

# INSIDE POLICE CUSTODY — PROCEDURAL RIGHTS AT POLICE STATIONS

**State report – Poland**

**Barbara Grabowska-Moroz**

**Consultation: Katarzyna Wiśniewska, Piotr Kładoczny, Maciej Kalisz**



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### 1. Introduction

#### 1.1. Procedural rights at the early stage of criminal proceeding

This report is a result of the “*Inside Police Custody*” project funded by the European Commission, coordinated by the *Irish Council for Civil Liberties* (ICCL), in which 9 partner organizations participated<sup>1</sup>. The research has covered the analysis of implementation of the EU directives regulating: the right to interpretation and translation in criminal proceedings<sup>2</sup>, the right to information in criminal proceedings<sup>3</sup>, and the right of access to a lawyer<sup>4</sup>. The primary aim of the project was to assess the practice of securing the rights of suspects on the stage of preparatory proceedings. The results of the research will subsequently be used in order to strengthen the enforcement of these rights in practice. An similar project was realized earlier, in 2014, and it resulted in publishing of the *Inside Police Custody: Empirical Account of Suspects’ Rights in Four Jurisdictions* (Intersentia, Cambridge, 2014).

#### 1.2. Law of the European Union in the scope of procedural rights

In 2009 the European Union accepted a schedule of actions aimed at strengthening the procedural rights of people suspected and/or accused during criminal proceedings<sup>5</sup>. On the basis of this schedule, consecutive regulations relating to the cooperation of the Member States in the scope of criminal law were being adopted, as well as regulations relating to procedural rights of the suspected and accused persons. EU directives adopted on this basis drew majorly from the case law of the European Court of Human Rights, this along the extended competence of the Court of Justice of the EU creates a possibility of the actual strengthening of the security of procedural rights in individual Member States. This research focused on three of these directives, which is a result of the fact, among others, that the deadline for the implementation of the rest of these directives lapses in the years 2018-2019.

#### 1.3. National context - criminal law system and definitions

Criminal proceedings in Poland are regulated by the code from 1997, which has been amended numerous times since being adopted, occasionally based on fundamentally different principles. The Act dated 27 September 2013 on the amendment of the Code of Criminal Procedure<sup>6</sup>, which came into effect on 1 July

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<sup>1</sup> Das Ludwig Boltzmann Institut für Menschenrechte (Austria); Bulgarian Helsinki Committee (Bulgaria); Hungarian Helsinki Committee (Hungary); Associazione Antigone (Italy); The Human Rights Monitoring Institute (Lithuania); The Helsinki Foundation for Human Rights (Poland) The Association for the Defence of Human Rights in Romania – the Helsinki Committee (Romania); The Peace Institute (Slovenia); Rights International (Spain). Grant awarded by the European Commission (Action Grant, JUST/2015/Action Grants, reference number 4000008627 „*Inside Police Custody: Application of EU Procedural Rights*”) covered the activities of eight organizations, while activities of the ninth organization - from Spain - was funded by Open Society Justice Initiative.

<sup>2</sup> Directive 2010/64/EU dated 20 October 2010 on the right to interpretation and translation in criminal proceedings.

<sup>3</sup> Directive 2012/13/EU dated 22 May 2012 on the right to information in criminal proceedings.

<sup>4</sup> Directive 2013/48/EU dated 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 about deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>5</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

<sup>6</sup> Act dated 23 September 2013 on the amendment of the act - Code of criminal procedure and several other acts (Journal of Laws of 2013, item 1247).

2015, has introduced a model of contradictory procedure<sup>7</sup>. Among others, the possibility of appointing a public defender at the stage of judicial proceedings, regardless of the financial status of the accused, has been introduced. These changes were mostly revoked through the amendment of April 2016<sup>8</sup>.

Preparatory proceedings may take the form of an **inquiry** or an **investigation**. They may be conducted “in the case of” or “against”, that is in the situation when the person suspected of committing a crime is charged. Then this person acquires the status of the “**suspect**”<sup>9</sup>. However, the code also uses the phrase “**suspected person**” without defining it and without regulating precisely the rights of a “suspected person”. It does regulate, however, the rights and status of a detained person (articles 244-245 of the Code of criminal procedure). The police has the right to detain a suspected person “if there exists a reasonable assumption, that the person has committed a crime” and at the same time there is a possibility of this person absconding, hiding, or removing traces of the crime, or if it is not possible to establish the identity of this person, or there exist grounds for accelerated proceedings against this person”<sup>10</sup>.

A reasonable assumption that the suspected person has committed a violent crime that caused damage to a cohabiting person and a possibility of the suspected person committing a violent crime against the said cohabiting person again are also grounds for detaining<sup>11</sup>. The detained shall be released once the reason for detaining is no more, or if within **48 hours** since detaining the suspected person is not placed at disposal of the court along with an application for provisional detention<sup>12</sup>. What is more, the detained should be released if within 24 hours since being placed at disposal of the court if they do not receive a decision on temporary detention. Terms of maximal periods of detention also arise from the Constitution<sup>13</sup>.

Detention may be subject to judicial control based on a complaint submitted to a court, in which one can ask for analysis of the **validity, legality, and correctness** of a detention. If a detention is ruled invalid, illegal or incorrect, the court informs a prosecutor and an authority superior to the authority which conducted the detention.

At the stage of judicial proceedings, the **accused** is a party to the proceedings, that is a person against whom charges have been submitted to a court and a person, in relation to whom the prosecutor has filed an

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<sup>7</sup> W. Jasiński, Polish criminal procedure after reform, Warsaw June 2015 - [http://beta.hfhr.pl/wp-content/uploads/2015/07/hfpc\\_polski\\_proces\\_karny\\_po\\_reformie.pdf](http://beta.hfhr.pl/wp-content/uploads/2015/07/hfpc_polski_proces_karny_po_reformie.pdf).

<sup>8</sup> Act dated 11 March 2016 on the amendment of the act - Code of criminal procedure and several other acts (Journal of Laws of 2016, item 437)

<sup>9</sup> According to Article 71 § 1 Code of criminal procedure a suspect is a person in relation to whom an order to present charges is issued, or a person who without such an order to present charges is charged in relation to having been interrogated as a suspect.

<sup>10</sup> Accelerated proceedings can be conducted if the investigation relates to cases in which the culprit has been caught in the act or directly afterwards and was brought forth by the Police within 48 hours and placed at disposal of the court along with an application for accelerated cognisance of the case (Article 517b Code of criminal procedure).

<sup>11</sup> What is more, the prosecutor may order detention and compulsory appearance of a suspected person or a suspect, if there exists a reasonable possibility of them not answering a summon in order to conduct activities with their involvement or that they might obstruct the proceedings in other unlawful ways. Detention and compulsory appearance are also possible if there is a need to immediately take a preventive measure.

<sup>12</sup> The detained shall be released also at the order of court or a prosecutor.

<sup>13</sup> According to Article 41 section 3 of the Constitution, each detained should immediately and in an understandable way be informed of grounds for their detention. They should be placed at disposal of the court within 48 hours since detaining. The detained shall be released if within 24 hours since being placed at disposal of the court they do not receive a decision on temporary detention along with the charges.

application identified in the Article 335 § 1 of the Code of criminal procedure or an application for the conditional discontinuance of proceedings.

### 1.4. Methodology of the research

Initial methodological principles assumed observation at police stations in the scope of conducting activities with the participation of the detained and the suspects. In December 2016, The Helsinki Foundation for Human Rights submitted to the Police General Commandant a request for the consent for conducting observations at 2-4 police stations supplemented by interviews with lawyers, detained and police officers. In January 2017, the General Police Headquarters informed the Helsinki Foundation for Human Rights that the Criminal Department of the General Police Headquarters “has identified too many threats of breaching legal norms” which resulted in a refusal to conduct the monitoring. In March 2017, a meeting with General Police Headquarters took place, which resulted in completing of the information related to the project. In May 2017, the General Police Headquarters informed that the Criminal Department of the General Police Headquarters has expressed “an averse position”. On the one hand, there was a possibility of interviewing lawyers, detained and police officers (on a voluntary basis) after fulfilling certain conditions. On the other hand, it was proved that the Helsinki Foundation for Human Rights does not have basic competencies for auditing police premises - only the penitentiary judge and the Commissioner for Human Rights have these competencies. Following the consent of the European Commission to introduce changes into the methodology of the research in October 2017 the Helsinki Foundation for Human Rights has applied to the Police General Commandant for identification of the police units with the highest numbers of detained, where interviewing the detained, lawyers and police officers would be possible. After another meeting with the General Police Headquarters representative in November 2017, the Helsinki Foundation for Human Rights completed the information about the project for the second time, attaching interview questionnaires. Finally, the First Deputy of the Police General Commandant informed the Helsinki Foundation for Human Rights that “in the actual legal environment, the conducting of this research at the police station is not possible.” His opinion was that “it is crucial for such a research undertaking to take place with the consent of the Ministry of Justice and with the involvement of the Prosecutor’s Office, which supervises i.a. the correctness of suspected persons’ detention”. What is more, it was indicated that the involvement of the Commissioner for Human Rights would be reasonable as the National Preventive Mechanism.

Difficulties related to the cooperation with the General Police Headquarters resulted in the necessity to introduce more changes into the methodology. Following the consent of the European Commission, the realisation of this Helsinki Foundation for Human Rights project consisted of:

- reviewing records covering cases of complaints on detention - 79 judicial records of 5 district courts were reviewed<sup>14</sup>;
- open interviews of 13 police officers and 4 criminal defence lawyers;
- closed interviews (*case-log*) of 30 detained and 4 lawyers that participated in procedural activities involving the detained.

Reviewing of records and the interviews took place from July 2018 to September 2018. Both the reviewing and the interviews covered the cases and persons detained after October 2016, that is after the deadline for

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<sup>14</sup> All of these courts were located in one city (over 500 thousand inhabitants). In one of the cases, the president of the district court refused to grant the Helsinki Foundation for Human Rights the access to records of the proceedings without justifications. In the next court it was indicated that a consent of the Prosecutor’s Office is necessary to the extent in which the records are related to records containing materials from preparatory proceedings.

the implementation of the directive on the access to a lawyer. The complaints relating to detention mostly claimed unreasonableness (29 cases) and incorrectness (32 cases) of the detention<sup>15</sup>. Arguments relating to the breach of procedural rights were presented within the complaints on incorrect detention. Within the complaints there were also claims relating to the way in which the detained was treated regardless of the execution of their procedural rights, such as providing water or food<sup>16</sup>.

In the cases of detention conducted during public gatherings, the question of the detention identified in the Article 244 of the Code of criminal procedure taking place at all in a given case was crucial. This in particular referred to prolonged verification of documents of a participant of the public gathering. The courts ruled the period of limited freedom of movement related to the verification of documents as detention, which should be governed by procedures (through i.a. preparing a report and instructing on rights). The courts ruled the detention unlawful only in three cases (i.a. in the case of detention on charges of committing an offence, that is participating in a non-notified gathering, during which the detained were transported to a police station and then released without the preparation of an appropriate report). In 10 cases the detention was ruled unreasonable, and in 12, the court ruled the detentions incorrect. Among the reviewed cases, in 26 of them the complaints were drafted and filed by a professional attorney in fact of the applicant (lawyer or attorney at law), however in none of these complaints did claims relating directly to the content of the laws of European Union (directives) governing the right to interpretation and translation or the right to a lawyer appear.

Additionally, it is worth noting that among the 30 detained that participated in the research only 5 people filed a complaint against the detention. In one case the detention was deemed reasonable, but incorrect.

### 1.5. The general normative framework in Poland

Apart from a criminal proceeding, prosecuting authorities may conduct proceedings in relation to offences, and the treasury authorities - penal-fiscal proceedings. In a criminal proceeding, the investigation is conducted by the police, while the probe is conducted by the prosecutor's office with the option of commissioning some of the activities to the police. Investigative powers in the scope of prosecuting certain offences (including the authority to conduct a procedural detention) apply also to other police services (Border Guard) and some of the intelligence forces (e.g. the Central Anticorruption Bureau). Prosecutor is the public prosecutor in criminal cases. He also supervises the preparatory proceedings. The prosecutor's office is led by the Public Prosecutor General (under an act this post is held by the Minister of Justice).

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<sup>15</sup> Judicial records of the complaints on detention varied in content in particular courts. In some of them the complaints or detention reports were missing, probably due to being attached to the records of preparatory proceedings (lent to a court for the consideration of the complaint) or being placed in police records. What is more, if a complaint was made by the detained himself, it usually did not contain claims against legality, validity or correctness of the detention, containing only general application for investigation by the court (ex officio) to determine if the detention was lawful. All of the above meant that it was not always possible to identify the claims made by the claimant.

<sup>16</sup> In one of the cases covered by the review of the records, the court ruled that *"if the manner and method of providing the detained with drink and food is deemed unsuitable by the detained, he can file a complaint in this scope provided for in the act on the police. This does not affect the correctness of detention."*

## 2. The right to interpretation and translation

### 2.1. Normative aspect

Directive no. 2010/64/EU was implemented by an act dated 27 September 2013. The act has amended the Article 72 of the Code of criminal procedure, according to which the accused (the suspect) is entitled to an unpaid assist of a translator if they are not sufficiently fluent in Polish. The translator should be **summoned for activities involving said accused**. On the accused's or their defence's request the translator should also be summoned to enable the defence's communication with the accused in relation to an activity to which the accused is entitled. As specified in the literature "the procedural authority is not obligated to provide the accused with a translator during each of the meetings with the defence, this is limited to communication with the defence in relation to an activity the accused may or must participate in"<sup>17</sup>. The content of the Article 72 of the Code of criminal procedure does not indicate the right to receive a translation of the correspondence between the accused and the defence. However, there are no obstacles that would prevent the procedural authority from providing a translation of said correspondence if this method of communication between the accused and the defence is deemed reasonable regarding the circumstances of the case. It is indicated in the literature that the regulation provided by the Article 72 of the Code of criminal procedure may not be sufficient in the context of the preparation of procedural documents, in particular means of appeal<sup>18</sup>.

