How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?

An inquiry conducted among the member states with the special focus on how Article 12 is transposed

Anneli Soo
Maastricht University, The Netherlands

Abstract
The deadline for transposition of the Directive 2013/48/EU was 27 November 2016. The author of this article sent out a questionnaire to the ministries of justice of the member states, with the aim of determining how the transposition of the Directive is evolving. Of the 25 member states that are obliged to transpose the Directive, 22 answered the questionnaire. The questionnaire focused on two aspects. First, the member states were queried about the amendments they have made or are planning to make in their law on the right of access to a lawyer. Second, special attention was devoted to remedies the member states have incorporated or are planning to incorporate in their national law for violation of the right of access to a lawyer. Answers were received between June 2016 and 4 October 2016. This article provides both an overview and an analysis of these answers.

Keywords
Criminal proceedings, EU criminal law, right of access to a lawyer, transposition of the Directive 2013/48/EU, right to an effective remedy

Corresponding author:
Anneli Soo, Department of Criminal Law and Criminology, Faculty of Law, Maastricht University, The Netherlands.
Email: anneli.soo@maastrichtuniversity.nl
Introduction

The deadline for transposition of Directive 2013/48/EU (hereafter the Directive) has elapsed. By 27 November, all member states (hereafter the MS), excluding Ireland, the UK and Denmark, had to comply with the Directive.

The road to the Directive has been long and difficult. Negotiations on the Directive proved to be complex due to the fear of some MS that the Directive would be a threat to the diversity of criminal justice systems in the European Union (EU). For that reason, the final version of the Directive is a compromise between involved parties. It generated much scholarly attention before it was adopted. After the adoption, the intensity of attention remained similar, but now there are critical voices arguing that due to the fact that the Directive is a compromise it more or less repeats the case law of the Strasbourg court or even falls under it. After all, the goal of the EU should be to raise the standards designed by the Strasbourg court, not to duplicate or lower them. Although the quality of the Directive in general is a subject that falls outside of the scope of this article, the author of this article agrees strongly with the criticism in relation to Article 12 of the Directive, which is her special research interest. Yet, almost all scholars criticizing the wording of the Directive itself, including the author of this article, acknowledge the initiative the EU has taken in guaranteeing the right to access to a lawyer to all suspects and accused persons in the EU. After all, there is no reason that the current wording of the Directive should be the final one – it is possible that when the minimum standard required by the Directive is achieved by the MS, the EU and the MS start looking for further opportunities to raise it.

The most important aspect of the EU taking the initiative in promoting defence rights is the competence it attains by issuing directives in this area. After transposition is over, the European Commission may initiate infringement proceedings against the MS that either has not transposed the directive, has transposed it wrongly, or in practice does not exercise the rights provided in the directive and its laws. In addition, the courts of the MS who have doubts as to how to interpret the Directive may turn to the European Court of Justice (hereafter the ECJ).

1. Official Journal of the European Union (OJC) 2013L 294/1.
2. See more about that V. Mitsilegas, ‘EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe’ (Portland, Oregon, Oxford: Hart Publishing, 2016), pp. 165–166.
3. See, for example, T. Spronken, ‘EU Policy to Guarantee Procedural Rights in Criminal Proceedings: An Analysis of the First Steps and a Plea for a Holistic Approach’, European Criminal Law Review 1(3) (2011), p. 225 onwards; C. Heard and R. Shaeffer, ‘Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice’, New Journal of European Criminal Law 2(3) (2011), p. 270 onwards; J. Blackstock, ‘Procedural Safeguards in the European Union: A Road Well Traveled?’ European Criminal Law Review 2(1) (2012), p. 29 onwards.
4. See, for example, I. Anagnostopoulos, ‘The Right of Access to a Lawyer in Europe: A Long Road Ahead?’ European Criminal Law Review 4(1) (2014), p. 3 onwards; L.B. Winter, ‘The EU Directive on the Right to Access to a Lawyer: A Critical Assessment’, in S. Ruggeri, ed., Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty (Berlin: Springer, 2015), p. 111 onwards; E. Symeonidou-Kastanidou, ‘The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation’, European Criminal Law Review 5(1) (2015), p. 70 onwards.
5. S. Steinborn, ‘The EU as a Role Model? – Innovative Maximum Standards for Suspects’ and Defense Rights vs. International Minimum Standards’, European Criminal Law Review 4(3) (2014), p. 204.
6. See A. Soo, ‘Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel’, European Journal of Crime, Criminal Law and Criminal Justice 25(19) (2017), p. 41 onwards; A. Soo, ‘Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation’, European Criminal Law Review 6(3) (2016), p. 293 onwards.
for a preliminary ruling. This means that soon the ECJ will be a key facilitator of defence rights in Europe.\(^7\) Through interpretation of the Directive, the ECJ will determine the standard set by the Directive, and it might be higher than what the scholars (and also the MS) argue they read from the Directive.

