



Why remote assistance breaches the EU Directive on the right of access to a lawyer

Briefing paper – European Union

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Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

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Since 2016, the European Union Directive 2013/48/EU on the right of access to a lawyer (the Directive)¹ requires EU Member States to guarantee that suspected persons have access to a lawyer before their first interview by law enforcement authorities and without undue delay after arrest.

Strong and effective procedural rights are key safeguards against police abuse, malpractice and the human errors that can lead to devastating miscarriages of justice and fundamental rights violations. Lawyers are the predominant counterpower to the State in the criminal justice process. They provide important oversight over agents of state force.² Rebalancing the power dynamic during the investigation phase, and in particular when persons are detained, is one of the primary objectives of the right of access to a lawyer as defined under the Directive.³

The Directive requires Member States to guarantee that suspected persons have access to a lawyer before their first interview by law enforcement authorities and without undue delay after arrest.⁴ Since it entered into force in 2016, most States appear to have adequately transposed the Directive in their legislation.⁵ In practice, however, the right of access to a lawyer remains to date widely unimplemented throughout the EU, leaving the majority of people suspected of a crime, in particular those deprived of liberty, to face police questioning alone.⁶

Member States' reactions to the pandemic have further limited effective access to a lawyer in police stations throughout Europe.⁷ During lockdowns, lawyers' access to police stations was severely restricted to reduce the risks of Covid -19 transmission and protect people's health and safety.⁸ When it was available, legal assistance in police custody was primarily provided remotely, either via telephone or video-link.⁹ It was often limited to pre-interview consultation and strictly limited in time, meaning people were not assisted during the questioning itself.¹⁰ It also became clear that some

¹ [Directive 2013/48/EU](#) of European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal hearings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communication with third persons and with consular authorities while deprived of authority.

² Research shows that the presence of a lawyer can reduce the use of intimidation techniques employed by the police to prevent people from exercising their right to silence. See e.g., Verhoeven W-J and Stevens L., "[The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect.](#)" in *Journal of Investigative Psychology and Offender Profiling*, 2012.

³ European Commission, Commission Staff Working Document, [Impact Assessment accompanying the proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings](#), 2011 (COM2011) 326 final, p.12.

⁴ Article 3(2) of the [Directive](#).

⁵ European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/ EU](#), COM(2019) 560 final, p.3.

⁶ European Union Agency for Fundamental Rights, [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), pp.12 and 13.

⁷ Identified notably in Fair Trials, [Beyond the emergency of the COVID-19 pandemic, Lessons for defence rights in Europe](#), 2020 and Fair Trials, [Justice under lockdown in Europe - A survey on the impact of COVID-19 on defence rights in Europe](#), 2020.

⁸ Fair Trials, [Justice under lockdown in Europe](#), op.cit., p.4.

⁹ *Ibid.*, p.5.

¹⁰ *Ibid.*

Member States were using remote technology to implement the right to a lawyer in police stations prior to the Covid -19 crisis.¹¹

As the European Union (EU) and Member States are looking into the digitalisation of justice, we are concerned that States may normalise the current practice of providing remote legal assistance in police stations. Our analysis and research show that remote assistance is not a substitute for in-person assistance. Member States cannot choose between in person or remote assistance, whether before or during questioning, as alternative ways of implementing their obligations under the Directive.

Context: coercion in police custody

Police custody is an inherently coercive environment.¹² People held in custody are, by virtue of being detained under the control of the State, placed in a situation of vulnerability.¹³ They are isolated, often without any contact with the outside world, for days. Many people have no contact at all with their support network, their employers, or families.

Police violence during arrest and following custody is still a systemic problem within Europe. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has frequently denounced physical violence¹⁴ (allegations of punches, slaps, kicks, truncheon blows, excessively tight handcuffing), verbal abuse¹⁵ and in some instances, the use of batons or sticks¹⁶ and electric shocks.¹⁷ Minorities, non-nationals and racialised groups are more likely to be verbally and physically abused.¹⁸

¹¹ See e.g., Austria, FRA, [Rights in practice](#), *op.cit.*, p. 45 ; Hungary, Spain and Slovenia, [Inside Police Custody 2](#), 2018, pp. 46-48; Scotland, Justice Scotland, [Legal assistance in the police Station](#), p.73 ("the majority (70%) of suspects waive their right to a lawyer and of those who do exercise the right, most (again, 75%) receive only telephone advice") ; Ireland, see e.g., [Legal Aid Board](#), p.8.

¹²FRA, [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), pp.28 and 42.

¹³ European Court of Human Rights (GC), [Rooiman v. Belgium](#), No. 18052/11, judgment of 31 January 2019, §143; ECtHR, [Premininy v. Russia](#), No. 44973/04, judgment of 10 February 2011, § 73 .

¹⁴ CPT, [Report on Greece](#), CPT/Inf (2020) 15, p.48; [Report on Romania](#), CPT/Inf (2019) 7, p.14; CPT, [Report on Portugal](#), CPT/Inf (2020) 33, p.10.

¹⁵ CPT, [Report on Portugal](#), *op.cit.*, p.4; CPT, [Report on Greece](#), *op.cit.*, p.48.

¹⁶ CPT, [Report on Portugal](#), *op.cit.*, p.10.

¹⁷ CPT, [Report on Bulgaria](#), CPT/Inf (2018) 15, p.16 ; CPT, [Report on Poland](#), CPT/Inf (2020) 31, pp.3 and 10 ; CPT, [Report on Romania](#), *op.cit.*, p.16 ; CPT, [Report on Portugal](#), *op.cit.*, p.4 and 15; See also Hungarian Helsinki Committee, [Investigation of Torture in Europe: A Comparative Analysis of Seven Jurisdictions](#), 2016; Aljazeera, [Greece : Police accused of excessive force against protesters](#), 19.12.2019 (accessed 13.03.2021); The Economist, [France admits its police is too violent](#), 23.01.2020 (accessed 13.03.2021).