An accused that is not fluent in Polish should **receive** the order of presentation, supplement or amendment of the charges, the bill of indictment or the judgment subject to appeal or terminating the procedure **together with the translation**. On the accused's consent the above may be limited to pronouncing the translated judgement terminating the procedure, if the procedure is not subject to appeal. It is noted in literature that "the Article 72 § 1 also applies when the accused knows Polish to some extent but his knowledge is not sufficient for individual defence"<sup>19</sup>. This is confirmed by the police officers who participated in the interviews which constituted a part of the research.

According to the Article 204 of the Code of criminal procedure a translator should be summoned if there arises a necessity to question: 1) a deaf or mute person, and the written form of communication is not sufficient; 2) a person not fluent in Polish. What is more, a translator should be summoned if there arises a necessity to translate into Polish a document prepared in a foreign language, or vice versa, or to inform the accused of the content of the collected evidence. "The regulation provided by the Article 204 § 1 point 1 is not sufficient, as it is limited only to **questioning** said persons. It should be recognised that an accused deaf or mute person should be provided with unpaid assist of a translator in sign language during all of the activities conducted with the involvement of the accused, which are conducted in spoken form, including spoken communication with the defence"<sup>20</sup>. This features, however, update the right to obligatory defence

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<sup>17</sup> R. Stefański, Commentary on Article 72 [in:] R. Stefański (ed.), S. Zabłocki (ed.), Code of criminal procedure. Tom I. Commentary on Articles 1-166, Wolters Kluwer Poland 2017.

<sup>18</sup> J. Grajewski, S. Steinborn, Commentary on Article. 72 [in:] L. Paprzycki (ed.), Updated commentary on Articles. 1-424 of the Code of the criminal procedure, LEX/el. 2015.

<sup>19</sup> J. Grajewski, S. Steinborn [in:] L. Paprzycki L. (ed.), Updated commentary on Articles. 1-424 of the Code of the criminal procedure, LEX/el. 2015.

<sup>20</sup> J. Grajewski, S. Steinborn, Commentary on Article 72 [in:] L. Paprzycki (ed.), Updated commentary on Articles 1-424 of the Code of criminal procedure, LEX/el. 2015.



(Article 79 § 1 of the Code of criminal procedure), which means that in criminal proceedings the accused must have a defence lawyer if they are deaf, mute or blind.

The right to interpretation and translation also covers the translation of instructions on rights of the detained persons. Translated templates of this instructions are available at police stations and on the website of the Ministry of Justice (in 26 languages)<sup>21</sup>. According to the regulations of the General Police Headquarters dated 30 August 2017 on conducting certain investigative activities by police officers<sup>22</sup>, the aggrieved party, the suspect and the witness that are not fluent in Polish receive from a police officer an instruction on their rights and obligations translated into a language they understand. If a text in a foreign language is not available, it should be noted in the report that the instruction was orally translated by an interpreter, and the person should be instructed on their right to receive a written statement of their rights and obligations in a language understandable for this instructed person<sup>23</sup>. According to § 81 of these regulations, a police officer should summon a translator for each procedural activity that requires their participation, in order to enable the **parties** to actively participate in the proceedings, as well as for an activity conducted with the participation of a person not fluent in Polish. A translator should also be summoned if the police officer knows the language in which the questioned person speaks or in which the procedural document is prepared. Receiving of a pledge from a translator that is not entered into the list of sworn translators should be documented in the report on the activity for which the translator was summoned.

**The detained person** that is not fluent in Polish receives a translated instruction on their rights from a police officer. If a text in foreign language is not available, it should be noted in the report that the instruction was orally translated by and interpreter, and the person should be instructed on their right to receive a written statement of their rights and obligations in a language understandable for this instructed person<sup>24</sup>.

### 2.2. The level of need for a translator

Both the regulations and the information received from police officers indicate that the participation of a translator is necessary for drawing up a report of detention of a person not fluent in Polish. In relation to this, if the detained participates in further procedural activities (such as presentation of charges and questioning), a police officer (e.g. from the investigation department) can already find information about a translator participating in procedures within the case material. Usually the same translator will participate in drawing up of the report of detention and in further procedural activities involving the detained. Police officers, however, noted that there occur situations in which during the drawing up of the report of detention the detained claims to know and understand Polish but at the stage of the presentation of charges and questioning, they state they do not know the polish language and then the police officer summons a translator to participate in the procedures.

Among the reviewed records, only 12 cases concerned complaints on the detention (conducted after October 2016) where a person not fluent in Polish was the claimant. They were detained by police officers or Border guard. The research conducted by the Helsinki Foundation for Human Rights shows that complaints on detention filed at court and drawn up in a foreign language are firstly translated in an urgent mode and then

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<sup>21</sup> Translations of the templates of instructions in a <https://www.ms.gov.pl/pl/dzialalnosc/wzory-pouczen/>.

<sup>22</sup> Official Journal of the the General Police Headquarters from 2017 item 59.

<sup>23</sup> § 19 section 4.

<sup>24</sup> § 87 section 7 of the regulations of the the General Police Headquarters.

the translated complaint is examined before court. Translators also participated in the court meetings, during which the complaints were examined.

### 2.3. Identifying the need for a translator and the appropriate language

The directive introduces a requirement for a mechanism which will check if suspects communicate in the language used in the proceedings, if they understand it, or if they need the assist of an interpreter. The authority conducting the proceedings (e.g. a police officer, prosecutor, court) assesses the need for the assist of a translator. This assessment is conducted on the basis of detained/suspect's fluency and the level of understanding of the polish language. During the interviews, a few of the police officers noted that they asked a detained/suspect to state in writing that they are fluent in spoken and written Polish. If they were not able to write such a statement, a translator was summoned. Sometimes, police officers also ask how long the foreigner has lived in Poland. The information given by police officers indicate that if there are doubts concerning the level of fluency in Polish, a translator is also summoned in order to conduct activities involving the detained more effectively<sup>25</sup>.

The participation of a translator is noted in the report of detention/questioning. The decision not to summon a translator does not take the form of a procedural decision which is subject to complaint. However, it seems that there would be a possibility to file a complaint on the basis of Article 302 of the Code of criminal procedure, according to which parties and persons which are not parties are entitled to file complaints on activities other than provisions and regulations that stand in breach of their rights. Nonetheless, since such a complaint is recognised by the immediately superior prosecutor, and not a court, it is doubtful if above can be deemed an effective complaint measure. What is more, the template of the instruction for the detained/suspect does not contain information about the Article 302 of the Code of criminal procedure and the possibility to file such a complaint. The defence lawyers have also noted that the absence of a translator during a questioning would be raised by them as a claim as a part of a complaint on detention. At the judicial stage, there is no possibility of filing a complaint on failing to provide a translator (rejecting a request for a translator). This may, however, be raised within the appeal against a ruling of a court of first instance, but a prior notice of the need for a translator is necessary during the proceedings before the court of first instance<sup>26</sup>.

According to the Article 2 Section 6 of the directive, in adequate situations communication technology such as videoconference, phone or the Internet may be used, unless physical presence of an interpreter is required in order to ensure reliability of the proceedings. The Code allows conducting a **videoconference** for the purpose of translation<sup>27</sup>. The information provided by police officers and defence lawyers indicate that this possibility is seldomly used in practice. In principle the translator is present at the police station at which the procedures are conducted.

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<sup>25</sup> "It is proper that in the doctrine regarding the guarantee such an interpretation of the Article 72 § 1 is proposed that the provision applies also if the accused does know the polish language to some extent, but not sufficiently for individual defence" [S. Steinborn (ed.), Code of criminal procedure. Commentary on certain provisions, LEX/el. 2016].

<sup>26</sup> Ruling of the Court of Appeal in Warsaw of 24 April 2017, file ref. no. II AKa 63/17.

<sup>27</sup> Article 177 § 1a of the Code of criminal procedure in conjunction with Article 197 § 3 of the Code of criminal procedure in conjunction with Article 204 § 3 of the Code of criminal procedure.

### **2.4. The assist of a translator at the earliest stage of detention - if and how is it provided and organized, by whom**

Police officers - both the officers conducting initial procedures related to detention, and the ones conducting activities on further stages - are obligated to guarantee the participation of a translator if there appear grounds indicated by the Article 72 of the Code of criminal procedure or the Article 204 of the Code of criminal procedure. The police officers have a list of translators cooperating with the police at their disposition ("we have got our own translators"). The translators are not police officers but they provide services commissioned by the police, and then issue an invoice for their services. Each time, however, the police officer must determine their availability on a given day, since the translator may have other commitments. The Code states that the suspect (accused) is provided with unpaid assist of a translator regardless of their financial situation. According to the Article 619 § 3 of the Code of criminal procedure, the State Treasury covers the costs related to the participation of a translator to the extent necessary for securing the right of the accused for defence.

Police officers noted that the not too high hourly rate<sup>28</sup> may also lead to translators prioritizing the better paying work, related to commercial services, and undertaking the participation in procedural activities of criminal proceedings only if no other commitments are present. According to the Article 15 of the act on sworn translators, a sworn translator cannot refuse to perform a translation in proceedings conducted on the basis of an act, on the demand of a court, a prosecutor, the police and administrative authorities, unless particularly important grounds for refusal are present.

One of the police officers that participated in the research noted that he once had to question a person speaking in Pashtu. On the list of sworn translators there is only one person that is a sworn translator in Pashtu, which lives in a town which is distant from the location of conducted activities. In this case, the role of the translator was played by an employee of an embassy. In the case of other rare languages the time of waiting for a translator may also be longer, and in consequence the total period of the detention may lengthen, however, it cannot exceed 48 hours. At times the contact with a translator may also be obstructed by the fact that on the list coordinated by the Ministry of Justice there is no information about the phone number or e-mail address, only the address of residence is provided.

### **2.5. Translating/Interpreting during a consultation with the defence**

According to the Article 2 Section 2 of the Directive no. 2010/64/EU, the Member States provide interpretation during communication of a suspect with the defence related directly to questioning, presenting statements, filing appeals or other procedural requests. The Article 72 of the Code of criminal procedure provides that on the request of a suspect or defence lawyer, a translator should also be summoned

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<sup>28</sup> According to the regulation of the Minister of Justice of 2005 on the consideration for services of sworn translators, the consideration for each commenced hour of translator's presence equals to the rate for a translation page raised by 30% (in accelerated proceedings - by 100%). Hours of translator's presence are counted from the hour for which the translator was summoned to the hour he is relieved from participating in procedures. Rates for a page of translation into the polish language are as follows: a) from English, German, French and Russian - 23 zł; b) from other European languages and from Latin - 24,77 zł; c) from non-European languages using the Latin script - 30,07 zł; d) from non-European languages using non-Latin script or ideograms - 33,61 zł. In turn, rates for a page of translation from the polish language are as follows: a) into English, German, French, Russian - 30,07 zł; b) into other European languages and into Latin - 35,38 zł; c) into non-European languages using the Latin script - 40,69 zł; d) into non-European languages using non-Latin script or ideograms - 49,54 zł.

for communication of the suspect and the defence lawyer related to an activity, in which the suspect has the right to participate. The interviews with police officers show that a situation in which a defence lawyer needs the assist of a translator is rare. The defence lawyers also noted that they rarely use the assist of a translator during the communication with the suspect. They did note, however, that if such a need arises, e.g. at the stage of court sittings related to lengthening of temporary detention, the responsibility to organise the participation of a translator in the communication with the suspect before such court sitting lies at the defence's side. This, in practice, meant the necessity to establish a date convenient for the translator and the administration of the custody suite, as well as obtaining the prosecutor's consent for contact with the detained.

One of the defence lawyers assessed that there is no express legal basis that would guarantee absolute defence secrecy if a translator participates in the contact between a suspect and the defence. He noted that it is not certain if the translator will not be relieved of the secrecy by the court and questioned on what he heard while interpreting the conversation of a suspect with his defence. Police officers stated that such a questioning would be unacceptable.

### **2.6. Translating/Interpreting during a questioning**

Usually during the questioning immediately subsequent to detention the same translator that participated in drawing up of the report of the detention is present. Translators' availability depends on i.a. the language used by the detained/suspect. It was indicated both in the interviews with police officers and defence lawyers that the participation of a translator significantly facilitates the conducting of a questioning. In police officers' opinion it is "safer" to involve a translator in case the suspect claims they do not know Polish at further stages.

### **2.7. Organizing a translation/interpretation**

The registry of sworn translators is kept by the Minister of Justice. The registry does not indicate if a translator specialises in legal language. What is more, the officers noted that the registry sometimes lacks in information, such as phone number, and provides only the address of residence. The same translators translate and interpret. The registry of sign language translators is kept by the voivode. Both the police officers and the defence lawyers emphasized that in the case of rare languages the waiting time can be significantly longer<sup>29</sup>. The police officers noted that in the case of rare languages it may happen that a non-translator is used, e.g. a person working in a relevant embassy.