Nevertheless, in order to demand higher standards first the understanding of MS on how the Directive is interpreted should be incorporated into national law. Therefore, attention should be paid that the final phase of the legislative process, transposition, is concluded. For that reason, the author of this article queried the ministries of justice of the MS about transposition of the Directive in the framework of her project. The results of this inquiry will form a basis for the second phase of her project during which the system of remedies in every MS is analysed in detail based on the information gathered by the ministries of justice, local lawyers and scholars. These findings will be compared to the legislation of the EU and the jurisprudence of a range of international courts (including the Strasbourg Court) and the Supreme Court of the United States as well as the theoretical literature. Consequently, the final goal of the project is to both assess the current state of the law and offer recommendations moving forward on remedies for violation of the right to counsel within the EU.

**Methods of current research**

The inquiry sent out to the Ministries of Justice of the MS that focused on transposition of the Directive consisted of three questions focusing on two aspects of the transposition. First, the MS were queried about the amendments they have made or are planning to make in their law on the right of access to a lawyer. Second, special attention was paid to the remedies that the MS have incorporated or are planning to incorporate into their national law for violation of the right of access to a lawyer. To be more specific, the concrete questions put to the MS were the following:

1. Will or did the transposition of the Directive require changes in the existing rules about the right to counsel in your legal system?
2. Will or did the transposition of the Directive include either inserting rules about the remedies for violation of the right to counsel into your legal system or making changes in the existing rules about the remedies for violation of the right to counsel in your legal system?
3. Article 12(2) of the Directive stipulates an obligation to ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorized in accordance with Article 3(6) of the Directive, the rights of the defence and the fairness of the proceedings are respected. Taking this into account, which of the following statements are true in your country?
   a. In meeting the requirement mentioned above, my country is planning to provide/there are already specific mechanisms in legislation.
   b. In meeting the requirement mentioned above, there are legal provisions that regulate the consequences of violations/derogations of defence rights so there is no need for specific mechanisms.

\(^7\) See also A. Tinsley, ‘Protecting Criminal Defence Rights Through EU Law: Opportunities and Challenges’, *New Journal of European Criminal Law* 4(4) (2017), pp. 468–473.
c. In meeting the requirement mentioned above, specific mechanisms are left open for the case law to determine.

For every answer, further elaboration was asked. Respondents were also encouraged to provide additional materials (court cases, statutes, etc.) if they possessed any.

The questionnaire was completed and sent out in May 2016, with a request to answer the questionnaire by 15 June 2016. The first answers were received in June 2016. As a number of ministries stated that their limited resources prevented them from answering in time, the deadline for answers was extended. As a result of intensive communication between the author and the ministries, 22 of 25 of the MS who are obliged to transpose the Directive answered the questionnaire by 4 October. Unfortunately, despite great effort the author could not reach three MS (Republic of Cyprus, France and Malta). Nevertheless, the author holds information that Malta is in the middle of transposition process (or has recently completed it), and in France transposition has been completed without any changes in remedies for violation of the right to counsel. To the author’s best knowledge, the Republic of Cyprus has not transposed the Directive.

**Progress on transposition of the Directive 2013/48/EU**

*Implementation of the right of access to a lawyer*

MS’ activities on implementation of the right to access to a lawyer provided in the Directive was not a central issue of the questionnaire as the project itself is focused on remedies rather than the right of access to a lawyer itself. All the same, if there is no right there is also no reason to look for remedies for violation of this non-existent right. Therefore, as the remedy clearly depends on scope of the right, MS were queried as to whether the Directive influenced them to make changes to their national law on the right of access to a lawyer. Here it must be emphasized that the question concerned only the right of access to a lawyer, not other rights (e.g., the right to have a third person informed of the deprivation of liberty) also provided in the Directive.

Of the 22 MS, 18 answered that the changes to the existing rules on the right to access to a lawyer were necessary. Slovenia was still analysing its law. Only Estonia, Hungary and Portugal said that no changes need to be made.

