

RIGHTS OF THE ACCUSED PERSON – COMPARATIVE ANALYSIS OF THE REGULATION IN THE SECONDARY LEGISLATION OF THE EUROPEAN UNION AND THE CONVENTIONAL PROTECTION STANDARDS

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Abstract: *The article aims to carry out a comparative analysis regarding the manner in which some of the procedural rights of the accused person within the criminal proceedings are regulated – right to interpretation and translation, right to information and right of access to a lawyer, chosen or appointed ex officio. The targeted sources of law are the EU Directives on the matter, as well as the conventional protection standards, as they have been developed in the ECHR case law. Therefore, the main similarities and differences between the two protection standards shall be revealed.*

Key words: *right to interpretation and translation, right to information, right of access to a lawyer, EU Directives, ECHR*

1. Introduction

Among the most recent challenges of the European Union, there is, beyond doubt, the creation of a space of freedom, security and justice on new grounds (following the changes brought about by the Treaty of Lisbon), and reaching this objective depends on the compatibility and convergence of the member state justice systems and setting up a homogeneous criminal justice system. (Bitanga, M., Franguloiu, S., Sanchez-Hermosilla, F., 2018, p.7)

The European Union's legislative activity in criminal matters, mainly aims at enhancing the effectiveness of cooperation between Member States in the fight against crime and the creation of European standards for the protection of human rights in criminal proceedings. (Udroiu & Predescu, 2008, p. 47)

At the same time, it can be noticed that the human rights' protection and the European Convention of Human Rights has an important position within the EU right, provided that art.6 par.3 of the EU Treaty sets forth that *"The fundamental rights, as they are granted by the European Convention for the defence of the human rights and*

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fundamental liberties, as well as the constitutional tradition of the member states, are the general principles of the Union's right."

As regards the rights conferred to the person accused in the criminal proceedings, we find these regulations both in the primary and secondary law of the European Union.

Thus, the Charter of Fundamental Rights of the European Union, adopted by the Nice European Council on 7 December 2000, sets forth the right to a fair trial (Chapter 47), "Justice" (Article 47), the right to free legal assistance (art.47), respectively the right to defense (art.48).

The procedural rights of the person suspected of having committed an offense are regulated by the European Union law and by secondary legislation, as the European Parliament and the Council of the European Union have adopted a series of directives regulating inter alia the right to interpretation and translation, the right to information and the right to information, access to a lawyer, either elected or appointed ex officio.

Thus, the European legislator considered that although the Member States are contracting parties to the European Convention on Human Rights, this is not always sufficient to effectively protect the rights of individuals accused within criminal proceedings, and strengthening mutual trust is requiring a more consistent implementation of the rights and guarantees provided in Art. 6 ECHR and the development within the Union of the minimum standards set forth in the Convention and the Charter.

In the following, I will analyze how the rights to interpretation, information and legal assistance are regulated in the secondary legislation of the European Union, and the similarities and differences between them as well as the conventional standards of protection in this field.

2. Right to interpretation and translation

The Directive 2010/64 / EU of 20 October 2010 regulates the right of an accused person, who does not understand the official language of the judicial proceedings, to benefit from the services of an interpreter and the content of such right, is at the same time imposing certain standards of quality of the interpretation and translation services offered to the accused.

According to Article 2 (1) of the Directive 2010/64 / EU, Member States must ensure that accused persons who do not speak nor understand the language of the criminal proceedings have, without delay, both before the criminal investigation bodies and before the courts, interpretation services.

At the same time, it is expressly stated that persons with hearing or speech deficiencies should be granted the right to interpretation.

The scope of this right also includes communications between the accused persons and their lawyers, where they are directly related to interrogation and hearings within the proceedings, or to the lodging of an appeal or any other procedural request.

The European legislative act sets onto the Member States the obligation to establish a mechanism for verifying that the accused person knows the language of the judicial proceedings and whether they need to be assisted by an interpreter or not.

The right of interpretation may also be exercised by means of remote communication, such as video conferencing, telephone or Internet, unless the physical presence of the interpreter is required in order to ensure the fairness of the proceedings.

