived of liberty in connection with an alleged offence, e.g. arrested or put in pre-trial detention (Article 245 § 1, Article 249 § 5 CPC);
4) suspicious person who has been arrested (Article 244, Article 247 CPC);
5) suspicious person presented in an identity parade Article 74 § 3 in conjunction with § 2 item 1 CPC) or participating in an examination or reconstruction of a crime scene.

In this context it is crucial that Articles 3(2)(a) and 3(3)(a) of directive 2013/48 expressly state that the right to meet a lawyer and obtain legal advice is to be guaranteed before the first questioning, whether it is conducted by the Police, or another law enforcement or judicial authority.

The Polish legal provisions however provide for no such right. Article 313 § 1 CPC requires that the suspected person be questioned immediately after the decision on charges is drafted and pronounced to that person. Article 301 CPC does state that "at the suspected person's demand, they shall be questioned with the participation of an appointed defence counsel", this provision however does not safeguard the possibility to exercise the right of access to a lawyer to the full extent guaranteed by directive 2013/48.

Firstly, the aforementioned provision only applies to a defence counsel who has been previously appointed, i.e. a lawyer whom the suspected person (or, in certain circumstances – another person) has already granted authorisation to represent them in a given criminal case. It, therefore, does not apply to a person who would wish to appoint a defence counsel and obtain legal advice upon learning that they have been charged with an offence. This could be the case, for example, if a person was summoned to be questioned as a witness but in the course of the questioning, the law enforcement authority suspect that they may have committed an offence and decide to question them again, this time as a suspected person.

Secondly, the second sentence of Article 301 indicates that "Non-appearance of the defence counsel is not an obstacle to the questioning". If a defence counsel was previously appointed, the law enforcement authority is obliged to summon him but the legal provisions do not prohibit them from commencing the questioning before the arrival of the counsel; to

the contrary - this is expressly permitted by law. There is not even a minimum period of time which the law enforcement authority should grant the counsel to arrive.

Thirdly, even if a defence counsel is present, the law enforcement authorities are not required to allow the suspected person any time to consult with the lawyer, instead they can commence the questioning immediately. As such, the requirements of Article 3(3)(a) of directive 2013/48, which clearly states that the suspected person has the right to meet in private (i.e. without the participation of representatives of the Police or other authorities) and communicate with the lawyer representing them, including prior to questioning, are not observed.

The right of access to a lawyer "before the questioning" is therefore completely illusory, depending wholly on the good will of the particular law enforcement authority, who, by dint of their very role in criminal proceedings, are not after all interested in the suspected or accused person being able to mount a successful defence.

Similarly, the legal regime concerning confidentiality of communicating with a lawyer has been set up without any regard to the requirements of directive 2013/48. A suspected or accused person who has not been arrested is, as a rule, free to contact his lawyer any way they choose, albeit with the reservations made above concerning the possibility to consult with the lawyer before a questioning. However, if the suspected or accused person is deprived of liberty, the confidentiality principle is severely limited.

Article 245 § 1 CPC states that "an arrested person, if they so demand, has the right to contact a lawyer without undue delay, including the possibililty to talk with the lawyer in person", however that same provision also immediately states that "in specific cases, justified by particular circumstances, the authority making the arrest may require that they be present during any such talks". Similarly, Article 73 § 2 – 4 CPC applicable to a suspected person placed in pre-trial detention provide that a public prosecutor may stipulate that they or a person authorised by them, be present during any talks between the suspected person and their lawyer, as well as review any correspondence exchanged between them, during the period of 14 days from the imposition of pre-trial detention. Both Article 245 § 1 and Article 73 § 2 and 3 CPC indicate that such infringements of confidentiality may be exercised "in specific cases, justified by particular circumstances" and "in particularly justified cases" respectively.

Such general restrictions, however, serve as no guarantees to the suspected person as they are so vague that indeed any case, as freely chosen by the public prosecutor, may be deemed "particularly justified". National provisions make no reference to the specific exceptions to the confidentiality principle mentioned in recitals 33 and 34 of directive 2013/48, instead they introduce exceptions of a general, blanket nature. The legal norms provide no limitations as to how often and in what types of cases such infringements of confidentiality can be made – once again the suspected person is solely at the whim and good will of a particular representative of law enforcement authorities.

It must be stressed that the infringements of the confidentiality principle allowed by Article 245 § 1 and Article 73 § 2 and 3 CPC are not subject to any appeal. This fact is particularly material in the light of the position of Poland's Minister of Justice who maintains that the abovementioned infringements are justified by Article 3(6) of directive 2013/48, claiming that if it allows for temporary derogations from the application of the right of access to a lawyer in general, it even more so allows for derogations from application of certain aspects of this right, in this case – confidentiality. However, this argumentation completely disregards the provisions of Article 8 of directive 2013/48 which expressly requires that any derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. In the case of the aforementioned infringements of confidentiality, no judicial review whatsoever is provided for, neither is there any obligation to provide the suspected person with any justification for why they are applied.