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8. Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. Answers of Greece were unofficial ones as they were provided by the Permanent Representation of Greece in Brussels.

9. A bill entitled an act to provide for legal assistance during detention and other rights to arrested persons has been drafted. This gives detained and arrested persons a right of access to a lawyer, including during questioning. The drafted remedies clause seems to repeat what Article 12 of the Directive provides as it states that ‘the rights of the defence and the fairness of the proceedings shall be respected in all criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised[.]’
Changes to national law on the right of access to a lawyer

The MS that claimed their law on the right to counsel meets the requirements of the Directive gave further explanation. Estonian Ministry of Justice explained that in Estonia, the right to counsel is very broad as it applies to all suspects from the moment they acquire the status of a suspect in the proceedings. Inter alia it covers the right to consult with counsel prior to and during interrogation (both custodial and noncustodial), the right of counsel to actively participate during interrogation and the right to legal aid in all criminal cases. The Hungarian Ministry of Justice also confirmed that existing criminal procedural rules concerning the right to counsel fully comply with the Directive. The defendant in Hungary may undertake his own defence and may be defended by a defence counsel at any stage of the criminal proceedings. In the cases specified in the Act of Criminal Proceedings, participation of counsel is mandatory. The Portuguese Ministry of Justice confirmed that suspects or accused persons must always have a lawyer according to the domestic law.

At the time the answers from the MS were received (4 October 2016), most of the MS that deemed amendments necessary said that the amendments were still in draft form. In Slovenia, the analysis was not completed (answers received on 3 October 2016), although they insisted that they were keeping the transposition date in mind. Therefore, all respondents seemed to have a goal for the amendments to come into force at least from 27 November 2016. Concerning the concrete amendments, inserting the right to dual representation in European Arrest Warrant (EAW) cases was the most frequently mentioned (specifically mentioned e.g. by Bulgaria, Czech Republic, Finland, Romania, Slovakia). In addition, a number of MS claimed that due to the Directive the right of access to a lawyer will broaden in their country (e.g., in Belgium, access to a lawyer for all interrogations and for confrontations and identity parades will be granted; in Croatia, the right of access to a lawyer will be broadened due to the fact that the Directive gives suspects the right of access to a lawyer from the time when they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence; in Austria, the right to effective participation during questioning is extended). Some MS (e.g., Lithuania and Luxembourg) seem to clarify existing rules rather than insert new ones into their law.
In any case, this is not a comprehensive overview of transposition of the right of access to a lawyer into MS’ national law. In order to meet such a goal, every aspect of this right prescribed in the Directive would have needed to be included in the questionnaire, which was not the intention of the author. Nevertheless, the answers provided by the MS prove that they are analysing their law, as they have either drafted or (hopefully, by 27 November 2016) made relevant amendments to it. Now it is within the competence of the European Commission to check in detail whether the right of access to a lawyer provided in national law complies with the Directive.

**Implementation of the right to a remedy for violation of the right of access to a lawyer**

The right to a remedy is provided in Article 12 of the Directive. According to the first paragraph of this Article, the MS have to ensure that ‘suspects or accused persons in criminal proceedings as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.’ The second paragraph states that ‘[w]ithout prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was granted in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.’ Compared to the initial proposal, the Article 12 adopted bears a number of differences. Namely, the initial Article 12 consisted of three paragraphs. As the first paragraph was similar to the existing one, requiring an effective remedy for a violation, the second paragraph was central to the meaning of ‘effective remedy’. It stated that such remedy aims at placing the person in the same position in which he would have found himself had the breach not occurred. The third paragraph provided the exclusionary rule according to which any evidence obtained in violation of the right to a lawyer or in cases where a derogation to this right was lawful may not be used against the accused person, unless the use of such evidence would not prejudice the rights of the defence.10 The general wording of the Article 12 adopted clearly demonstrates that while drafting the Directive, a number of compromises was made.11

Although the wording of Article 12 is general, it has at least two practical values. First, it compels the MS to address the issue. Second, it enables the ECJ to form its own interpretation on effective remedies for violation of the right to counsel.12 By incorporating the requirement of a remedy in the Directive, the EU is sending a message that the MS must have remedies for cases in