Pursuant to Article 3 of the Directive 2010/64 / EU, the accused persons who do not understand the language of the criminal proceedings are provided within a reasonable time of written translations of all essential documents relating to the case, deprivation of liberty, indictment or any prosecution document or judgment verdict ruled in the matter.

Exceptionally, an oral translation or an oral summary of the essential documents may be provided instead of a written translation, provided that the fairness of the proceedings is not thereby prejudiced.

The judicial authorities in the Member States may decide whether there are other documents for which translation is required and that the accused person or his/her lawyer can make a reasonable request in that regard. Essential documents are to be translated only in their relevant parts, in order to allow the accused person to know the case brought against them.

Furthermore, the Directive requires that accused persons have the possibility to appeal against any decision denying them the right to interpretation or the translation of documents by the judicial authorities of the Member States. At the same time, when interpreting or translating is ensured, the accused persons must have the opportunity to claim that such interpretation or translation is not of sufficient quality as to guarantee the fairness of the proceedings.

The European legislator attaches great importance to the quality of the interpretation and translation services provided to the persons accused within criminal proceedings, and it is necessary to ensure that these persons know the case against them and can exercise their rights of defense in an effective manner.

In order to promote the appropriateness of the interpretation and translation, as well as effective access to them, Member States should establish registers of the names of the duly qualified translators and interpreters, to be made available to lawyers and competent authorities.

The European normative act provides that Member States cover the costs of interpreting and translation services rendered to the accused persons.

Thus, it is noted that the Directive 2010/64 / EU provides for a standard of protection similar to that derived from the ECHR jurisprudence in the field of the right to interpretation, guaranteed by Article 6 para. 3, item e, of the European Convention on Human Rights.

Both the European normative act and the Convention provide for the free right of linguistic assistance from an interpreter.

Moreover, similar to the provisions of the Directive, the European Court has determined that the right provided by Article 6 paragraph 3 item e of the Convention includes the right to translation of the essential parts of the file so that the person concerned understands the nature of the charge and can effectively exercise his/her right of defense. However, the conventional standard does not require the translation of all substantiated evidence or all the procedural documents drawn up. (ECHR, case

Kamasinski against Austria, Provision of 19 December 1989, §74).

At the same time, similarly to the provisions of the Directive, the European Court has held that, in order for the right provided for in Article 6 para. 3 letter e of the Convention to be practical and effective, the obligation of the competent national authorities is not limited to the appointment of an interpreter, but also to a certain extent, to verify the quality of interpreting or translation services. (ECHR, case Kamasinski against Austria, Provision of 19 December 1989, §74)

Instead, while the European legislator chose to impose the interpretation to be carried out by "suitably qualified" interpreters and translators, the Strasbourg Court held that Article 6 (3) item e is not violated if the interpretation was provided by another prisoner or a person who was not a certified interpreter, as long as the interpreting services were able to provide the defendant with effective assistance in the defense. (ECHR, case Kamasinski against Austria, §76, as cited in Udriou & Predescu, 2008, p.800)

At the same time, unlike the conventional standard in the matter, the European legislative act sets onto the Member States the obligation to create procedural mechanisms whereby the accused person can challenge both the decision to refuse to provide linguistic, oral or written assistance and the quality of the services of interpretation and translation.

Furthermore, while the European law requires national authorities to create a mechanism for verifying whether an accused person needs an interpreter to defend himself/herself effectively, the Strasbourg Court found that the provisions of Article 6 paragraph 3 letter e of the Convention were infringed, on account of the fact that the defendant did not benefit from the services of an interpreter, even though the national court was aware that he did not sufficiently understand the language of the proceedings. (ECHR, case Cuscani against the United Kingdom, Provision of 24 September 2002, §39)

It is debatable to what extent the Court would have reached the same conclusion if the national court had not been aware of the linguistic difficulties the accused had encountered or whether the deficiencies in the understanding of the official language in the procedure would not have been obvious.