Lastly, the information requirements pertaining to the concept of "double defence" in European Arrest Warrant cases are not implemented properly. Article 10(4) of directive 2013/48 clearly indicates that the executing Member State has the obligation to inform the requested person that they have the right to appoint a lawyer in the issuing Member State. Article 607l § 4 CPC however only provides for a general obligation to inform the requested person of the right to appoint a defence counsel which must be interpreted as legal assistance by a lawyer in Poland as the executing Member State. One must keep in mind that the lawyer acting in the issuing Member State has a very specific role, which is to assist the lawyer acting in the executing Member State, as foreseen by Article 10(4) of directive 2013/48 itself. It is a

role separate to the defence counsel acting in the executing Member State and as such is not covered by the obligation to inform the requested person. Neither does the Ordinance of the Minister of Justice introducing a template of a notice of rights and obligations for a requested person[10] make any reference whatsoever to the right to appoint a lawyer in the issuing Member State.

2. Incompatibility of Polish law with directive 2016/1919.

Directive 2016/1919 was meant to complement the system introduced by directive 2013/48 by providing for a concept of legal aid, in addition to legal assistance. According to Article 3 of directive 2016/1919, legal aid means "funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer". As such, the principal role of directive 2016/1919 is to ensure that the rights set out in directive 2013/48 are available also to suspected and accused persons who do not retain their own chosen defence counsel (Article 2(1) and recital 1 of directive 2016/1919).

All the aforementioned shortcomings in the implementation of directive 2013/48 therefore also influence the assessment of whether directive 2016/1919 was properly implemented. This applies in particular to the issue of confidentiality of communication with a lawyer appointed under legal aid and the availability of legal aid before the first questioning. However, further provisions of directive 2016/1919 are also not implemented properly into Polish national law.

According to Article 78 § 1 CPC, a suspected person who does not retain a chosen defence counsel may demand that one be appointed for them under legal aid, if they demonstrate in an appropriate fashion that they are unable to bear the costs of legal representation without detriment to the necessary upkeep of themselves or their next of kin. Polish law, then, employs the concept of a "means test" as mentioned in Article 4(3) of directive 2016/1919. Article 81 § 1 CPC stipulates further that a defence counsel under legal aid is appointed by the president of the court or a court clerk (*referendary*) at the court competent to hear the case.

[10] Ordinance of the Minister of Justice of 11 June 2015 on the template of a notice of rights of a person arrested on the basis of an European Arrest Warrant (Journal of Laws item 874).

However, no provision of the CPC provides for any deadline or time limit to consider the request for granting legal aid. Article 81a § 2 CPC states only that it should be done "without undue delay". In practice however, considering the request may take several days or even, in some cases, several weeks, in particular if there is need to correct formal deficiencies of the request by presenting evidence that the suspected person is indeed unable to bear the costs of legal representation. In the meantime, there is nothing in the law preventing law enforcement authorities form carrying out procedural acts with a suspected person deprived of liberty, including questioning them or conducting investigative or evidence-gathering acts (such as those mentioned in Article 2(1)(c) of directive 2016/1919).

This is in stark contrast to Article 4(5) of directive 2016/1919 which expressly states that legal aid must be granted at the latest before questioning or before the investigative or evidence-gathering acts referred to in point (c) of Article 2(1) are carried out. No such mechanism is provided for by Polish national law. To the contrary, it is common practice by law enforcement authorities to take the request for legal aid from the suspected person, forward it to an appropriate court and then immediately commence the questioning.

As to the time of granting legal aid, the incompatibility of Polish provisions with EU secondary law is twofold. Firstly, contrary to the provisions of directive 2016/1919, there is no obligation to consider the request for legal aid before the questioning or carrying out of other investigative or evidence-gathering acts. Secondly, even if a lawyer under legal aid is eventually appointed, it is still possible to conduct the questioning without his participation and without allowing the suspected person to confer with such lawyer beforehand, as was already explained in relation to directive 2013/48.

A Member State is well within its rights to have a "merits test". If a state avails itself to that option however, it is required to introduce an appropriate legal and organisational framework to ensure that legal aid can be granted in the timeframe set out in Article 4(5) of directive 2016/1919. If, due to certain circumstances, this is unfeasible, the given Member State might introduce an alternative system, e.g. provisional legal aid, financed by the state

and applicable until the eventual decision on granting regular legal aid (recital 19 of directive 2016/1919)[11]. Poland, however, decided to introduce no such alternative system.

In this context one cannot fail to address the contents of the official notice for a suspected person, as determined by the Minister of Justice[12]. According to it, the request for appointment of a lawyer under legal aid is to be filed within 7 days after an indictment is lodged with a court. The notice completely ignores the pre-trial stage of proceedings. A suspected person receiving such a notice may easily get the impression that in pre-trial proceedings they have no possibility to request a lawyer under legal aid at all. Instead, the notice should indicate that the right to legal aid kicks in without undue delay after deprivation of liberty, including at the pre-trial stage, and the decision whether to grant legal aid should be taken before the questioning, in accordance with directive 2016/1919. Despite interventions I have addressed to the Minister of Justice in this regard[13], the content of the official notice was not amended. I am therefore forced to conclude that the current notice which misinforms the suspected person as to the actual scope of his right to legal aid is endorsed by the Minister of Justice.