### **2.8 Quality of the translation**

According to the Article 204 § 3 of the Code of criminal procedure the translator is subject to regulations related to expert witnesses. In criminal proceedings there is no obligation to use the services of a sworn translator, so if there is not available translator "from the list", police officers contact translators that are not on the list (*ad hoc* translators). A translator is seen as an assistant to the authority conducting a proceeding, that is he holds a (non-independent) assisting position in relation to other participants in the proceeding<sup>30</sup>. An *ad hoc* translator makes a pledge before commencing translating or interpreting.

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<sup>29</sup> One of the defence lawyers stated that during EURO2012 there was only one translator in Greek available in Warsaw.

<sup>30</sup> K. Witkowska, Translator in criminal proceeding, Prosecution and Law 1/2014, p. 32.

According to the act on the profession of sworn translator, sworn translators are obligated to perform committed activities with special diligence and impartiality, pursuant to the rules arising from the provisions of law. The Article 14 of the act on sworn translators introduces the obligation to keep secrecy, however, the court may relieve the translator from the secrecy under general rules. In one of the cases of complaints on detention, the court has relieved the translator from the secrecy and questioned them on the circumstances of the questioning (if the detained was provided with meals during the detention). In consequence there is no direct regulation introducing an absolute security of the translator's secrecy in the scope of translating legal advice received by a suspect (that is by the person to whom the charges were presented) or a detained (that is a person who has not been presented with charges yet) from their defence lawyer.

Due application of the regulations related to expert witnesses results in the possibility of changing the translator (Article 201 of the Code of criminal procedure). There is also a possibility of excluding the translator from the participation in a procedural activity. The change of the translator may happen on the request of the suspect/accused.

On the basis of the Code of criminal procedure there is no separate complaint on the quality of the translation (Article 2 section 5 and Article 3 section 5 of the Directive no. 2010/64/EU). The claim may be possibly raised as a part of the complaint on detention in the scope of the correctness of detention. It is not clear, however, to what extent the findings of the court examining the complaint on detention will affect the assessment of evidence collected in breach of the right to interpretation and translation by the court examining the criminal case. Regardless of criminal regulation, the act on the profession of sworn translator provides that the control over the activity of sworn translators is performed by the voivodes. What is more, the proceedings in the case of professional liability of a sworn translator is initiated by the Commission of Professional Liability on the request of the Minister of Justice or a voivode. Entity commissioning a translation may apply to the Minister of Justice or a voivode for the initiation of such a proceeding.

### 2.9. Conclusions

The code of criminal procedure implements the majority of rights resulting from the Directive no. 2010/64/EU, that is the right to interpretation of procedural activities, in which a suspect participates and of the most significant procedural decisions. Although it does not literally arise from the content of the provisions of the Code of criminal procedure, the right to interpretation and translation covers also the stage of detention before presenting the charges. Detailed regulation in this scope arises from the regulations of the Police General Commandant. **However, supplementing the content of the Article 72 § 1 of the Code of criminal procedure so that it includes the rights of deaf and mute persons should be taken into consideration**, as only the regulation arising from the Article 204 of the Code of criminal procedure related to translator's participation in a questioning involves said persons. These persons should be provided with unpaid assist of a sign language translator throughout all of the activities in which they participate.

The method of recognising the need for a translator varies among police officers - at times it takes the form of oral contact or a request of a written statement on the knowledge of Polish. In the case of doubts, police officers summon a translator in order to facilitate the questioning. The organization of translator's participation is the responsibility of the police officer conducting activities in the given case.

The Code provides translator's assists in the scope of the communication between a suspect and their defence lawyer in relation to preparation to the most significant procedural activities. The Code does not,

however, contain a regulation providing absolute secrecy regarding the legal advice that is being translated. **Both on the basis of the Directive no. 2010/63/EU, and the absolute nature of defence secrecy, a regulation securing such secrecy in the case of using the assist of a translator should be introduced.**

In spite of the list of translators being available, at times it may take a few hours to organise translator's help by a police officer, depending on the translator's availability at a given moment. In general, however, police officers assess that the system of organising the access to translation or interpretation does not cause any significant problems. It should be ensured that the list of sworn translators kept by the Minister of Justice contains contact details such as phone number and e-mail address.

The Code of criminal procedure does not contain a regulation enabling **appealing** against a procedural authority rejecting the request for the participation of a translator in the activities involving the detained/suspect. The right to appeal against such a decision - expressed in the report of the detention or questioning - can be partly contained within the right to file a complaint on the detention. What is more, the Code formulates a possibility of filing a complaint on activities other than provisions and regulations that stand in breach of the rights of parties or persons which are not parties. Such a complaint, however, is recognised by the immediately superior prosecutor, and not a court. It seems that both the courts examining the complaints on detention, and the prosecutors examining the complaints on the basis of the Article 302 of the Code of criminal procedure should interpret the law in such a way that will respect the right to appeal against a decision not to provide a translator, which is expressed in the Article 2 Section 5 of the Directive.

Technical conditions that would allow a broader use of **videoconferences** for the purpose of providing translator's assist should be introduced into police stations. This would allow a quicker access to interpretation<sup>31</sup>.

Translator's consideration rates have not changed since 2005 and may not be competitive against commercial rates. If the prosecuting authorities wish to employ the best translators, taking into consideration the raise in the rates is necessary.

### **3. The right to information**

#### **3.1. Information about the rights of a detained/suspect**

##### ***Regulation by law***

One of the general provisions of the Code of criminal procedure is expressed in the Article 16 of the Code of criminal procedure, the so called principle of procedural loyalty. According to the so called absolute obligation to inform, if an authority conducting the proceedings is obligated to instruct the participants of the proceedings on their duties and rights, **the lack of such instruction or wrong instructions cannot result in negative procedural consequences** for a participant of the proceedings or other person in question. In turn, the Article 16 § 2 of the Code of criminal procedure provides that the authority conducting proceedings should additionally inform the participants of the proceedings of their duties and rights as needed, also in the cases where the act does not express such an obligation.

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<sup>31</sup> A. Mendel, Report on a survey on the quality of translation and interpretation in criminal proceedings, National School of the Judiciary and Prosecution Service 2011, p. 37.

It is noted in the literature that, for example, a person not instructed on the content of the Article 182 of the Code of criminal procedure (the right to refuse to give evidence if the accused is of closest relations) “can reappear before the authority and referring to the lack of instruction state that they wish to exercise the right”<sup>32</sup>. However, referring to this right *post factum* “cannot remove them from the proceeding, as this applies only in cases identified in the act”<sup>33</sup>. It is also noted in the literature that “progress of the proceedings may exceptionally compensate for the lack of instruction”<sup>34</sup>. On the other hand, however, it is presented that wrongly conducted evidential activities shall not constitute the basis of a ruling in criminal proceeding<sup>35</sup>. A misleading or wrong instruction, however, is not an absolute ground for appeal (Article 439 of the Code of criminal procedure). It has been accepted in case law, however, that the lack of or a misleading instruction may constitute a relative ground for appeal, if the misconduct affected the substance of judgement<sup>36</sup>.

The Directive no. 2012/13/EU was implemented by the act dated 27 September 2013 on the amendment of the act - the Code of criminal procedure and certain other acts. It unified informative obligations towards sides and participants of a criminal proceeding, as well as authorised the Minister of Justice to prepare templates of instructions - i.a. for the detained, the suspect, the temporary detained.

### Detained

According to the code regulations a **detained** is firstly informed of **grounds for detention**, then the Article 244 § 2 of the Code of criminal procedure also requires that the detained is instructed on his rights. Instruction on the rights of detained is a part of drawing up the report on detention - firstly it contains information about the very act of detention (place, time, personal details of the detaining officer), then information about the detained person, grounds for detention, and then the report contains the part titled “Declaration of the detained”, in which information about the type of instruction presented to the detained is included.

#### Declaration of the detained:

„I have been informed of grounds for detention and of my rights. I have received:

- Instruction on the rights of detained in criminal proceedings
- Instruction on the rights of detained in the case of an offence
- Instruction on the rights of detained on the basis of an European arrest warrant
- Instruction on the rights of detained according to the Article 15a of the act dated 6 April 1990 on police

.....  
(signature of the detained)

A copy of the instruction signed by the detained is attached to the main records of the proceeding.

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<sup>32</sup> T. Grzegorzcyk, Code of criminal procedure. Vol. I. Articles 1-467. Commentary, LEX 2014.

<sup>33</sup> T. Grzegorzcyk, Code of criminal procedure. Vol. I. Articles 1-467. Commentary, LEX 2014.

<sup>34</sup> *Ibidem*.

<sup>35</sup> J. Kosowski, Principle of legal information ..., p. 287.

<sup>36</sup> J. Kosowski, Principle of legal information ..., p. 291.

The Code requires instructing the detained on their right to a lawyer's or solicitor's assistance, to unpaid assistance of a translator, if they are not sufficiently fluent in Polish, to make a statement and to refuse to make a statement, to receive a copy of the report of detention, to the access to first aid. What is more, the detained is instructed on the rights specified in the Article 245 (the right to contact a lawyer or a solicitor) and Article 612 § 2 (the right to contact a consular authority), as well as the on the content of the Article 248 § 1 and 2 (maximum period of detention), and they should too be heard. Further, on request of the detained a person of closest relations appointed by the detained should be informed (Article. 245 § 3 in conjunction with Article 261 of the Code of criminal procedure).

At the end of the report there are sections related to requests of the detained - such as for contact with a lawyer or to inform a person of closest relations. The conducted research shows that the above is noted for each right, also if the detained does not exercise a right. Then it is stated that the detained, for example, "does not request the contact with a lawyer". In this part of the report the detained are asked if there are any reservation towards the method of detention and if they will file a complaint on the detention. Despite the fact that in most cases such reservations were not raised in the cases covered by the reviewing of records, the complaints were subsequently filed regardless, and were then examined by courts.

The fact of receiving the instruction as well as filed requests should be confirmed by the signature of the detained. The detained sometimes refuse to place a signature (then they write down "I refuse to sign"), however, the refusal to sign usually does not contain a justification. Based on the conducted research, it seems that the lack of signature of the detained does not indicate an incorrect detention. Police officers also noted that the detained do not sign the report if they are intoxicated.

In one of the cases of a complaint on detention the time of drawing up of the report of detention equaled to 5 minutes<sup>37</sup>. In such a period of time it is not possible to familiarize oneself with the instruction, and in particular to understand its content. As one of the defence lawyers noted "explanation of the rights [of the detained/suspect] does not take 5 minutes." Police officers agree and emphasize that instructing the suspect on their rights is vital. One of the officers even stated that without such an instruction a person will not be allowed in the PDOZ (Detention Room). It was also noted that the detained actually learn of their rights only after entering the Detention Room, that is, only then do they have the time to calmly read through the instruction. Some of the detained sign the instruction without reading it. During the interviews the majority of defence lawyers assessed that the detained/suspects do not know their rights but they did note that the general public knowledge of procedural rights is increasing.

The Directive no. 2012/13/EU provides that the detained must be immediately instructed on his rights, and should be able to keep the instruction throughout the whole period of detention. The detained receive an instruction in written form and, as the interviews prove, react to this in various ways - some try to read and understand the content, even ask questions on the meaning of their rights. On the other hand, people who had been detained before do not read the instruction, which might arise from the fact that they already know their rights. However, in one of the cases covered by the reviewing of the records, the claimant claimed that he received his instruction only when exiting the police station, a few hours after being detained. In a different case, in relation to a similar claim the court ruled that "the Article 244 of the Code of criminal procedure does not specify the timeframe for providing the detained with the copy of the report of detention".

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<sup>37</sup> Godzina rozpoczęcia i zakończenia sporządzania protokołu jest odpowiednio oznaczana na początku i na końcu.



According to the regulations of the General Police Headquarters, when receiving the written instruction of his rights, the detained should also have the content of the instruction explained to him.<sup>38</sup> Police officers noted that they do try to explain the instructions if the detained asks related questions. Some of the detained that participated in the research noted that the police officers have additionally explained the instruction. On the other hand, the assessment of their understanding of the instruction varied among the detained. Some of them claim to have understood the instruction, others claim that it was unclear or that they did not have enough time to acquaint themselves with the content. One of the surveyed claimed that he learned of some of his rights only later (after the detention).

If the detained person is not fluent in English, a police officer provides them with a **translated** instruction, in the language which is understandable to them. If there is no written version of such an instruction, a translator translates it into the appropriate language. According to the regulations of the General Police Headquarters in the above situation the police officer informs the person about the possibility of requesting a written form of the list of their rights in a language which is understandable to them<sup>39</sup>.

Instruction on the rights of the detained does not contain information about **the access to the materials of the case**, which applies only to a suspect and his defence lawyer, pursuant to the Code. However, according to the Article 4 Section 2a of the Directive no. 2012/13 the instruction on the rights of the detained should contain information about the access to the materials of the case. What is more, it is not clear if a detained has **the right to a public defence**. Surely a detained is not informed of the content of the Article 517j, which appropriately applies to detained persons (according to the Article 245 § 2 of the Code of criminal procedure). The provision of the Article 517j applies to the defence lawyers acting in an accelerated proceeding. The correct application of the Article 245 § 2 of the Code of criminal procedure should result in the detained being provided with a list of defence lawyers acting in accelerated proceedings. The interviews show that such lists are not available for the detained, and according to the police officers, they are not available at all at the police stations.

Statutory authorisation provides that the Ministry of Justice, while specifying the template of the instructions should take into consideration “the necessity of the instructions being understood even by a person without the assist of a lawyer.” The above arises from the Article 4 Section 4 of the Directive no. 2012/13/EU, which states that the instruction on rights is drawn up in simple and understandable language. The police uses the template of the instruction on the rights of the detained<sup>40</sup> which formulates the rights in the third person singular (“The detained in criminal proceedings has the following rights”) and then lists the rights (e.g. “the right to give or refuse to give a statement in their case”). Such form of the instructions seems hard to understand, especially in the stressful situation of detention. What is more, the instruction does not provide information about the further procedural steps taken with given statements<sup>41</sup>.