3. The right to be informed

Directive 2012/13 / EU of 22 May 2012 regulates the right of the accused persons to be informed of the procedural rights they can benefit from, on the cause and nature of the allegation and the right of access to the case file.

According to Article 3 of the same Directive, Member States must ensure that the accused persons are informed promptly, orally or in writing, in a language that is accessible, of a minimum number of rights, in order to enable such rights to be effectively exercised:

- (a) the right to be assisted by a lawyer;
- (b) any right to free legal counseling and the conditions for obtaining such counseling;
- (c) the right to be informed of the indictment in accordance with Article 6 of the

Directive;

(d) the right to interpretation and translation;

(e) the right to remain silent.

At the same time, art. 6 of the Directive sets forth that Member states make sure that the accused persons receive promptly detailed information on the criminal offence they are suspected to have committed, so that the equitable nature of the proceedings and the effective exercise of the right to defence are guaranteed.

Member States shall ensure that, on the presentation of the substance of the charge before the court at the latest, detailed information shall be provided on the accusation, including the nature and legal classification of the offense, as well as the form of participation of the accused person.

At the same time, the accused persons must be promptly informed on any change related to the accusation brought against them (changing the legal classification of the offence, etc.)

The Directive regulates both the right to be informed about the nature and cause of the charge, guaranteed by Article 6 para. 3 letter a of the Convention and the right of access to the case file analyzed by the Strasbourg Court in the light of the provisions of Art. 6 par.3 let. b of the Convention, which states that the accused person has the right to benefit from the facilities necessary for the preparation of his/her defense.

Firstly, it is noted that the European law establishes a higher standard of protection in the material right of information, provided that the accused is to be informed not only of the allegation brought against him, but also of the procedural rights which he/she has during the criminal proceedings.

None of the two standards of protection impose a certain form as to the way in which the accused person is informed of the charge he/she is being brought against. Thus, the Directive does not impose an obligation onto the authorities to make such notification in writing, whereas the European Court has held that, in order to comply with the requirements of a fair trial, it is important that such information be provided. (ECHR, case *Pelissier and Sassi against France*, Provision of 23 March 1999, §53)

At the same time, as far as the content of the information is concerned, the regulation of the European law is similar to the conventional standard.

Thus, the Strasbourg Court held that the provisions of Article 6 (3) letter a of the Convention guarantees the right of the accused to be informed both of the cause of the accusation, namely the material deeds imputed and of the nature of the charge, namely the legal classification of the facts (ECHR, case *Pelissier and Sassi against France*, Provision of 23 March 1999, §51; ECHR, case *Dallos against Hungary*, Provision 1 March 2001, §47).

It has also been established in principle that the change in the legal classification of the facts must be notified to the accused person so that he/she can effectively exercise his/her rights of defense by reference to the new legal setup established in the case at hand (ECHR, case *Mattei against France*, Provision of 19 December 2006, §38).

Moreover, the European Court of Justice has held that information must also cover the essential details of the place and time of the offense (ECHR, *Mattocia v. Italy*, Judgment of 25 July 2000, §70-71).

However, the Court has held that the right guaranteed by Article 6 (3) item a of the Convention is not intended to provide information on the aggravating circumstantial elements or the aggravating circumstances of the offense (ECHR, case *De Salvador Torres v. Spain*, Provision of 24 October 1996, §29-33 as cited in *Udroiu & Predescu*, 2008, p.697).

None of the standards of protection requires that the information on the accusation should also refer to the evidentiary material administered, which substantiates the allegation.

4. The right to have access to a lawyer

Directive 2013/48 / EU of 22 October 2013 regulates the right of the accused person to receive legal assistance from a lawyer in the criminal proceedings against him/her, in the cases in which the presence of the lawyer is required as well as the content of the right of access to a lawyer.

Article 3 of the Directive stipulates that accused persons have the right to have access to a lawyer without undue delay in order to be allowed to exercise their rights of defense in a practical and effective manner in the following situations:

(a) before being interrogated by the police or other judicial authority;

(b) within a procedure of investigation or evidence-gathering conducted by the investigating authorities or other competent authorities; Legal assistance is required if domestic law permits or requires the presence of an accused person within the administration of evidence, at least when identifying suspects, confronting or re-establishing a crime.