Finally, the provisions of directive 2016/1919 pertaining to "double defence" in European Arrest Warrant cases have not been implemented at all. Despite an express requirement in Article 5(2) of directive 2016/1919 that the issuing Member State guarantee that the requested person have the right to apply for legal aid in that state, there is no legal basis whatsoever in the Polish law to facilitate that. Whereas in the case of legal assistance (as provided for by directive 2013/48) one can assume that a lack of regulation is simply no obstacle for the suspected person to retain a lawyer in the issuing state, in the case of legal aid, there must be an express legal basis for the authorities to be able to consider requests for granting a lawyer. While the final part of Article 5(2) of directive 2016/1919 does allow for some leeway for Member States to regulate under what circumstances legal aid is necessary in EAW proceedings, it cannot serve as justification to refrain from allowing such possibility altogether.

3. Incompatibility of Polish law with directive 2012/13.

[11] Incidentally, this was the system originally proposed by the European Commission in the draft directive.
[12] Ordinance of the Minister of Justice of 14 September 2020 on the template of a notice on the rights and obligations of a suspected person in criminal proceeding (Journal of Laws item 1618).
[13] Addresses dated 6 November 2019 and 24 June 2020 (II.5150.5.2019).

Relating to directive 2012/13, one must indicate a significant gap in the implementation pertaining to the situation of a person who was arrested but ultimately not charged with a criminal offence and, as a result, released. Such a person has the *prima facie* right to file a complaint against the arrest, demanding that the legality, validity and reasonability of the arrest be examined (Article 246 § 1 CPC). Nevertheless, lodging a successful complaint may face significant difficulties if the arrested person does not even know the motives behind the arrest or other circumstances pertaining to them which are contained in the case file. There is no provision which would grant such arrested person the right to examine the case file. Article 156 § 5 CPC states that the case file can be made available to parties to the proceedings, defence counsels, attorneys and statutory representatives. An arrested person, who was subsequently released without being charged, does not become a suspected person in the given case and therefore does not become a party to the proceedings. As such, there is no legal basis to grant them access to the case file.

This is in contrast to Article 7(1) of directive 2012/13 which clearly states that where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. The provisions of Polish national law do not fulfil this obligation.

It must be stressed that while Articles 1 and 2(1) of directive 2012/13 indicate that the directive applies to "suspects or accused persons" and a person who is arrested and then released without charges does not formally become a "suspect" within the meaning of Polish national law, the terms used in the directive should be interpreted autonomically and thus should encompass the "suspicious person", i.e. someone who has not been formally charged with an offence but who is being investigated by law enforcement as someone who might have committed a criminal offence (which is in itself a prerequisite to arrest them in the first place, as provided for by Article 244 § 1 CPC). This would be consistent with the argumentation pertaining to the scope of directive 2013/48 outlined above, as well as with recital 21 of directive 2012/13.

An arrested person, who is subsequently released without charges, should therefore have access to the case file, since it is the only way they can fully exercise their right to challenge the arrest. The lack of such possibility constitutes another instance of incompatibility of Polish national legislation with the requirements of secondary EU legislation.

4. Concluding remarks.

I would like to stress that many of the aforementioned instances of faulty implementation of directives on procedural rights in criminal proceedings have already been brought by me, on numerous occasions, to the attention of Polish authorities, in particular the Minister of Justice[14], whose scope of competence includes these matters, and the Prime Minister of Poland[15]. However, I only received token replies stating that the Minister of Justice does not share my concerns and that EU directives have been implemented properly.

In light of the above, being unable to take any further binding internal legal action, in particular due to the fact that there is no longer an independent Constitutional Court which could rule on any incompatibilities of national legislation with binding EU law, I was forced to address the present letter to you, Commissioner. Though it pains me, I realise I am doing it for the benefit of all citizens of Poland and all persons residing within the territory of Poland and thus I make an official request that you consider exercising the European Commission's powers in order to ensure the compatibility of Polish national legislation with the provisions of directive 2013/48, directive 2016/1919 and directive 2012/13 mentioned above.

Taking action by the European Commission would be a logical consequence of opening infringement proceedings in relation to directive (EU) 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[16] started on 18 February 2021, no (2020)2351. Directives 2013/48, 2016/1919 and 2012/13, along with directive 2016/343, constitute vital elements of a package of procedural rights

[14] Addresses dated 25 January 2017, 17 March 2017, 5 June 2017, 8 October 2019 (II.5150.9.2014.MM) and 18 July 2019 (II.511.437.2019.MM).
[15] Address dated 4 July 2018 (II.5150.9.2014.MM).
[16] OJ of 11 March 2016, Series L no 65, p.1.

which should be guaranteed to all persons within the territory of the European Union, irrespective of the Member State they may reside in.

Both me and the employees of my Office are at your full disposal should there arise a need to provide any further clarifications, information or legal context pertaining to the case thus presented to you.

With assurances of my highest consideration,

Adam Bodnar

Commissioner for Human Rights

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