Additionally, it should be noted that the instruction on the rights of the detained in accelerated proceedings is significantly different from the instruction on the rights of the detained in ordinary proceedings, e.g. it lacks

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<sup>38</sup> § 87 Section 6 of the regulations of the General Police Headquarters.

<sup>39</sup> § 87 Section 7 of the regulations of the General Police Headquarters.

<sup>40</sup> Regulation of the Minister of Justice dated 3 June 2015 on determining the template of instructions on the rights of the detained in criminal proceedings. (Journal of Laws from 2015, item 835).

<sup>41</sup> D. Czerniak, W. Jasiński, Instructing the suspected person and the suspect on procedural rights and duties after the amendments to the Code of criminal procedure, Review of the Law and Administration 2015.

the information about the possibility of requesting a questioning in the presence of a defence lawyer, despite the fact that no provision excludes this right<sup>42</sup>.

The reviewing of the records shows that the fact of signing a template of the instruction and the report of (detention/questioning) results in the court ruling that such an instruction took place and that the detention was correct in this scope. Proving that the detained did not understand the instruction requires further evidence. Similar was stated by the Court of Appeal in Cracow in a ruling in 2014, which stated that “the written instruction being drawn up and then signed by the detained excludes the possibility of the detained to refer to the lack of instruction on procedural rights, according to the Article 300 of the Code of criminal procedure”<sup>43</sup>. Statistically, the content of the report or a notice of an officer is usually recognised by courts as more credible than claims raised by the detained in his complaint. In one of the cases covered by the reviewing of the records, the claimant wrote the following in his complaint on detention: “I was so shocked and scared (...) that I signed the detention report with no reservations”. He further argument that “I would sign anything to leave and get home safely”. A different detained wrote: “I wish to hear from a third person what my rights are and why I should spend a night in the detention room”. In his complaint he also demanded the contact with a lawyer.

The only cases in which the court ruled the detention incorrect in the scope of instructions, where situations when a person was deprived of their liberty for a few hours in relation to reviewing of their documents, that is without a report and without the instruction on their rights. In the majority of such cases the courts deemed the prolonged reviewing of their documents as detention, which requires the appropriate procedural security arising from the Code of criminal procedure.

### Suspect

According to the Article 300 § 1 of the Code of criminal procedure, **the suspect** should be instructed on his rights before the first questioning. He should receive a **written** instruction. He then confirms that he received the instruction with a signature. The template of the instruction is also determined by the Minister of Justice. It is, however, noted in literature that providing a written instruction does not “relieve the procedural authority from the possible oral instruction, if the instructed person reports such a need, or if the circumstances of the case or possibly the circumstances in which the instruction was received will indicate that the detained or the victim may have difficulties in understanding the content of the written instruction”<sup>44</sup>. Both the doctrine and practice show that the instructions are translated into foreign languages - the most popular ones - and available at police stations and at the website of the Ministry of Justice.<sup>45</sup>

The suspects is instructed on his rights to: make statements, refuse to make statements or to refuse to answer questions, to information about the content of charges and changes in charges, to file request for an investigative procedure, to assist of a defence lawyer, including applying for public defence in the case

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<sup>42</sup> J. Kosowski, *The principle of legal information in accelerated proceedings [in:] From the issue of the function of criminal proceeding*

<sup>43</sup> Judgement of the Court of Appeal in Cracow from 20 November 2014 r., file ref. no. II AKz 392/14.

<sup>44</sup> J. Grajewski, P. Rogoziński, S. Steinborn, *Commentary on the Article 300 [in:] Steinborn Sławomir (ed.), the Code of criminal procedure. Commentary on certain articles*, LEX/el. 2016.

<sup>45</sup> The English translation of the instruction available on the website of the Ministry of Justice is, however, obsolete - it contains information about the Article 60a of the penal Code revoked in April 2016. - <https://www.ms.gov.pl/pl/dzialalnosc/wzory-pouczen/>.

specified by the Article 78, to finally acquaint himself with the preparatory proceedings materials, as well as other rights, such as access to the records of the proceeding. According to the Code regulations the instruction should be received by the suspect in writing, and the suspect confirms having received the instruction with his signature.

In the context of instructing a suspected person on their rights, the scope of instruction on **witness'** - who may also be the suspected person (or may obtain such status during the questioning as a witness) - rights is significant. The existing template of the instruction does not contain the information about the right to appoint an attorney in fact, who may participate in the questioning, if it is in the witness' interest (Article 87 of the Code of criminal procedure). The instruction also does not contain the information about the right to file a complaint on actions actually breaching rights pursuant to the Article 302 of the Code of criminal procedure. The instruction does contain the information about situations in which the witness may refuse to answer a question (e.g. Article 183 of the Code of criminal procedure). The interviews with police officers additionally show that during the questioning itself, if the police officers determine that the witness may become the suspected person, they additionally inform the witness (again) of the content of the Article 183 of the Code of criminal procedure. The officers, however, do not stop the questioning.

The template of the instruction for the suspect is bigger in volume than the template of the instruction for the detained<sup>46</sup>, which arises from the broader scope of procedural rights of the suspect. Some of the surveyed detained deemed this instruction as quite long and intricate. Among claims against the instructions, the most frequent related to hermetic language, which takes form of a two-page text. The text of the instruction contains bulleted rights and duties of the detained/suspect, which graphically is the best solution. However, the third person form "The suspect in criminal proceedings has the following rights" may not be sufficiently understandable for a person deprived of their freedom, who in the stressful situation of detention must decide which rights and to what extent they will exercise. At the further stage, the rights are listed in the order of appearance in the Code of criminal procedure. This results in significant rights being missed among the less important rights.

In the officers' assessment, however, the instructions are understandable and constitute - for the detained and the suspects - the main source of information about their rights. Nonetheless, one of the officers admitted that they are written in legal language and time is needed in order to understand them. Some of the officers clearly emphasized their role in the proper instruction of the detained/suspect on their rights. They did not, however, postulate broadening of the scope of the instructions, even suggesting that the suspect's rights are too broad (in the scope of presenting untruth when giving statements). The defence lawyers deemed the language used in the instructions hermetic, and the instruction for the suspects itself quite extensive. Most of the defence lawyers emphasized that the detained is in a stressful situation, which results in persons performing responsible functions in their everyday life lose their confidence and cannot make basic decisions. In their opinion, persons that had a defence lawyer's assistance in the past or had already been detained know their rights. One of the defence lawyers stated that in practice "a well informed suspect is not in the state's interest".

In one of the complaints on detention the claimant included claims related to his inability to acquaint himself with the instructions on the rights of the detained and the suspect and then stated "I demand cancellation

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<sup>46</sup> Regulation of the Minister of Justice dated 13 April 2016 on determining the template of instructions on the rights and duties of the suspect in a criminal proceeding.

of the statements I gave at the station. I was shocked (...), scared (...) and I couldn't think clearly." While examining this complaint, however, the court decided that there are no reservations towards the detention procedures in the report and the complaint was not recognised.

### **3.2. Information about the grounds for detention/temporary detention and about the alleged act**

#### **Grounds for detention**

According to the Directive no. 2012/13/EU, the Member States ensure that the detained and accused persons, who were detained or arrested, receive information about **the grounds for detention or arrest**, including the prohibited act they are accused or suspected of committing. According to the Article 244 § 2 of the Code of criminal procedure, the detained should be immediately informed about the grounds for detention, and the information is included in the report of detention of this person. The report also contains information about the offence that the person is suspected of committing, the name and surname of the police officer conducting the detention, the name and surname of the detained person, and the date, time and location of the detention. The statements of the detained are also included in the report. The detained receives a copy of the report.

Information about the grounds for detention is a mandatory part of the report. It is subject to judicial control through the right to file a complaint on detention in the scope of the **validity** of the detention. In most of the cases covered by the reviewing of records the courts ruled the detentions valid.<sup>47</sup> In turn, the interviews with the detained show that most of them did not file any complaints on detention<sup>48</sup>. One of the detained noted that she heard from the officer that she may file a complaint but she is not going to win her case anyway. The interviews with the detained show that the significant majority did not know why they were being detained. One of them noted that a vague statement of the activities being conducted on the Public Prosecutor's behalf was given as grounds for his detention (and home search).

#### **Presentation of charges**

The Directive no. 2012/13/EU requires providing the suspected/accused persons with information "about the prohibited act they are accused or suspected of committing". The information should be given immediately and be as detailed "as it is necessary to ensure diligent proceedings and effective exercise of the right to defence". According to the article 313 § 1 of the Code of criminal procedure if data existing at the commencement of the investigation or collected throughout the investigation sufficiently justify the suspicion that a certain person has committed the act, **an order of presentation of the charges** is drawn up, the charges are immediately presented to the suspect and the suspect is questioned, unless the presentation of charges or questioning of the suspect is not possible due to him remaining in hiding or to his absence from the country. An order of presentation of the charges contains identification of the suspect, precise identification of the act he is accused of, and its legal qualification. The suspect is entitled to request grounds for charges in a spoken form as well as a written justification, up until informing him of the date for acquainting himself with the case materials, he should be instructed on this right. The justification is provided to the suspect and his appointed defence lawyer within 14 days. The justification should include in particular

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<sup>47</sup> The detention was deemed invalid in 10 cases.

<sup>48</sup> Only five of the detained filed a complaint, in one of these cases the detention was deemed valid but incorrectly conducted.

which facts and evidence have been accepted as the grounds for charges. The conducted reviewing of records and the interviews with the defence lawyers show that the written justifications of charges are really short and constitute a slight expansion on the content of the charges themselves. The research shows that i.a. the justification of charges does not refer to the evidence material collected for the case. “You do not receive the actual grounds for charges” - one of the defence lawyers noted.

The suspect must sign the printed order for presentation of the charges after the order is presented in order to confirm that the charges were presented to him. If he refuses to sign, an appropriate annotation is required giving reasons for the lack of signature (Article 121 of the Code of criminal procedure). In the case of people who are not fluent in Polish, the obligation of a translator’s participation in the presentation of charges is realized. The Code of criminal procedure also provides the possibility of supplement or amendment of the charges (Article 314 of the Code of criminal procedure).

A delay in the presentation of the charges may result in the suspected person remaining as a **witness** and consequently not having the rights of **the suspect** (such as the right to refuse to give statements). Such a delay may be explained as an element of the procedural strategy of the police/prosecution, but in practice it may restrict the right to defence. The principle of objectivity of the authority conducting the proceeding, which is expressed in the Code, may constitute some security measure. However, there are no procedural securities, as the order for presentation of the charges is not subject to complaint

According to the Article 250 § 3 of the Code of criminal procedure the prosecutor, delivering an order for a temporary detention together with the record of the case, instructs the suspect on his rights in the case of temporary detention, and orders the placing of the suspect at disposal of the court. However, it seems that the same provision **does not formulate the obligation to provide the suspect with said order** (nor their defence). This is confirmed by the interviews with defence lawyers. What is more, there are no provisions in the Code which would guarantee that the order of a court on temporary detention would be delivered to the suspect. Pursuant to the Code, such an obligation is realized only if the suspect was not present at the presentation of said order. It is regulated differently, however, by the § 298 of the rules concerning the operation of the courts<sup>49</sup>. According to this provision, after the court presents an order for temporary detention, the court delivers a copy of said order to the suspect present at the presentation, against a receipt, which includes the date and time of the delivery together with the date and method of appeal.

### 3.3. Access to the case materials

According to the Article 7 Section 1 of the Directive no. 2012/13/EU, if a person is **detained and arrested** at any stage of a criminal proceeding, the Member States provide the detained or their defence with access documents remaining in the possession of appropriate authorities, which are related to the case and are of significant meaning for effective questioning, according to the state law, the legality of the detention or arrest. The Member States provide the **suspected or accused persons** or their defence with access to at least the whole of the evidence material remaining in the possession of appropriate authorities, regardless of the material being for the benefit or disadvantage of the suspected or accused persons, in order to guarantee diligent proceedings and the possibility to prepare the line of defence. According to the Directive, the access to the evidence material is provided within an appropriate period enabling an effective exercise of the right

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<sup>49</sup> Regulation of the Minister of Justice dated 23 December 2015 on the rules concerning the operation of the ordinary (Journal of Laws of 2015, item 2316, as amended).

to defence, and **not later than at the moment of presenting the grounds for charges for the consideration of the court**. If the appropriate authorities obtain further evidence materials, the Directive states that the access to this new materials is provided in an appropriate period, enabling the taking of this material into consideration.

The Directive provides the possibility of **restricting the access** to case materials, if “such access can lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted”. The Directive requires the decision in this scope to be made by a judicial authority or for the decision about the refusal to be subject to judicial control.

The act of September 2013 which implemented the Directive no. 2012/13/EU, has amended i.a. the Article 156 of the Code of Criminal procedure which regulates the access to case materials. The provisions was since then subject to amendments. Currently, according to the Article 156 of the Code of criminal procedure “if there exists a necessity to secure the proceedings or important public interest, during the preparatory proceedings the parties, defence lawyers, attorneys in fact and statutory representatives are provided with access to the records, are able to make copies of the records and may received certified copies against payment”. The decision in this scope is made by the authority conducting the preparatory proceedings in the form of an order. An order refusing the access of case records is subject to **complaint** on the basis of the Article 159 of the Code of criminal proceeding. The decision about the refusal of the access may be amended in the case of a repeated request for access. Instruction on the rights of a suspect does not, however, include information about the right to file a complaint on the refusal of access to records<sup>50</sup>, thus the lack of a defence lawyer may result in the lack of knowledge about the right to file such a complaint.