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a competent court in criminal matters, in good time before the time-limit set.

At the same time, it is foreseen that the right to access a lawyer involves the following:

- the right of the accused persons to have interviews and confidentially communicate with the lawyer representing them, including prior to the interrogation by the police or another judicial authority;
- the right of the accused person to be present and actually participate when they are interrogated.
- the right of the attorney of the accused persons to attend at least the following investigative or evidence-gathering actions, where provided for in national law, and the person accused of the action in question is or is to be present: upon identification of the suspects, in confrontations, respectively when reconstituting an offence.

In exceptional circumstances and only in the course of criminal proceedings, Member States may temporarily derogate from the application of the above-mentioned rights when:

(a) there is an urgent need to prevent serious adverse consequences for a person's life, liberty or physical integrity;

(b) immediate action by the investigating authorities is necessary to prevent the

criminal proceedings from being seriously jeopardized.

As regards the moment when the accused person has the right to be assisted by a lawyer, similar to the provisions of European law, the Strasbourg Court has held, as a general rule, that access to a lawyer should be allowed right from the first questioning of a suspect by the police.

It was considered that the rights of the defense would be irremediably affected if the accused person's statements made before the criminal investigation authorities in the absence of a lawyer were used to substantiate the conviction (ECHR, *Salduz v. Turkey*, Judgment of 27 November 2008, §51; ECHR, *Panovits v. Cyprus*, judgment of 11 December 2008, §67, as cited in *Bîrsan*, 2010, p.555).

In contrast, unlike the conventional standard of protection, European Union law requires an accused person to have access to a lawyer and to carry out evidentiary procedures such as identifying suspects, confronting and reconstituting.

5. The right to legal assistance free of charge

The right to free legal assistance on behalf of the accused persons is governed by the Directive (EU) 2016/1919 of 26 October 2016. The European legislative act provides for the cases in which the competent authorities of the Member States have to appoint an *ex officio* lawyer to assist the accused person and the criteria to be considered when providing free legal assistance.

According to Article 4 of the Directive, Member States shall ensure that the accused persons who do not have sufficient financial resources to cover the costs of legal assistance from a lawyer, are entitled to free legal aid when this is in the interest of the act of justice.

In order to determine whether legal aid is to be granted, the criterion of material status, criterion of solidity or both should be taken into account.

Where a Member State applies the criterion of material status, elements such as income, capital, family circumstances of the person concerned and costs of legal assistance from a lawyer and the standard of living in the Member State concerned shall be taken into account in order to determine if the accused persons do not have sufficient resources to obtain legal assistance from a lawyer.

When Member States apply the criterion of soundness, account shall be taken of the seriousness of the offense, the complexity of the case and the degree of severity of the sanction in question in order to determine whether the interests of justice require the provision of free legal aid.

Member States shall ensure that free legal assistance is granted without undue delay and before the person is questioned by the police or by a judicial authority at the latest, or before carrying out investigative or evidence-gathering documents imposing or permitting the presence of the person accused (identification of suspects, confrontations, reconstructions respectively).

Under Article 6 of the Directive, decisions related to granting free legal aid and appointment of lawyers shall be taken without delay by the competent authority and the accused persons shall be informed in writing that their request for free legal

assistance is wholly or partially rejected .

Article 7 of the European legislative act states that Member States are required to take the necessary measures to ensure that there is an effective and adequate free legal aid system and that free legal aid services are of sufficient quality to guarantee the fairness of the proceedings, with due regard for the independence of the legal profession.

Member States shall take the necessary measures to ensure that accused persons have the right, upon request, to replace the lawyer providing free legal assistance services, where specific circumstances so justify.

Article 8 of the Directive states that Member States shall ensure that accused persons have an effective remedy under national law in the event of violation of their rights under the European legislative act.