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10. Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final, 8.06.2011. In the proposal, Article 12 was Article 13.
11. See a detailed analysis of the legislative history of Article 12 at A. Soo, ‘Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel’, fn. 6, p. 35 onwards.
12. Of course, the general right to an effective remedy arises also from Article 47 the Charter of Fundamental Rights of the European Union (2012/C 326/02), but there it is much broader compared to the Directive, as nothing similar to Article 12(2) is stated. For detailed analysis on the relationship between Article 12 of the Directive, Article 47 of the Charter of Fundamental Rights of the European Union and European Convention on Human Rights (ECHR) standards, see A. Soo, ‘Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel’, fn. 6, p. 46 onwards.
which the right of access to a lawyer is violated, and these remedies have to be effective. This is also the reason why even after significant changes, the presidency decided not to remove Article 12 from the Directive by explaining that ‘the issue of assessing the value of statements obtained in breach of the right of access to a lawyer is addressed, which will contribute to enhancing mutual trust among judicial authorities.’ Indeed, this enabled the author of this article to address the issue of remedies in her questionnaire as a central one.

The answers of the MS about their plans for inserting remedies for violations of the right of access to a lawyer or amending existing ones were exactly the opposite of what was said about the amendments in relation to the right itself. Of the 22 MS, 18 answered that there was no need for such amendments. Slovenia explained again that it was still analysing its law, although it indicated that in its law it already has an exclusionary rule for evidence received in violation of the right of access to a lawyer. Only Croatia, Finland and Latvia said that changes needed to be made.

Croatia explained that the proposal has been made to insert a new article into their Criminal Procedure Act according to which if the police did not inform the suspect of their right of access to a lawyer, the statements of the suspect are considered illegal evidence, and therefore could not be used for conviction.

In Finland, the Code of Judicial Procedure was renewed from 1 January 2016. According to its Chapter 17 section 25 subsection 2, the court may not use evidence obtained contrary to the right to remain silent provided in section 18. Subsection 3 of the same section provides that in other cases, the court may use evidence that has been obtained unlawfully, unless such use would endanger the conduct of a fair trial, taking into consideration the nature of the case, the seriousness of the violation

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13. Progress report from presidency to the council on proposal for a directive of the European Parliament and of the council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 17159/11, 5 December 2011, p. 11.
14. Croatia did not indicate that the same would apply if the right to access to a lawyer is itself breached.
of law involved in the obtaining of the evidence, the significance of the method used in order to obtain the evidence in relation to its credibility, the significance of the evidence in respect of the decision in the case, and the other circumstances. The Finnish Ministry of Justice explained that if the question is not about protection against self-incrimination but more practical aspects on how defence is arranged, subsection 3 is relevant. The infringement will therefore be ultimately decided by courts applying a balancing test. Even if an absolute exclusion (prohibition on use of suspect’s statements as evidence in pretrial criminal proceedings) would not be imposed, the question of whether the evidential value of those statements should be reduced remains to be assessed separately.

The Latvian Ministry of Justice failed to explain the amendment that was initiated by Article 12 of the Directive. According to their answer, the information obtained by violating the procedure defined by the law is generally considered inadmissible in court (i.e. general exclusionary rule without specific reference to the violation of the right of access to a lawyer).\(^\text{15}\)

Twelve of the remaining 19 MS (including Slovenia that had not decided whether transposition of Article 12 of the Directive is necessary) affirmed that they have concrete remedies for violation of the right of access to a lawyer, and in most cases also the exclusion of unlawfully gathered evidence. Four of the MS, Estonia, Germany, Luxembourg and the Netherlands, explained that they have general remedies for violation of procedural rights, including exclusion of unlawfully obtained evidence, which could in principle also be applied to violation of the right of access to a lawyer. In Poland, the general remedies are available but exclusion of unlawfully obtained evidence is prohibited. The Austrian and Swedish Ministries of Justice put strong emphasis on free assessment of evidence, which essentially means that it is up to the courts to decide on the exclusion of unlawfully obtained evidence. More specific explanation is provided below by each of the 18 MS on why they consider amendment of national law unnecessary in order to implement Article 12 of the Directive.