The interviews with police officers show that the case records are not accessible for a suspect or a defence lawyer before the first questioning, so the suspect does not adapt his statements to the collected materials. In order to gain access to the records, one should file a request which is recognised within a few days. Although the appointment of a defence lawyer is not a condition for accessing the records, it seems that the participation of a defence lawyer in the proceedings increases the frequency of requesting for access to records. In one of the cases, in which the Helsinki Foundation for Human Rights intervened, the prosecutor granted the access to records to the defence, but not to the suspect<sup>51</sup>.

The Code of criminal procedure regulates separate conditions related to granting access of the case materials in the case of request for temporary detention. The articles which regulates this matter, Article 156 § 5a of the Code of criminal procedure results i.a. from the judgement of the Constitutional Tribunal (K 42/07)<sup>52</sup>. While the previous regulations were in effect, the lack of access to materials giving grounds for temporary

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<sup>50</sup> According to the instruction, the suspects has “the right to access the case records, to create copies, also subsequent to the conclusion of the preparatory proceeding. The access may be denied in relation to an important public interest or the interest of an ongoing investigation (Article 156 § 5)”.

<sup>51</sup> <http://www.hfhr.pl/interwencja-hfpc-w-sprawie-dostepu-do-adwokata/>

<sup>52</sup> Article 156 § 5 of the Code of criminal procedure has been deemed inconsistent with the Article 2 and Article 42 Section to in relation to the Article 31 Section 3 of the Constitution, to the extent in which it enables an arbitrary exclusion from disclosure of those material from the preparatory proceedings which justify prosecutor’s request in the scope of temporary detention.

detention was one of the main issues which resulted in the abuse of this institution<sup>53</sup>. Currently, according to this regulation, if during preparatory proceedings a request for temporary detention or elongation of temporary detention is filed, the suspect and their defence are immediately provided with the part of case records that contains evidence attached to the request, excluding evidence from witness questioning regulated by the Article 250 § 2b of the Code of criminal procedure<sup>54</sup>. In this scope, the access to records arises by virtue of law and does not require separate decisions of the court or prosecutor. The Article 249a of the Code of criminal procedure is closely related to the 156 § 5a of the Code of criminal procedure, and according to this article the grounds for ruling in the case of temporary detention or its elongation may constitute findings made on the basis of: the evidence disclosed to the suspect and his defence, and the evidence given by the witnesses in questioning, which are regulated by the Article 250 § 2b of the Code of criminal procedure. The court, informing the prosecutor beforehand, also takes the circumstance not disclosed by the prosecutor into consideration, after disclosing them during the sitting, if they are of benefit to the suspect.

In the light of the wording of **the rules governing the operation of the prosecution**, the prosecutor prior to applying to the court for temporary detention, in the case of grounds specified in the Article 250 § 2b of the Code of criminal procedure, issues an order determining which evidence arising from the questioning of witnesses that is to constitute grounds for temporary detention will not be made accessible to the suspect and their defence. This order is attached to the reference files. The request for temporary detention or for its elongation lists evidence **indicating the commitment by the suspect of the act he is accused of** and the circumstances which point to the necessity of this preventive measure or its elongation on the legal basis referenced in the request. The request for temporary detention or for its elongation does not list evidence identified in the order arising from the Article 250 § 2b of the Code of criminal procedure. According to the rules, referring to the circumstances arising from the evidence identified in the order may only take place in exceptional cases and in a way that prevents identification of the evidence source.

Although the Article 156 § 5a of the Code of criminal procedure covers the basic issues related to the right to defence at the stage of the request for temporary detention, it does not solve all issues. Firstly, the exclusion referring to the Article 250 § 2b of the Code of criminal procedure is criticised as inconsistent with the Directive no. 2012/13/EU, as the reservation of access to these materials is not subject to complaint, while the grounds for restriction are not subject to complaint according to the Directive<sup>55</sup>. Secondly, the defence lawyer still has little time to acquaint himself with the materials presented by the prosecution, which are to justify temporary detention. From the practical point of view, in the case of being granted the access to records on the stage of request for temporary detention, the organisation of the operation of the court recognising the request for temporary detention is vital. It is noted that the possibility of earlier access to the records by the suspects would be a way of solving this issue<sup>56</sup>. Thirdly, the prosecutor, as grounds for

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<sup>53</sup> A. Grochowska, Abuse of pre-trial detention in Poland as a result of the limited access of suspects and defence lawyers to case-files, Warsaw, November 2013, p. 17-18.

<sup>54</sup> According to the Article 250 §2b of the Code of criminal procedure, if there exists a reasonable fear of threat to the life, health or freedom of the witness or a person of close relations to the witness, the prosecutor attaches to the request specified in § 2a, in a separate set of documents, the evidence arising from the questioning of the witness which are not made accessible to the suspect and his defence.

<sup>55</sup> P. Kryczka, M. Smarzewski, Efficiency of the right to defence in preparatory proceedings (access to records subsequent to a request for temporary detention or for its elongation), State and Law 4/2018, p. 97-98.

<sup>56</sup> K. Wróblewski, A. Tęcza-Paciorek, Suspect's access to case records concerning temporary detention after amending the code of criminal procedure, Prosecution and Law 3/2016, p. 46.

temporary detention, presents only the evidence of disadvantage to the suspect and does not provide the court (and the suspect) with the materials to the suspect's benefit (the prosecution rules use the term "evidence indicating the commitment by the suspect of the act he is accused of"). Regardless of the scope of obligatory access to the records on the basis of the Article 156 § 5a, the defence lawyer may apply (to the prosecutor) for the access to the remaining materials. It seems, however, that the possibility of acquiring said access before a court sitting is slight.

The prosecutor is not obligated to deliver the request for temporary detention filed to the court to the suspect. It happens that the requests are delivered to the defence very late, that is immediately before the date of the court sitting. A postulate has been formed in literature, according to which "not making the records accessible should result in not conducting or revoking of the temporary detention"<sup>57</sup>, however, it is not reflected in the criminal procedure regulations. In the case of court sittings regarding the temporary detention it happens that the court orders e.g. a 2-hour break so that the defence may acquaint themselves with the case records. Access to the records is further obstructed if there is more than one suspect in one case, in relation to whom the request for temporary detention was filed and is based on the same materials (records), "then there are fights for the records". In the context of time limitations for recognition of a request for temporary detention, one of the interviewed defence lawyers assessed that: "a bit of unwillingness and you will not get the records". on the other hand, as one of the defence lawyers noted, "if at a sitting I have the records, then the court (which recognises the request) does not".

It should also be taken into consideration that a preparatory proceeding, which was conducted for e.g. a few months, may have led to collection of even a dozen or so volumes of records which constitute the basis for the request for temporary detention. In such a case it is challenging for both the court and the defence to acquaint themselves with such material. the defence lawyers assess that the situation is a bit better in the case of request for elongation of temporary detention. Several of the interviewed defence lawyers assessed that the right to access to preparatory proceedings records is realized at the stage of final acquaintance with the materials (Article 321 of the Code of criminal procedure) and in the case of a complaint on the refusal to initiate or discontinue an investigation (Article. 306 of the Code of criminal procedure). It seems that **the final acquaintance** with the records does not cause significant issues in practice.

One of the defence lawyers stated that the access to records is possible subsequent to presentation of the charges, noting that the suspect must make at least some statements, especially if other procedural activities are also planned. "After presentation of the charges it is easier to access the records" - one of the defence lawyers noted. Technical issues related to making photocopies of the records were noted. One of the defence lawyers assesses that in minor cases the records may be accessible even before the questioning. In major cases (including political cases) they are "rationed". "I often apply for access to photocopies or records throughout the whole preparatory proceeding. Then the police directs me to the prosecutor overseeing the case, and the prosecutor refers to the factual lack of this records as they remain in the possession of the police".

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<sup>57</sup> A. Grochowska, Ł. Malinowski, The right of the parties to information in criminal proceedings in the light of amendments to the code of criminal procedure dated 27 September 2013 and 28 November 2014 [in:] Around the guarantee of the current criminal procedures. Jubilee book of Professor Piotr Kruszyński (ed. B. Bieńkowska, M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska), Wolters Kluwer 2015.



### 3.4. Conclusions

The right to information in a criminal proceedings is expressed through three types of rights: instruction on rights, information about grounds for detention and charges, access to case records.

**Instructions** are delivered in a written form to the detained and the suspects. Instructions on rights are also delivered in foreign languages - translations of instructions are available at police stations and at the website of the Ministry of Justice. They are the basic form of information about the rights of the detained/suspect, however, it is not clear to what extent they fulfill their informative functions. Such a change in the instructions should be taken into consideration that would make them more understandable, also in the graphic aspect<sup>58</sup>. Brochures written in a very simple language available not only at the station at the stage of initial procedural activities could constitute a supplement to this instructions. The introduction of a written (and not only oral) translation of the instruction into a language understandable for the suspect should be taken into consideration<sup>59</sup>.

On the basis of the interviews with police officers it may seem that the template of the instruction on rights somehow relieves them of further activities related to explaining the rights to the detained/suspect. The police officers note that they answer all possible questions related to the instructions but it may happen that a person deprived of their freedom may not know what to ask about or, worse, be scared of asking questions in a stressful situation. The written instruction should not exclude spoken instruction independent of possible questions of the detained. The officer should ensure - through 2-3 questions - that the detained (suspect) understood the instruction. Posters including information about the rights of the detained/suspect at the police stations could be taken into consideration.

**Justification of the charges** is usually very general and does not contain the factual basis or information about the collected evidence material. Consequently, the written justification broadens the knowledge on the factual basis of given charges only slightly.

The detained does not have **access to the records**, only the suspect is granted said access - in practice only after procedures with his involvement (e.g. questioning) are conducted. The refusal of access to preparatory proceedings records must be consistent with one of the two grounds expressed in the Article 156 § 5 of the Code of criminal procedure. The act implementing the Directive no. 2012/13/EU has introduced the right to file a complaint on the refusal of access to the records. The right to such complaint does not, however, apply in the case of materials excluded on the basis of the Article 250 § 2b of the Code of criminal procedure.

## 4. Access to a lawyer and legal aid

### 4.1. Legal regulation

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<sup>58</sup> how to inform in a criminal proceeding? Polish law and practice vs European standards. Report in the scope of implementing the Directive of the European Parliament and the Council no. 2012/13/EU dated 22 May 2012 on the right to information in a criminal proceeding. Member State: Poland, Warsaw January 2016 r.

<sup>59</sup> The Article 72 § 3 of the Code of criminal procedure does not state the obligation to deliver a written translation of the instruction on rights.

The Directive no. 2013/48/EU has not been implemented into the Polish legal order through a separate act. The Ministry of Justice assessed that the Code of criminal procedure meets the standard of access to a lawyer expressed in the Directive no. 2013/48/EU. In 2015 The Codification Commission for Criminal Law, functioning by the Ministry of Justice, presented an opinion in the case of implementation of the Directive of the European Parliament and the Council no. 2013/48/EU into the Polish law<sup>60</sup>, in which it was noted which of the effective regulations should be amended. At the same time, the Commission stated that it is worth to delay amending the Code until further directives are adopted, which will regulate the right to defence, in particular the directive on temporary public defence of suspects and accused in criminal proceedings. In March 2016 a bill was introduced into the schedule of legislative work of the Council of Ministers, which was aimed at implementing the Directive no. 2013/48/EU. However, the bill was removed from the schedule in February 2017<sup>61</sup>.

The Code of criminal procedure provides that on the suspect's demand **the suspect** should be immediately enabled to contact a lawyer in an available way or attorney at law and hold a direct conversation. Officially, a lawyer or attorney at law do not have the status of the defence at this stage, but of the attorney in fact. The detained does not have the right to contact a third party, only the right to have a third party informed of the detention. The conclusions of the last report of the Council of Europe's Committee for the Prevention of Torture (CPT) point to the need for providing an actual contact of the detained with a defence lawyer<sup>62</sup>. CPT's observations showed that the presence of lawyers at police stations were seldom<sup>63</sup>. In relation to the above, CPT urged the Government of the Republic of Poland to establish a system of access to a lawyer immediately after being detained of persons that cannot afford to cover the costs of a defence lawyer's assist.

In the Polish criminal procedure the right to defence applies also to **the suspect**. According to the Article 301 of the Code of criminal procedure, on the demand of the suspect should be questioned in presence of the appointed defence lawyer. If the defence lawyer does not appear for the questioning, it does not cancel the questioning. The Code does not, however, regulate expressly the right to defence of a "suspected person" holding e.g. the status of a witness. In such a case the participation of an attorney in fact is dependent on acquiring consent of the prosecutor who has to recognise that this is in the witnesses' interest (Article 87 of the Code of criminal procedure). The refusal of a lawyer's participation in the procedures is subject to a

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<sup>60</sup> Codification Commission for Criminal Law, Opinion in the case of implementation into the Polish law of the Directive of the European Parliament and the Council no. 2013/48/EU dated 22 October 2012 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 available at: <https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego/download,2663,0.html>.