It is noted that the criteria covered by the Free Legal Aid Directive have been taken over from ECHR jurisprudence in this area. Thus, in assessing the interests of the judiciary, the European Court reported the gravity of the offense imputed to the accused, the severity of the punishment provided for by national law, the complexity of the case, and the personal circumstances characterizing the accused (Bîrsan, 2010, p.554).

Similarly to the provisions of the Directive, as regards the financial criterion, when assessing the financial situation of the accused at the time of filing the application for the appointment of an ex officio lawyer, the European Court considers:

- If the accused has received free legal assistance at an earlier stage of the proceedings (preliminary investigation, trial before the lower courts). It is appreciated that the change in his financial situation, in the sense that he may pay a lawyer to assist him in appeals, must be proved by the authorities (ECHR, case *Wersel v. Poland*, Provision of 13 September 2011);
- If the accused has informed the national courts of the fact that he does not have the financial means to pay a lawyer, or whether the authorities have otherwise become aware of this;
- If the accused had income sources at the time the application was filed, or it can be assumed that he did not generate revenue-generating activities (he was in custody, was unemployed, etc.) (ECHR, *Maksimenko v. Ukraine*, judgment of 20 December 2011, §26; ECHR, *Tsonyo Tsonev v. Bulgaria* (No. 3), Judgment of 16 October 2012, §51);

Moreover, both standards of protection are of particular importance to the quality of the services provided by the lawyer ex officio. Thus, the European legislative act imposes onto the Member States the obligation to ensure an adequate quality of the legal assistance on behalf of the accused, while at the same time establishing his/her right to replace the appointed lawyer ex officio when the circumstances of the case so require.

Similarly, the European Court of Human Rights has held that the mere appointment of a state-funded defence lawyer does not provide effective legal assistance, as the lawyer may pass away, become ill, or be incapacitated for a certain period time, for objective reasons, and thus unable to carry out their professional duties.

It has been argued that the conventional text refers to the concept of "legal assistance" and not to the "nomination" of an ex officio lawyer, in which context the

national courts must ensure that the defendant is effectively defended by the lawyer designated to assist him/her.

If such a situation is brought to light, in the sense that there is a defective benefit of the *ex officio* lawyer, the competent national authorities must either order the replacement of the lawyer or summon him to fulfill his obligations. (ECHR, case Artico v. Italy, Provision of 13 May 1980, §33).

6. Conclusions

The regulation of the secondary legislation of the European Union on the rights of the person accused in criminal proceedings tends to develop the conventional standards of protection in the matter, as it is clear that the jurisprudence of the European Court of Human Rights has been an important source of inspiration for the European legislator.

Although the two standards are similar in terms of the content of the rights guaranteed to accused persons, the provisions of European law offer increased protection, designed to help build mutual trust in the judicial systems of the Member States.

Thus, the European legislator paid particular attention to the need to inform the accused persons of their rights in the criminal proceedings and of the conditions under which they can be exercised.

Moreover, European normative acts extend the scope of the right to legal aid, as they require the presence of a lawyer not only on the occasion of the interrogation to which the accused is subjected but also when some evidential procedures such as the identification of the suspects, confrontations between the accused or the reconstruction of a crime are carried out.

At the same time, the European legislator has imposed onto the Member States the obligation to create procedural mechanisms to offer the accused persons the possibility of challenging the decisions of the judicial bodies whereby their rights are violated.

The Regulation of the European Union law pays increased attention to the quality of free linguistic and legal assistance services benefitting the persons accused in the course of criminal proceedings, thus ensuring that the exercise of the right to interpretation and translation and the right to legal assistance from a lawyer appointed *ex officio*, is effective.

Taking all these aspects into account, I appreciate that the existing standard of protection in the secondary legislation of the European Union regarding the rights of the accused persons is complementary to that developed in the case law of the European Court of Human Rights.

Thus, although there are many similarities between the two protection systems and the European Convention on Human Rights occupies an important place in the European Union law, the European legislator has considered that detailed rules are required in order to clarify and extend the scope or content of the guaranteed procedural rights to the persons accused within criminal proceedings.

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