**Remedies for violation of the right to access to a lawyer in the MS**

- Concrete remedies in law - 12 (BE, BG, CZ, GR, HU, IT, LT, PT, RO, SK, SI, ES)
- General remedies in law - 5 (EE, DE, LU, NL, PL)
- Free assessment of evidence - 2 (AT, SE)

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15. This principle seemed to be in force already before March 2016, when the law ‘Amendments to the Criminal Procedure Law’ aiming at transposition of the Directive came into force. The different versions could be Available at: http://likumi.lv/doc.php?id=107820. Last accessed 31 March 2017.
In Belgium, the remedy the Code of Criminal Procedure Article 47 bis paragraph 6 provides, ‘No sentence may be handed down against a person on the basis of statements made in violation [... ] on the prior private consultation or assistance of a lawyer during the hearing.’ The initial wording, which became law in 2011, stated that no sentence may be handed down solely on the basis of these statements. However, the Constitutional Court (decision 7/2013 of 14 February 2013) annulled the word ‘solely’ stating that it violated Articles 10 and 11 of the Belgian Constitution and Article 6 of the European Convention on Human Rights (ECHR).

The Bulgarian procedural criminal law embraces the concept of the so-called ‘substantial breach of procedural rules’ which serves as a safeguard in relation to the suspect’s and accused person’s right to a fair trial. Generally, the application of this concept leads to repetition of the procedural action that was performed in substantial breach of the procedural rules, including the right of access to a lawyer. If repetition of the procedural action is not possible, the evidence gathered through such a breach is disregarded.

In the Czech Republic, there is a system that contains regular remedies (e.g., an appeal against the judgement of the court of first instance), extraordinary remedies (e.g., extraordinary appeal, retrial) but also an option to review the actions of authorities involved in criminal proceedings during the proceedings. The latter means a possibility to apply for a review of actions of the police force, under which the suspect has a right at any time during pretrial proceedings to request that the public prosecutor eliminate any defects.

The Greek law provides legal grounds for the annulment of the investigative or other procedural act in relation to which the violation of the right of access to a lawyer occurred. The authority competent to declare the annulment varies depending on the type of the defective act and on the procedural stage during which the breach occurred. It may be the judicial chamber or the sitting court for investigative acts of the preliminary procedure, or the court of appeal, or the court of cassation.

In Hungary, the exclusionary rule for evidence received in violation of defence rights applies and it can be invoked at any stage of the proceedings. If the right to counsel was violated by the prosecutor or the investigating authority, the suspect may lodge a protest within 8 days of receiving information about that right. If the trial was held in the absence of a person whose presence is compulsory by law, the court of second instance quashes the judgement of the court of first instance and orders the court of first instance to conduct a new procedure.

In Italy, formal acts become void upon violation of the rights of defence, which means that evidence gathered in violation of legal rules is deemed inadmissible.

The Lithuanian Code of Criminal Procedure provides a mechanism for appealing almost any decision (or inaction) of a pretrial investigation officer, prosecutor or pretrial investigation judge, including any breach of the right to a defence. The appeal chain includes senior prosecutor, pretrial investigation judge, and a court of appellate instance. The Code of Criminal Procedure stipulates that evidence is data that were obtained by legal means during the criminal proceedings, and only a court decides whether such data may be recognized as evidence at trial. The Supreme Court of Lithuania has developed a comprehensive jurisprudence on admissibility of evidence, and on remedies. The exclusionary rule is applied to evidence obtained in breach of the right of access to a lawyer.

According to the Ministry of Justice of Portugal, no new rules or amendments to the existing rules were considered necessary. If assistance by counsel is mandatory, the absence of such a requirement is of the court’s own motion an irreparable nullity. The declaration of nullity affects both the act rendered invalid and those which depend on it and those it may affect.
In Romania and Spain, in cases where legal representation is compulsory its absence is a reason for the annulment of the procedural act.\textsuperscript{16}

In Slovakia, the violation of the right to a defence is a ground for an appeal against the decision of the court of first instance (both appeal and extraordinary appeal available). Infringement of the right to a defence is also considered a violation of rights guaranteed by the Constitution, so after exhausting all available appropriate means, the accused may submit a constitutional complaint at the Constitutional Court. The court of appeal may revoke the contested judgement and return the matter to the court of first instance if it finds that the defendant did not have a defence counsel even though this was mandatory.\textsuperscript{17}

Although due to significant differences in criminal justice systems, it is often very difficult to categorize the remedies for violations of the right of access to a lawyer, five of the MS that did not deem amendments to the existing law necessary seem to have remedies of a more general nature than the 12 previous ones.