<sup>61</sup> Bill available on the website: <https://bip.kprm.gov.pl/kpr/form/r2273,Projekt-ustawy-o-zmianie-ustawy-Kodeks-postepowania-karnego-oraz-niektorych-inny.html>. In January 2018 an act on amendment of the act - Code of criminal procedure and certain other acts was adopted, which introduced a reference in the Code of criminal procedure, according to which: "This act in the scope of its regulation realizes provisions of the Directive of the European Parliament and the Council no. 2013/48/EU dated 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 (Official Journal of the European Union L 294 of 06.11.2013, p. 1)". However, the act does not amend the Code of criminal procedure in the scope of access to a lawyer. Act dated 10 January 2018 on the amendment of the act - Code of criminal procedure and certain other acts, Journal of Laws of 2018 item 201.

<sup>62</sup> Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017

<sup>63</sup> Point 25, p. 18

complaint<sup>64</sup>. In April 2017, the First President of the Supreme Court noted in the annually prepared analysis of detected failures and loopholes in law<sup>65</sup> that “normative acts which would aim at implementing (...) the Directive [2013/48/EU] into the legal system have not yet been adopted”. According to the First President of the Supreme Court the lack of implementation of this directive arises from inappropriate guarantee of access to defence of a “suspected person”, that is e.g. a witness who during a questioning starts to provide self-accusatory information. It has also been noted that there is a lack of regulation of access to lawyer or attorney at law of **a suspected person** in relation to the presentation, lack of a provision that would require enabling the person to consult the defence lawyer before questioning, a possibility of limiting the secrecy of the contact with the defence.

The Code of criminal procedure does not provide **a procedure for limiting the right to a defence lawyer**. This arises partly from the fact that the Code does not provide grounds for such restriction. In practice there might be situation when a defence lawyer may not be permitted to participate in a questioning, e.g. in relation to a conflict of interest (if for example he is the defence lawyer of several accomplices). The interviews show that in such a situation the police officers would enter the information about the impossibility of the defence participating in the questioning into a notice or in the report of questioning, but it would not constitute a separate procedural decision which would be subject to complaint.

The procedure of limiting the right to a defence lawyer appears partly on the basis of the Code in relation to the participation of the defence lawyer in procedural activities. According to the Article 317 § 1 of the Code of criminal procedure, the parties, defence lawyer, or an attorney in fact should be allowed to participate in other investigative activities on their demand. However, in a specially justified case the prosecutor may through an order refuse permittance to participate in an activity for important investigation interest or refuse to summon an accused deprived of freedom if it would cause major difficulties. It is noted in literature that the prosecutor’s order is not subject to complaint<sup>66</sup>.

On the basis of the Code of criminal procedure, **secrecy** of the contact of a detained with a lawyer/attorney at law can be limited. According to the Code “in exceptional cases, justified by exceptional circumstances” the detaining may reserve his presence during the conversation of the detained with the lawyer/attorney at law. This decision does not take any procedural form and is not subject to complaint, but it can be referred to as a claim in the scope of the correctness of detention within the complaint on detention. In the light of the wording of the regulations of the General Police Headquarters, the presence of a police officer during this conversation can be of exceptional nature and must be justified by exceptional circumstances<sup>67</sup>. Such a limitation is also possible in relation to temporarily detained persons and may last 14 days. However, the content of the Article 4 of the Directive no. 2013/48 states that **the secrecy** of the contact with a lawyer is a right to which there are no exceptions<sup>68</sup>.

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<sup>64</sup> A proposal for amendment to the Article 6 of the Code of criminal procedure through broadening its application also to the suspected person has been presented in the literature (R. Stefański, p. 310).

<sup>65</sup> First President of the Supreme Court, *Comments on the detected failures and loopholes in law*, Warsaw 2017.

<sup>66</sup> K. Boratyńska, Commentary on the Article 317 [in:] Code of criminal procedure. Commentary (ed. A. Sakowicz), C.H. Beck 2016, p. 570.

<sup>67</sup> § 87 Section 2 wytycznych of the regulations of the General Police Headquarters.

<sup>68</sup> Similarly: A. Klamczyńska, T. Ostropolski, Right to a lawyer in the Directive no. 2013/48/EU – European background and implications for the polish legislator, Białystok Legal Studies 2014, p.153. However, there is also an alternate interpretation presented, according to which the matter of secrecy is subject to the Article 3 Sections 6 of the Directive, which allows for its limitation.

### 4.2. Organising the access to a lawyer and legal aid

The report of detention, and then in the report of questioning, contain an annotation if the detained/suspect applies for informing a lawyer/attorney at law. The police officer conducting the detention or procedural activities contacts the appointed lawyer/attorney at law by phone. The detained is not entitled to a phone conversation with his attorney in fact, nor with a third party.

Issues with securing the access to a defence lawyer arise if the detained or suspect does not have an appointed defence lawyer or does not have their number at disposal. In the second case the officers can - but are not expressly obligated to do so on the basis of effective regulations - determine the phone number and inform the lawyer about the detention. If there is no appointed defence lawyer, it happens that the family appoints a defence lawyer once they are informed of the detention, and the appointed lawyer appears at the police station to participate in the procedural activities. If the detained has no appointed attorney in fact and the family does not appoint one, the interviews with police officers show that they do not search for information about lawyers/attorneys at law that offer their services in criminal proceedings<sup>69</sup>.

The Article 245 of the Code of criminal procedure, which regulates the right of the detained to contact a lawyer/attorney at law, refers to a correct application of regulations relating to the lawyers and attorney on duty for the purposes of accelerated proceedings (that is the Article 517j of the Code of criminal procedure)<sup>70</sup>. It is noted in literature that “a proper application of the Article 517j § 1 in relation to the detained, and of the regulations based on the Article 517j § 2 means that the detained may use the assist of a lawyer or attorney on duty for the purpose of case solve through accelerated proceedings”<sup>71</sup>. The interviews with police officers show that **they are not aware of duties arising from this regulation** in relation to persons detained in ordinary proceedings, and that **the lists of defence lawyers on duty for the purpose of accelerated proceedings are not available at police stations**, despite the fact that they should be transferred there by the president of an appropriate court<sup>72</sup>. The regulations of the General Police Headquarters also refer to the correct application of accelerated proceedings in the scope of access to a defence lawyer<sup>73</sup>.

In April 2015 the District Bar Council in Cracow issued a statement in which it was assessed that the Article 244 § 2 of the Code of criminal procedure and the Article 245 § 1 of the Code of criminal procedure do not guarantee the detained person an actual access to a lawyer. It was noted that in the first hours of detention they do not have the status of a suspect or accused. What is more, the so called initial questioning of the

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<sup>69</sup> This is confirmed by the statement of the District Bar Council in Cracow that noted: “currently the possibility of requesting contact with a defence lawyer is illusory in the case of not having the contact details to a lawyer”. The statement of the District Bar Council in Cracow of 10 April 2015 - available at <http://adwokatura.krakow.pl/news/stanowisko-podjete-przez-okregowa-rade-adwokacka-w-krakowie-na-posiedzeniu-w-dniu-10-kwietnia-2015-roku>.

<sup>70</sup> According to this regulation, in order to enable the accused to use the assist of a defence lawyer in accelerated proceedings an obligation for lawyers and attorneys at law to be on duty is established, at times and places identified in separate regulations.

<sup>71</sup> D. Świecki Dariusz (ed.), Code of criminal procedure. Commentary, Vol. I, edition. IV, Published: WKP 2018

<sup>72</sup> According to the regulation of the Minister of Justice the president of the district court immediately refers the determined list of lawyers and attorneys at law on duty to the attention of the president of the appropriate regional court, the district bar council, district chamber of legal advisers, the appropriate district prosecutor and the chief or the appropriate police unit.

<sup>73</sup> According to the Article § 87 Section 3 of the regulations in order to enable the detained to contact a lawyer or an attorney at law a properly identified mode is used, which is specified in the regulation of the Minister of Justice dated 23 June 2015 on the method of providing the accused with the possibility of using the assist of a defence lawyer in accelerated proceedings (Journal of Laws, item 920).

detained person takes place without the participation of a lawyer. The District Bar Council in Cracow called for introducing lists of lawyers at police stations in order to ensure the actual access to a lawyer and at the same time ensure through right to defence. It was noted that the detained person, who officially does not have the status of a suspect, should be at least informed about the possibility of appointing an attorney in fact.

In turn, the court appoints a public defender for **the suspect** in preparatory proceedings at least a few days after the application is filed. This application is attached to the report and the is transferred to the prosecution, who refers it to the court. If there exist circumstances that could constitute grounds for **obligatory defence** (Article 79 of the Code of criminal procedure), the prosecution after receiving the materials collected by the police, orders psychiatric examination and on the basis of its results files an application for a public defender appointed by the court<sup>74</sup>. This means that both the examination and the appointing of a public defender take place after the first procedural activities with the involvement of the suspect. Depending on the size of a judicial district, the appointing of a public defender may take from a few to a dozen or so days. Consequently, it is not possible for the public defender to participate in the first questioning as a suspect<sup>75</sup>. This state of event was sanctioned through the case law of the Supreme Court that in 2017 ruled that “lack of a defence lawyer in the cases of circumstances obstructing defence ( the Article 79 § 2 of the Code of criminal procedure) during the first questioning of the suspect in preparatory proceedings cannot constitute an obstacle for using the statements given in such conditions at a trial, unless there were other circumstances limiting the freedom of expression or an objectively existing vulnerability of the suspect to disadvantage”<sup>76</sup>. During the interviews one of the police officers expressly stated that he did not see a case where a detained filed for a public defender at the stage of first procedural activities. He even expressed his surprise that the institution of a public defender appears at the stage of preparatory proceedings.

One of the defence lawyers, when asked how the system of providing access to lawyer for the detained works in practice, answered that such a system does not exist at all Another defence lawyer emphasized that in practice the organisation of legal aid takes place outside of the police station (e.g. it is organised by the family of the detained). This assist seems not be institutionalized at the stage of the detention itself. In one of the complaints on detention it was claimed that “request for the contact with a lawyer was ignored by the police officers under the pretext of not knowing the phone number of the lawyer - the information about the number being saved in the mobile phone of the detained was disregarded”. A defence lawyer noted that, after receiving from the station the information about the detention of his client, he goes to the station in order to contact the detained and - in order to ensure qualified security - sends a document containing such information to the station by fax.

The interviews with police officers show that they are not obligated to inform the detained/suspect about available defence lawyers which may be appointed by choice for the purpose of participation in the procedural activities, which will be conducted in relation to detention. They also note that they i.a. do not

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<sup>74</sup> If the suspect had been treated psychiatrically or if he is addicted to alcohol, he is virtually always sent for examination, and then - depending on the results of the examination - the prosecutor files for a public defender.

<sup>75</sup> At the stage of applying for temporary detention, informing the defence lawyer about the date of questioning by the court is not obligatory, unless the accused requests so and it will not obstruct the proceedings (the Article 249 Paragraph 3). Requesting the public defender is not possible at the stage of elongation of the temporary detention. (Article 249 Paragraph 5 of the Code of criminal procedure).

<sup>76</sup> Judgement of the Supreme Court of 27 June 2017. II KK 82/17.

want to be deemed partial in providing this information or in searching for the defence lawyer if the services of the lawyer were assessed by the detained as incorrect. The officers note that in order to contact a lawyer they need to know at least his name and surname. One of the officers noted that she was never in a situation when a detained/suspect requested a defence lawyer while not having his contact details at disposal or not having an appointed lawyer. She also stated that in such situation she would contact her superior and then the prosecutor in order to learn how to behave in this situation.

How long it takes to organise the presence of a lawyer at a police station may vary depending on the availability of the lawyer, but also on the organisation of work at a given station. The interviews with defence lawyers show that in the situation of detention happening in evening hours, the right to contact a lawyer is realised the next day in the morning. If a detention happens during weekend or not also affects the access to a defence lawyers. In one of the cases covered by the reviewing of the records, the detention was ruled incorrect as the immediate contact with a defence lawyer was not provided. In the complaint it was stated that the contact with a defence lawyer was provided only 1 h 20 min later. In a different case the court deemed a practice, in which the contact with a lawyer was enabled 7 hours since detention, reprehensible. What is more, in the same case the court did not recognise circumstances requiring the presence of an officer during the contact of the detained with the defence lawyer. Considering the fact that the activities with the involvement of the detained took a long time (the charges were presented only the next day), the court ruled that “the process of detention (...) was characterised by material breach of the right to defence”.

### **4.3. The decision of the suspect to exercise the right to a lawyer and to waive this right**

the Code of criminal procedure does not regulate a separate procedure of **waiving** the right to a defence lawyer. The instructions for suspects also do not contain an express information about the possibility to waive the right to a defence lawyer, nor about the right to cancel such waiver. It seemed that the legislator assumed that an implied, and not only the direct form of deciding not to exercise this right is possible. In practice the lack of request for contact with a defence lawyer or the lack of applying for a public defender is seen as waiving the right to a defence lawyer. Both in the report of detention and the report of questioning the conclusions of the detained/suspect are noted.

The above is confirmed through the interviews with the detained. They show that waiving the right to a defence lawyer is usually implied, that is the detained does not request contact or appointing of a defence lawyer. Situations where a detained expressly stated that he does not wish to contact a lawyer were rare. However, one of the detained claimed that he did not file such a request as he “thought that it would cost and couldn't afford it then”. In the case of 4 detained that participated in the research, a defence lawyer, whose number was given by the detained or who was appointed by the family, has participated in the first questioning.

