

Judicial cooperation in criminal matters: right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and right to communicate upon arrest

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The Commission presented a report on the implementation 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 person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

The Directive was adopted to ensure that the right of suspects or accused persons to access a lawyer and to communicate upon arrest is applied both in criminal proceedings and in European arrest warrant proceedings.

European added value

The Directive contributes to improving mutual trust among Member States, as set out in the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.

By establishing common European minimum standards, the Directive has a significant impact on the protection of suspects or accused persons in Member States. It achieves this by providing a more consistent implementation of the rights and guarantees set out in Articles 47 and 48 of the Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights.

Overall, the Directive has provided EU added value by improving the protection of citizens involved in criminal proceedings, especially in some Member States where the right of access to a lawyer was not granted to all suspects and accused persons, especially at the early stages of proceedings. Also, a right of access to a lawyer in the issuing Member State of a European arrest warrant is now clearly established.

Persistent difficulties with key provisions of the Directive

Member States had to transpose the Directive into national law by 27 November 2016. At the date of expiry of the transposition period, nine Member States had not communicated the necessary measures to the Commission: Bulgaria, Cyprus, Germany, Greece, France, Croatia, Luxembourg, Slovenia and Slovakia. The Commission therefore decided in January 2017 to launch infringement proceedings against these nine Member States for failing to communicate their transposition measures. Meanwhile all Member States have notified full transposition. Infringement proceedings are still ongoing as not all provisions of the Directive have been transposed.

The extent of the Directive's impact on Member States varies according to the national criminal justice systems in place. This implementation report highlights that there are still difficulties regarding key provisions of the Directive in a number of Member States. This is particularly the case as regards:

(1) The scope of the rights provided for in the Directive

In four Member States, rights under the Directive are made dependent on a formal act. This formal act is often also the necessary condition for acquiring the status of a suspect or prosecuted person. In a limited number of Member States, the legislation is not clear as regards persons who are not deprived of their liberty.

(2) The extent of possible derogations, in particular from the right of access to a lawyer

Derogations were identified in 20 other Member States, justified by risks to individuals or for investigation needs. In some cases, national legislation reflecting the situations might not clearly state that all the derogations should be applied only in exceptional circumstances and to the extent justified in the light of the particular circumstances of the case. Another concern is that the possibility to derogate may go beyond the pre-trial stage of the proceedings.

(3) Waiving the right of access to a lawyer

A significant number of Member States have legislation in place governing the possibility to waive the right of access to a lawyer. No such legislation exists in five Member States. One Member State offers no possibility to waive the right of access to a lawyer, and defence is thus always mandatory.

(4) The right of access to a lawyer in the Member State issuing a European arrest warrant

In most Member States, legislation provides for application of some or all the rules concerning criminal proceedings *mutatis mutandis*. This means that the substance of the rights granted in European arrest warrant cases corresponds to the right that suspects and accused persons enjoy during national criminal proceedings. In five Member States, the transposition of the right of access to a lawyer is based exclusively on specific rules regulating European arrest warrant proceedings and addressing the rights of the Directive in that context.

Improving transposition

The report concludes that while there is currently no need to revise the Directive, its transposition into national law and practical application need to be further improved. Shortcomings risk to affect the correct implementation of the other procedural rights directives, in particular Directive (EU) 2016/1919 on legal aid in criminal proceedings, which builds upon this Directive (see Article 2(1) of Directive (EU) 2016/1919). Directive (EU) 2016/1919 had to be transposed by Member States by 5 May 2019.

The Commission will continue to assess Member States' compliance with the Directive and take every appropriate measure to ensure conformity with its provisions throughout the European Union.