In Estonia, any activity of the investigative body or prosecutor is subject to appeal, including violation of the right to counsel. Violation of the right to counsel is automatically considered to be a material violation of the criminal procedural law if the violation takes place during the court proceedings. If the violation has occurred at the pretrial stage of the proceedings, the court must evaluate whether it constitutes a material violation or not. However, it must be noted that Estonian court proceedings are by nature adversarial, which means that in most cases statements made by a suspect during pretrial proceedings can be used only for verification of credibility of the statements and not as independent evidence.

In Germany, the court makes its decision based on evidence gained from the hearing as a whole. When the court takes that decision, it also has to decide whether to exclude evidence that was illegally obtained. For example, it has to exclude statements of the accused if he was denied contact with a lawyer before being questioned.

The Ministry of Luxembourg indicated that there are general remedies (\textit{recours en nullité}) in the Criminal Code, which are elaborated by the case law.

In the Netherlands, the Code on Criminal Procedure provides the court with a competence to decide legal consequences (including application of the exclusionary rule) in cases where procedure has been infringed during pretrial proceedings and these infringements cannot be repaired.

In Poland, violation of the right to a defence, including the right to counsel, constitutes a relative ground for appeal. This means that if an appellate court determines that the right to counsel has been violated, it may change or overturn the judgement if the violation could have affected the contents of the original ruling. If the accused person was obliged by law to be represented by counsel and this obligation was infringed, this constitutes an absolute ground for appeal, that is, the appellate court is bound to overturn the judgement irrespective of other allegations. However, evidence cannot be discounted by the court merely because it has been obtained as a result of a criminal offence or breach of procedure, including the violation of the right to counsel. This provision was added to the Polish Criminal Code in April 2016 and no changes to it are foreseen.

\textsuperscript{16} Similar is the situation in Slovenia as the court decision cannot be based on statements obtained in breach of the right to access to a lawyer. As was stated above in Slovenia the analysis of whether the national law is in compliance with the Directive was still ongoing at the time the answers were received.

\textsuperscript{17} However, the Slovakian Ministry of Justice did not mention exclusionary rule as such.
Austria and Sweden form the separate group as they both very strongly emphasized free assessment of evidence. However, the Austrian Ministry of Justice noted that the courts have an obligation to ensure respect for the rights of the defence and fairness of the proceedings in the assessment of statements or of evidence obtained in breach of the right to a lawyer or in cases where a derogation to this right was authorized in accordance with Article 3(6) of the Directive and Article 6 of the ECHR. The Swedish Ministry of Justice explained that there is no general prohibition against using evidence that has been obtained in contravention of the law. Instead, the circumstances under which evidence has been collected affect the assessment. Evidence obtained in violation of human rights or other procedural safeguards would be given a reduced or non-existent evidential value. There is transparency in the assessment of the evidence – all evidences that have been presented have to be assessed by the court and the assessment has to be articulated in the judgement. The ECHR is part of the Swedish law. Therefore, Swedish judges and other officials in the judicial system adhere to the case law of the Strasbourg Court.

Discussion

When it comes to guaranteeing that the right to access to lawyer is respected at least at the minimum level set by the EU, the EU faces a number of difficulties, which are argued here based on the answers of the ministries of justice of the MS on the transposition of the Directive.

The foundation of guaranteeing the right of access to a lawyer is providing it in the national law. Here the MS have an obligation to correctly transpose the Directive, which is not as easy a task as one might assume. Criminal justice systems of the MS are diverse, and the understandings of the MS of concrete aspects of the right of access to a lawyer provided in the Directive may significantly vary. Who has not encountered a situation in which two lawyers, even with the same background, interpret the same sentence in a completely different manner? The inquiry among the MS showed that 21 of 22 that answered the questionnaire had analysed their law on access to a lawyer (in Slovenia the process was still ongoing), and most of them had taken a decision that at least some amendments were necessary. Three of the MS, Estonia, Hungary and Portugal, offered justifications why no amendments were necessary. It has to be remembered that this is just the self-analysis of the MS on their national law, so there is no ground to assume that it is the correct one. Also, as during the time of inquiry the deadline for transposition had not passed, a number of MS had drafted but not adopted the amendments (therefore, these amendments were subject to change). As the transposition date has now passed, it is the task of the European Commission to verify whether the obligation to transpose is fulfilled. Although the content of the right of access to a lawyer provided in the Directive is not the focus of this project, taking into account the scholarly criticism it has deserved, one may predict that in close future the Commission has to turn to the ECJ to determine the correct interpretation of this right. Otherwise, every MS will still follow their own version of the right of access to a lawyer.18