The decision not to exercise the right to a defence lawyer may arise from not having the contact details of a certain lawyer/attorney at law, but also from the stressful situation in which the detained is. Most likely what is vital for the detained is the release which may be delayed in time if the time spent waiting for the defence lawyer is taken into consideration. One of the defence lawyers noted that in his practice there were cases in which the officers tried to convince the detained that he would be released earlier without a lawyer. Another defence lawyer has in turn noted that he warns his clients that if they are ever detained by the police they must insist on the access to a lawyer. Another one of the factors is the extent of the understanding of the

received instruction in the scope of the right to contact a lawyer/attorney at law<sup>77</sup>. The reviewing of the records shows that the detained did not attach any reservations to the report, including the intention to file a complaint, and then a complaint was filed claiming that the detention was incorrect, e.g. because the contact with a lawyer/attorney at law was obstructed.

### **4.4. Method and form of providing legal advice - secrecy of the first contact with a defence lawyer**

Both the request for contact with a defence lawyer, and the participation of a defence lawyer in a procedural activity should be noted in the report of questioning. According to the Article 301 of the Code of criminal procedure on the suspect's demand he should be questioned in presence of appointed defence lawyer. If the defence lawyer does not appear, the questioning still takes place. The regulation does not, however, specify if the lack of appearance by the defence lawyer was justified or not. The decision to participate in a questioning without an informed defence lawyer - who stated his willingness to participate in the questioning of the suspect - does not take form of a separate decision and consequently is not subject to complaint. According to the motive 32. of the Directive no. 2013/48/EU related to the framework of suspect questioning which would take place without the participation of a defence lawyer, "questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence".

The Article 301 of the Code of criminal procedure refers to the possibility of an "appointed defence lawyer" participating in a questioning. It is noted in the literature that "in the situation when the suspect only intends to appoint a defence lawyer, the procedural authority is not obligated to take such a request into consideration"<sup>78</sup>. Such a statement seems not to be consistent with the Directive no. 2013/48/EU, according to which the Member States take efforts to make general information facilitating the access of suspects and the accused to lawyers available.

A procedure conducted on the basis of the Article 308 of the Code of criminal procedure, that is the so called **investigation to the necessary extent**, may constitute a challenge in the scope of the access to a lawyer. The Article 308 § 2 of the Code of criminal procedure, in urgent cases allows the possibility of questioning a "suspected person" as a suspect before the order for presentation of the charges is issued. A questioning in this cases starts with the information about the content of charges. Despite the obligation to instruct on suspect's rights, due to the pace of conducted activities, the participation of a defence lawyer in a questioning conducted according to the Article 308 of the Code of criminal proceedings may factually be obstructed. One of the defence lawyers noted that the police officers "question (the suspects) for notes" before the actual questioning. The officers can be questioned on the content of such notes.

The interviews show that the lawyers/attorney at law are informed of the detention of their client by telephone. The information collected from police officers indicate that there is no possibility of a

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<sup>77</sup> When asked if they understood the instruction, one of the detained stated that: "not much. The officer wasn't clear, enlisted paragraph numbers".

<sup>78</sup> System of the criminal procedural law (ed. P. Hofmański, R. Stefański), vol. X, Wolters Kluwer Polska 2016, p. 776.

detained/suspect contacting a lawyer/attorney at law by phone<sup>79</sup>. There is such a possibility at the stage of temporary detention.

While the possibility of confidential contact with a lawyer/attorney at law may be limited (Article. 245 § 1 of the Code of criminal procedure), the contact of a suspect with his defence lawyer is not regulated. the Code only mentions the participation of a defence lawyer in a questioning or other procedural activities. The majority of police officers noted that they are always present during the contact of a detained/suspect with the defence lawyer. In this scope they seem to overlook that in the light of the Article 245 § 1 of the Code of criminal procedure the presence of an officer should be exceptional and not usual. Only two officers noted that they cannot participate in such conversations, at the same emphasizing that this does not relieve them from the responsibility over the detained (i.a. ensuring he does not abscond)<sup>80</sup>. In its report, the CPT has expressly emphasized that the presence of an officer during the conversation of a detained with the defence lawyer is unacceptable<sup>81</sup>.

Restriction of the confidentiality is directly transposed into the scope of legal advice, which may be provided in those conditions. The conversation takes place as a quiet, whispered one. Sometimes a conversation with a defence lawyer before a questioning takes part in a corridor of a given police station. At times the presence of an officer in the room in which the conversation takes place results from the fact that there is no room at the station where such a conversation could be conducted in confidentiality. In such a situation, much is dependent on the attitude of the office. The officers assured that they do not listen to the conversations of the detained (suspects) with the defence lawyers. Regardless, officers' conviction of their right to be present during such a conversation in all cases seems worrying.

Regardless of the freedom and quality of legal advice, which may be provided in circumstances of restricted confidentiality, there arises an issue whether the officer who has heard the content of the legal advice can be questioned on what he has heard during the conversation of the detained and his defence lawyer. The officers state that there is no such possibility, however, one of the defence lawyers who participated in the research assessed that the Polish law does not secure against the possibility of an officer being questioned on the circumstances around and the content of the conversation of the detained and his defence lawyer. "An officer is not bound by the defence secrecy" - he noted. "The matter of confidentiality is the worst" assesses another defence lawyer. He also added: "I assumed that each conversation with the detained is heard by someone. In order to secure against this, some talk in a foreign language".

The decision to reserve the presence of an officer does not take the form of a procedural decision which would be subject to complaint. However, one of the defence lawyers noted that he asks for the information of the presence of an officer during his contact with the detained into the questioning report. The conducted research shows that limitation of confidentiality does not always result in deeming the detention incorrect. In one of the cases the court reviewing the complaint ruled that *"The presence of third parties during the contact in the initial period of the proceedings is possible pursuant to the Article 245 § 1 of the Code of criminal procedure and in the circumstances of this case was reasonable in the court's assessment considering the*

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<sup>79</sup> However, during the interview, one of the detained noted that he was able to contact his defence lawyer by phone during a detention.

<sup>80</sup> According § 91 the regulations of the General Police Headquarters once the detained is taken from the detention room in order to conduct procedural activities with his involvement, it is unacceptable for him to be left without supervision.

<sup>81</sup> CPT Report, point 26, p. 18.



*circumstances of the event [...] (considering the fact that numerous detained requested the contact with the same lawyer and then his representation, which the threat of subterfuge may have arisen)”.*

The current wording of this article results from the judgement of the Constitutional Tribunal of 11 December 2012, in which it was deemed that the Article 245 § 1 is not consistent with the Article 42 Section 2 in conjunction with the Article 31 Section 3 of the Constitution of the Republic of Poland, and that it does not note the grounds entitling the detaining to be present during the conversation of **the detained with the lawyer** (file ref. K 37/11). The Tribunal accepted the possibility of limitation of the confidentiality of the contact with the defence lawyer (as a part of the right to defence), if such a limitation fulfills the condition of necessity (in the scope of state interest security). The Tribunal ruled i.a. that “it is irrational to treat the presence of the detaining during the direct conversation of a lawyer with a detained as means leading to collecting evidence in a criminal proceeding”. The appealed regulation may - in the assessment of the Tribunal - “prevent communicating also the type of information which is necessary for the lawyer to secure the effective defence of a client”. The Tribunal noted that the appealed regulation does not regulate if and possibly how the detaining may use information collected through his presence during the conversation as one of the drawbacks of this regulation.

The Code of criminal procedure also allows the limitation of confidentiality of the contact with a defence lawyer of a person who is temporarily detained. The decision is made by a prosecutor and the limitation may last for 14 days since the commencement of the temporary detention<sup>82</sup>. This decision of a prosecutor is not subject to judicial control either<sup>83</sup>.

### **4.5. Questioning, legal advice, the right to remain silent**

**A detained** that has not yet been presented with charges (that is, is not yet a suspect), does not have the right to remain silent, since usually no procedural activities are conducted with his involvement immediately. Consequently, the instruction on the rights of the detained does not contain information about the right to remain silent. It is dangerous as it seems that there are not procedural contraindications against questioning an officer as a witness on e.g. what the detained (not yet a suspect) said before he was presented with charges. The instruction on the rights of the detained does not indicate how the statements he gives may be used<sup>84</sup>. Thus in literature it is postulated that “the detained should have the right to remain silent, which should be *expressis verbis* included in the regulations of the criminal procedure, and the officers conducting

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<sup>82</sup> What is more “if it is required by the interest of the preparatory proceeding, the prosecutor in exceptionally justified cases, may also reserve the supervision of the correspondence of the suspect with the defence lawyer”. An equivalent of this regulation is the Article 215 of the Code of criminal procedure, according to which the authority at whose temporary disposal remains the detained, may reserve their or an authorised person’s presence during a contact.

<sup>83</sup> The current wording of the Article 73 § 2 and 3 of the Code of criminal procedure results from the realisation of the judgement of the Constitutional Tribunal of 10 December 2012, K 25/11, in which it was deemed that the existing wording of the Article 73 § 3 since it does not determine grounds which would entitle a prosecutor to reserve the supervision of the correspondence of a suspect with his defence lawyer, was not consistent with the Article 42 Section 2 in conjunction with the Article 31 Section 3 of the Constitution of the Republic of Poland.

<sup>84</sup> D. Czerniak, W. Jasiński, Instructing the suspected person and the suspect on procedural rights and duties after the amendments to the Code of criminal procedure, *Review of the Law and Administration* 2015., p. 60.

a detention should be obligated to instruct the detained on such a right<sup>85</sup>. One of the defence lawyers has also expressly stated that the rights of the detained should be supplemented with the right to remain silent<sup>86</sup>.

This is relevant since the detained can give statements which are noted in the report of detention. The regulations of the General Police Headquarters state that listening to **the detained** and receiving a statement from him is not a procedural questioning<sup>87</sup>. What is more it was noted in the regulations that such a listening cannot breach the rights of the detained, e.g. the lack of obligation to “provide self-incriminating evidence (the right to remain silent)”. On the other hand, however, one of the defence lawyers noted that: “The officers use the time of transporting of the detained for various purposes. There is no rule to this, but my clients have experienced e.g. threatening or intimidation with false (incriminating) evidence material. A client accused of manslaughter was in addition <<persuaded>> through a threat of violence from the officers if he does not plead guilty”.

If the detained is suspected of having committed a prohibited act, he is presented with charges, and then he is instructed on his rights, including the right to remain silent. **The suspect** has the right to make statements, however, he can refuse to answer certain questions or to give statements, without justifying so. This is the first right the suspect is informed of. What is more, the Code of criminal procedure allows that the suspect in preparatory proceedings may - on his request or on the request of the defence lawyer - provide written statements during a questioning. The Code reserves, however, that the person conducting the questioning is obligated to take preventive measures against the suspect contacting other persons while making statements.

Both the detained and the suspect cannot refuse to answer the questions about personal details (name, surname, address, place of work, family status) arising from the report of detention or questioning. The instruction does not contain information about the results of remaining silent not about the results of not exercising the right to remain silent. On the other hand, the witness does not have the right to refuse to make statements. He is, however, informed in which situations he can refuse to answer certain questions (e.g. on the basis of the Article 182 of the Code of criminal procedure, according to which a person of closest relations to the accused can refuse to make statements). Some of the detained noted that they did not learn of the right to remain silent at the beginning of the questioning, but only at its further stage.

However, the right to remain silent is subject to restriction if the suspect wishes to realise the institution provided by the Article 335 of the Code of criminal procedure, that is the request for sentence without trial. One of the grounds for acceptability of filing such a request is pleading guilty and giving statements, which do not raise doubts in the scope of circumstances of the crime<sup>88</sup>. The participation of a defence lawyer in the activities leading to making a decision to realise this institution is not obligatory. Consequently, in practice a police officer determines the details of a possible request provided by the Article 335 of the Code of criminal procedure (e.g. penalty level) in cooperation with a prosecutor. Such a request is then directed to a court that makes a judgement. It seems that the position of the suspect (previously the detained) at the

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<sup>85</sup> M. Kolendowska-Matejczuk, M. Warchoń, The right to remain silent, Published, PiP 1/2015, p. 82-83.

<sup>86</sup> It seems that the statements included in the report cannot be read in the light of Article 389 of the Code of criminal procedure, consequently they cannot constitute direct evidence, but they surely can constitute indirect evidence allowing to make other findings.

<sup>87</sup> § 87 Section 5 of the regulations of the General Police Headquarters.

<sup>88</sup> To some extent the obligation to justify the willingness to exercise the Article 335 of the Code of criminal procedure constitutes a method against unreasonable self-incrimination.

negotiations of the conditions of the request provided by the Article 335 of the Code of criminal procedure may be exceptionally obstructed. One of the detained noted that during a questioning it was suggested to him that if he is more agreeable the sentence will be more lenient. One of the surveyed stated that the police officer made contacting the lawyer dependant on her giving statements. At the moment of detention she was 21, she stated that she got “brainwashed” by the officers and answered all questions, admitted to the crime. In turn, others claimed that they did not have the full knowledge of their rights, but exercised the right to remain silent intuitively. In one of the complaints, the claimant noted: *“I was not duly informed of the grounds for detention itself, and it was suggested at the station that I should admit to the crime and voluntary subject myself to the penalty as this would be advantageous in my situation.”* However, in a different case, in a judgement on a complaint has the court assessed that *“the fact of officers talking among themselves about the lenient treatment of a person who admits to the crime cannot be seen as persuading to make statements of certain content. (...) It can be only deemed as informing of legal consequences of the attitude of the questioned”*.

It should be also noted that in the case of a very general justification of charges (which may be drawn up even a few days since the first questioning of the suspect), difficulties in assessing the procedural situation may arise and consequently in deciding to exercise the right to remain silent.