18. As the transposition date of the Directive has elapsed, in principle the rights provided in it are now directly applicable even if the member states (MS) have not transposed the Directive or have not done it in a correct manner. In practice, this works only if national authorities give the directive correct interpretation. Otherwise, the person still faces the situation in which the right is in the directive but not in national practice. In that case, he can either turn to the European Commission with the complaint or ask a national court for a preliminary ruling. However, the preliminary reference is an option for as opposed to an obligation on the national court as it can claim that in its opinion the interpretation of the Directive is clear and there is no need for guidance from the European Court of Justice (ECJ).
When the goal is to promote a right, the issue of remedies should not be underestimated. There are two ways an MS can avoid application of the right to concerned persons. One is not to provide the right in the law or provide it in a way that a great number of exceptions could be made, and the other is not to exercise the right in practice. When it comes to the right of access to a lawyer the first could be cured by guiding the MS to transpose the Directive in a correct manner, which was already discussed above. But if the right laid down in a law is not exercised, the need for remedies arises. Otherwise, if there is a breach and no remedy follows, the right exists only in law but not in daily life.19 The EU has recognized this issue by inserting Article 12 into the Directive.

The aim of this article was not to critically view the content of Article 1220 but to describe the activities of the MS on implementation of this article. Yet when one analyses the answers of the MS, the general manner of Article 12 is exactly what rises into focus of attention. Most of the MS answered the author’s inquiry by stating that in order to comply with Article 12, no changes in law are necessary. To justify such a decision they described the existing system of remedies for violation of the right of access to a lawyer. Based on this description, it can be concluded that the remedies for such violations vary significantly – from an absolute exclusionary rule to the court’s wide discretion to choose a remedy and finally to prohibition of the exclusionary rule. The MS are right to leave their remedies as they are as long as they can show that in their opinion these remedies are in fact ‘effective’ as Article 12(1) of the Directive prescribes. Compared to the initial version of Article 12 there is no specification on what ‘effective remedy’ really means. But if similar violations of the right of access to a lawyer have different consequences in different MS due to the diversity of the systems of remedies – for example, in one the statements made in the absence of a lawyer are excluded, in other MS they are still considered by the court which might give them less weight than ‘normal’ statements – can it be said that the right itself is exercised in the same manner? The answer is supposedly ‘no’ as in the latter case application of the right to counsel can be avoided, and the result could still be used in order to convict. Yet, both systems could still be in accordance with Article 12 of the Directive as in the latter case the state may argue that this article does not actually oblige the MS to fully restore the person’s pre-violation position (as it was in the initial proposal of Article 12). Based on the answers provided by the ministries, it can be concluded that the MS really have different understandings of an effective remedy for violation of the right of access to a lawyer. The existing diversity in the systems of remedies has remained the same even after the transposition date has passed as most of the MS did not deem it necessary to amend their systems.

In addition, attention must be paid that the remedies described by the MS are actually applied in daily practice. Here it has to be stated that, although it needs further verification among practitioners, the author has already received number of hints from practitioners that this might not be the case.21 Here the situation is not black and white – it might be that a state that has a comprehensive list of remedies in law is less likely to remedy the violation of the right of access to a lawyer than

19. See a detailed analysis of the relationship between rights and remedies at A. Soo, ‘Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation’, fn. 6, p. 291 onwards.
20. The author has done that already in above referred articles.
21. This is the second stage of the author’s project and still in process – to check whether the remedies provided by law are actually applied. She will also go deeply into existing systems, for example, to check whether the ‘fruit of poisonous tree’ doctrine also applies to MS where the exclusionary rule is applied; to check whether there is a right to a speedy remedy, and so on.
the state that has left the remedies for the courts to decide. But in any case, how can non-application of a remedy be remedied? Here the right to a remedy should not be a goal itself but a means to an end – it guarantees enforcement of the right of access to a lawyer. Therefore, the situation in which violation of the right to counsel is not remedied should not happen in the EU at all.\(^{22}\) In order to achieve that, the EU should aim at promoting the common understanding on effective remedies among the MS and make sure that this understanding is also practiced by the MS (e.g., by observation of the European Commission). Answers provided by the MS on implementation of the right to a remedy for violation of the right of access to lawyer prove that now when the transposition date has passed, the EU’s work in this area has not finished but only begun.

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\(^{22}\) It is unrealistic to hope that the violation of the right to access to a lawyer is something that remains past in the European Union.