The Article 313 of the Code of criminal procedure which regulates the rules of the presentation of charges, states that once the order for presentation of the charges is drawn up, “they are presented to the suspect and the suspect is questioned”. The legislator does not provide a separate stage of the contact with the defence after the presentation of charges (that is after becoming the suspect) and before the first questioning. The possibility of such contact is not specified by the legislator, but it is not forbidden either. Police officers themselves state that defence lawyers are able to contact their client before the first questioning. However, it seems that the contact with the defence lawyer before the first questioning should be expressly specified by the legislator.

The Code of criminal procedure provides a possibility of **recording** of the image and sound during the reported activities (e.g. during a questioning, Article 147 of the Code of criminal procedure), however, both the interviews with police officers and with the detained show that this happens rarely<sup>89</sup>. It seems that recording of the questioning would enable to secure the correctness of questioning and facilitate the control of this correctness on further stages of a proceeding. It would also constitute a security against an officer overstepping his authority and against unreasonable claims of the detained. During the interviews, one of the officers noted, however, that the presence of another officer is a form of security against malpractice during the questioning. Some officers noted that the presence of a defence lawyer could constitute such a security, while others noted that the presence of a defence lawyer could constitute the security against possible claims.

### 4.6. Role of the lawyer during police questioning

According to the lawyers, their role relates to explaining the rights and situations that the detained (suspect) is in. In this sense, the lawyers/attorneys at law complement the written instruction on rights. They see their role as a person who calms the detained down but also organizes **assist** in particular if a request for temporary detention is filed. This assist may entail e.g. providing essential items to the detained. In practice,

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<sup>89</sup> None of the detained that participated in the research was questioned with simultaneous recording of image and sound.

they are a middleman between the detained and his family, persons of closest relations. “We are the connector,” assessed one of the defence lawyers. “You prepare the family for the detention (of the detained),” he added.

In turn, from the point of view of the **role in the proceedings**, the defence lawyer is seen by the officers as an opponent whose aims are opposite to the ones they realise. However, a lawyer/attorney at law as the attorney in fact of a witness - through the additional questions he may ask during a questioning - can lead to the broadening of evidence material. One of the defence lawyers noted that the roles of the defence lawyer in a questioning also depends on the officer conducting the questioning. “You have to have a good relationship with the officer,” one of the defence lawyers noted. Another, in turn, assessed that the defence lawyer “disciplines” the conducting of the activity.

An officer noted that the presence of a defence lawyer during activities “does not change anything at all” (he added that “no lawyer managed to close an investigation”). It is partly confirmed by a defence lawyer who augmented that the structure of preparatory proceedings prevents effective defence, as it commences only before court. He assessed that the procedural rights in a preparatory proceedings are “available but not effective” and do not give real results, as “you cannot reverse the situation”. He even suggested that this is why there is “no reason to participate in it” at the stage of the preparatory proceeding. one of the defence lawyers noted that the possibility of participation directly after the detaining is dependent on his time availability. Is he is not available, he suggests to the family they could find a different lawyer.

The assessment of the role of the defence lawyers does not only vary between the lawyers and police officers, but also among the officers themselves. Some see the defence lawyers as ones obstructing the questioning. Other see defence lawyers as a means of better contact with the suspects. Other in turn are indifferent in relation to the presence of a defence lawyer during the procedural activities. One of the defence lawyers assessed that the officers see the defence lawyers’ role as disruption Another emphasized that the participation of a defence lawyers limits the risk of violence. Police officers are worried about the claims related to incorrect realisation of their duties. They do not, however, receive any signs from the courts recognising the cases, which would indicate any malpractice during questionings.

### **4.7. Quality of legal advice and assist**

The function of the defence lawyer can be performed by a lawyer or an attorney at law<sup>90</sup>. District Bar Councils and District Chambers of Legal Advisers are responsible for the system of training the applicants and - respectively - lawyers and attorneys at law. Self-governments are also responsible for conducting disciplinary proceedings against lawyers and attorneys at law, e.g. in relation to malpractice.

One of the detained persons that participated in the research noted the low quality of a public defender appointed at the judicial stage. She noted that the police officer that was sitting next to her at the trial allegedly commented and said “Mrs X, defend yourself”. In turn, a different detained stated that he has no contact with his public defender. An officer provided an example of a defence lawyer who did not show willingness to participate in activities and then reported his dissatisfaction with that.

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<sup>90</sup> Attorneys at law acquired the right to perform the function of defence lawyers in 2015, provided that they are not employed on the basis of an employment agreement.

The reviewing of records shows that the defence lawyers that filed complaints on detention, virtually never lodged claims based on the Directive no. 2013/48/EU. This may suggest that the knowledge of norms contained in the directive is not common among professional attorneys in fact. One of the defence lawyers that participated in the research noted that a case of a (penal) court referring to the Directive no. 2013/48/EU is not known.

### 4.8. Conclusions

A vast majority of the interviewed detained did not have a defence lawyer at the stage of detention. Some of the detained noted that they learned about the right to a lawyer from other detained persons. In turn, the officers assessed that the right to a lawyer is the most oftenly exercised among the detained. One of the detained that participated in the research received legal advice before the first questioning, however, it was provided in a corridor, in circumstances that did not secure confidentiality.

**Waiving** the right to a lawyer takes an implied form, that is the lack of request for a contact with a lawyer. What is more, in the case of not providing a phone number of a certain lawyer, such contact is impossible to organise. The illegibility of the instruction on the right to a lawyer, in conjunction with the lack of an express procedure of waiver, may finally result in the fact that the suspects rarely exercise this right.

The criminal procedure which does not provide a procedure **restricting** the right to a lawyer results in i.a. the lack of effective means of reserving such a possible decision of an authority conducting a questioning. In the cases of the participation of a defence lawyer in the procedural activities (Article 317 § 2 of the Code of criminal procedure), the refusal takes form of a decision, however, it is not subject to complaint. However, the officers all emphasize that if a defence lawyer wishes to participate in procedural activities, he is able to do so. The limiting of confidentiality of the contact with a defence lawyer (through the reservation of presence during a conversation) does not take form of a procedural decision and consequently is not subject to judicial control. There should be rooms at the stations which would facilitate confidential conversation with a defence lawyer without the risk or the suspect absconding.

The lack of an express procedure of waiving the right to a lawyer and the lack of procedure of restricting the right to a lawyer may result in irregularities in the scope of the right to **an effective remedy** provided by the Directive no. 2013/48/EU. Possible irregularities at the stage of detention or initial procedures during the detention may be appealed against through a complaint on detention. It was noted in the literature that there is a need to consider introduction of the inadmissibility in evidence related to the cases in which the defence lawyer is not provided to vulnerable suspects (e.g. minors, or intoxicated persons). This would constitute a part of application of the judgement in *Płonka vs Poland*<sup>91</sup>. „In particular it is required that the admissibility of evidence from the statements of the suspect collected during the first questioning, before he was able to use the assist of a defence lawyer, is reviewed”<sup>92</sup>. In particular, the court should assess if the suspect could have deliberately exercise the right to remain silent.

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<sup>91</sup> Judgement of the ECHR of 31 March 2009, complaint no. 20310/02.

<sup>92</sup> M. Wąsek-Wiaderek, On the admissibility of using statements of the suspect given without the presence of a defence lawyer as evidence [in:] Issues of the criminal justice system. Jubilee book of Professor Jan Skupiński (ed. A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska), Wolters Kluwer Poland 2013, p. 558.

The lack of the participation of a defence lawyer also endangers the police officers to unreasonable claims (such as overstepping or violence against the detained), especially since image and sound are usually not recorded during questionings. **The obligatory recording of procedural activities** should constitute a security against forced waivers of the right to a lawyer - from the presentation of charges to the end of a questioning - if a defence lawyer does not participate in the activity. Recording of the conducted procedures could also positively affect the quality of interpretation<sup>93</sup>.

## 5. Conclusions and recommendations

### 5.1. Conclusions

Repeated amendments to the Code of criminal procedure for the purpose of implementation of EU legislation in the scope of the rights of suspects result in the proper security of the right to a translator and information, however, they do not guarantee an effective access of the detained to a lawyer. The practical assessment of the security of these rights in a criminal proceeding, however, requires conducting a research in which the cooperation of the police is necessary. Experiences of the lack of understanding from the police in the scope of this project indicate that currently the police is not open to external assessment of the practice of EU law application in the scope of criminal proceedings.

#### ***The right to a lawyer in a criminal proceeding***

Police officers eagerly use the assists of a **translator** since it enables them to conduct activities with the involvement of the detained (suspect) more effectively and constitutes a security against claims of unreliability of the proceedings raised at a further stage of the proceeding. The procedure of assessment of the level of need for a translator varies and depends on individual officers. Thus a unification of the practice in this scope should be considered. The decision not to summon a translator for participation in a given procedure does not take form of a procedural decision which would be subject to complaint. A mechanism of complaints on the quality of translation does not function in criminal proceedings either, while the current system of professional responsibility of sworn translators is not directly related to criminal proceedings. The legislations does not guarantee literally absolute secrecy of the legal advice given to the suspect by the defence lawyer with a translator's participation.

#### ***The right to information in criminal proceedings***

**Instruction** on the rights of the detained and suspects is the basic source of information about their rights, however, since the language used is quite hermetic, the instructions do not fulfill their informative function in many cases. Posters presenting the rights of the detained/suspect at police stations could be considered.

information about the grounds for detention is included in the report of detention and are subject to judicial control in the scope of the validity of detention. However, charges justification is usually very general and does not contain the information about the actual grounds and the collected evidence material, and until the indictment is directed to court it is not subject to judicial control.

The scope of grounds justifying the refusal of access to records is consistent with admissible grounds for refusal arising from the Directive no. 2012/13/EU. The refusal of access to records is also subject to complaint. However, this norm is not fulfilled by the possibility of excluding certain materials of the

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<sup>93</sup> A. Mendel, Raport z badania ankietowego na temat jakości tłumaczenia w postępowaniu karnym, s. 41.

proceedings on the basis of the Article 250 § 2b of the Code of criminal procedure. These materials may also constitute the grounds for the request for temporary detention, although the suspects does not have access to them. The grounds for the request for temporary detention involve only the incriminating evidence which is disclosed by the prosecutor, not the whole of collected materials. What is more, the actual access to records of proceedings before a trial in the case of temporary detention is significantly dependent on the organisation of court's operations.

### ***The right of access to a lawyer in a criminal proceeding***

A slight percentage of the participation of lawyers/attorneys at law in the initial activities confirm the thesis that the existing solutions providing the access to a lawyer are not sufficient. Consequently, in practice the organisation of legal aid takes place outside of the police station. The confidentiality of the contact may be limited due a decision made by the detaining officer, which does not require a written justification and is not subject to any control. The rooms at police stations do not secure a confidential conversation of the detained with the defence lawyer, which would also secure against the suspect absconding. The article 245 § 2 of the Code of criminal procedure - which requires a proper application of regulations on the defence lawyers on duty in accelerated proceedings - is not applied in practice. At police stations, there is no available information about available defence lawyers, in particular the lists of defence lawyers in accelerated proceedings. An insufficient knowledge of the content of the Directive no. 2013/48/EU among the professional attorneys in fact may affect the low level of application of the directive in case law.

## **5.2. Recommendations**

- Taking into consideration the Article 5 Section 3 of the Directive no. 2010/64/Eu the absolute secrecy in the scope of the translation of the contact with a defence lawyer should be secured through the wording of regulations;
- Such technical conditions should be provided at police stations that will facilitate a broader use of videoconference for the purpose of providing translation. This would allow a quicker access to interpretation. The list of sworn translators kept by the Minister of Justice should include contact details such as phone numbers and email addresses.;
- The decision to refuse the appointment of a translator should be subject to complaint;
- Translators' consideration rates have not changed since 2005 and may prove non-competitive in relation to commercial rates, thus it is necessary to consider a raise in the rates;
- Such a change in the instructions should be considered that will make them more understandable, also on the graphic level;
- The written instruction should not exclude the spoken instruction regardless of any questions of the detained. The officer should ensure - through 2-3 questions - if the detained (suspect) understood the instruction;
- Granting the detained person whose was not yet presented with charges the right to remain silent should be considered;
- Supplementing the instructions with the information about the right to file a complaint on the basis of the Article 302 of the Code of criminal procedure, the right of the witness to a lawyer's participation in a questioning and the right to file a complaint on the refusal of access to the records in preparatory proceedings should be considered;

- Excluding the materials on the basis of the Article 250 § 2b of the Code of criminal procedure, which may constitute grounds for temporary detention should be subject to complaint, in order to fulfill the norm arising from the Directive no. 2012/13/EU;
- The legislature should expressly provide the possibility to contact the defence lawyer before a questioning (Article 313 of the Code of criminal procedure) and not just the possibility of the defence lawyer's participation in a questioning (Article 301 of the Code of criminal procedure);
- Restrictions of the access to a lawyer should fulfill the norm arising from the directive - it should take form of a decision subject to complaint. Factual grounds for such a decisions should remain in the scope of grounds admissible pursuant to the Directive no. 2013/48/EU;
- Police officers should apply the Article 245 § 2 of the Code of criminal procedure and provide the detained with information about the defence officers on duty for the purpose of accelerated proceedings;
- Police units should fulfill technical conditions facilitating a confidential conversation of the defence lawyer and his client, which does not entail the risk of the detained absconding;
- Limiting the confidentiality of the contact with a defence lawyer should be an exception, not a rule;
- Profession self-governments and the National School of the Judiciary and Prosecution Service should provide trainings to a bigger extent on the norms arising from the EU legislation in the scope of the rights of suspects, in particular the rights arising from the Directive no. 2013/48/EU;
- Security against forced waiver of the right to a lawyer should be achieved through the obligatory recording of procedural activities in which no defence lawyer participates.





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