¹⁸ CPT, [Report on Portugal](#), *op.cit.*, p.10; CPT, [Report on Romania](#), *op.cit.*, p.14; CPT, [Report on Greece](#), *op.cit.*, p. 48 ; Human Rights Watch, ["They Talk to Us Like We're Dogs" – Abusive Police Stops in France](#), 2020; The EU Observer, [Pandemic : Roma at the receiving end of racist policing](#), 04.05.2020,(accessed 13.03.2021) ; The Guardian, [Systemic racism and police brutality are British problems too](#), 04.06.2020 (accessed 13.03.2021).

Police across the globe still use coercive or deceptive interrogation techniques aimed at obtaining confessions,¹⁹ despite the growing consensus that these techniques lead to false confessions²⁰ and miscarriages of justice.²¹ This reliance on confessions is in part due to the pressure felt by law enforcement authorities from politicians, supervisors, judges and prosecutors to 'resolve' cases quickly for a variety of structural reasons, including systems of appraisal that focus on convictions or the number of crimes 'solved' and on an overburdened criminal justice system.²² As highlighted by the CPT, "[i]t is self-evident that a criminal justice system which places a premium on confession evidence creates incentives for officials involved in the investigation of crime - and often under pressure to obtain results - to use physical or psychological coercion."²³

It is in these highly stressful circumstances that persons need to understand and decide how and whether to exercise their rights. In practice, the inherent coercion of police custody leads many people to 'waive' their procedural rights, including the right to be assisted by a lawyer.²⁴ This can seriously and irretrievably impact the course of the criminal justice process. What someone says or does not say during their first interaction with law enforcement authorities may determine the direction of an investigation, the likelihood of pre-trial detention and the outcome of a trial.

Objectives of the right to a lawyer in police custody

Article 3(3) (a) to (c) of the Directive states that a person must have access to a lawyer (1) "before they are questioned by the police or by another law enforcement or judicial authority" and/or "without undue delay after deprivation of liberty"²⁵ and (2) "during questioning".²⁶

¹⁹ CPT, Extract from the 12th General Report of the CPT published in 2002, [Developments concerning CPT standards in respect of police custody](#), §35; Kassin, S. M., "[False Confessions: Causes, consequences, and implications for reform.](#)" in. *Policy insights from the behavioral and brain sciences*, vol.1, 2014, pp. 112-121; Alpert, G. P. and Noble, J. J., "[Lies, true lies, and conscious deception](#)", in. *Police Quarterly*, 12 (2), 2008, pp.14-15; The New York Times, [It's Time for Police to Stop Lying to Suspects](#), (accessed 13.03.2021).

²⁰ In the United States, the Innocence Project has helped unveil and quantify the extremely damaging toll of individuals swept into criminal justice systems as a result of bad and abusive interrogation techniques, See Innocence Project, available at <http://www.innocenceproject.org>; Brandon L. Garrett, [Judging Innocence](#), 108 Colum. L. Rev. 55, 142, 2008; Leo, R.A., "[False confessions: causes, consequences and implications](#)", in. *J Am Acad Psychiatry Law* 37, 2009, p.335; OHCHR, [Set universal standards for interviewing detainees without coercion](#), A/71/298, §§ 17-19.

²¹ Leo R.A and Ofshe R.J., "[Consequences of False Confessions: Deprivations of Liberty and Miscarriage of Justice in the Age of Psychological Interrogation](#)" in. *Journal of Criminal Law and Criminology (1973-)* Vol. 88, n^o2, 1998, p.494; Leo, R.A., "[False confessions: causes, consequences and implications](#)", *op.cit.*, pp.333 and 341; UN, Office of the High Commissioner, [Set universal standards for interviewing detainees without coercion](#), *op.cit.*, p.6.

²² United Nations Office of the High Commissioner for Human Rights (OHCHR), [Set universal standards for interviewing detainees without coercion](#), *op.cit.*, § 10. CPT, Extract from the 12th General Report of the CPT published in 2002, [Developments concerning CPT standards in respect of police custody](#), §35.

²³ CPT, Extract from the 12th General Report of the CPT published in 2002, *op.cit.*, § 35; OHCHR, [Set universal standards for interviewing detainees without coercion](#), *op.cit.*, § 11.

²⁴ See generally, FRA, [Rights in practice](#), *op.cit.*; Justicia report, [Inside Police custody II](#), 2018, pp.53-54.

²⁵ Article 3(2)(a) and (c) of the [Directive](#). The right also applies before an investigative act and before a hearing under Article 3(2)(b) and (d), we do not focus on these situations here.

²⁶ Article 3 (3) b of the [Directive](#).

The intention of the EU legislator when drafting the Directive was to set standards going beyond the protection offered by articles 5 and 6 of the European Convention on Human Rights (ECHR).²⁷ Therefore, the right to a lawyer as guaranteed by the ECHR and interpreted by the European Court of Human Rights (ECtHR) must be seen as the starting point with regard to the objectives of the rights enshrined in the Directive.

The ECtHR explicitly refers to the “physical presence” of a lawyer when defining the aims and content of the right to a lawyer.²⁸ The right to a lawyer has two distinct objectives:

- **Prevention of police abuse, violence and coercion.** Recognising the particularly coercive environment of police custody, the ECtHR has emphasised that lawyers perform a key prevention to police abuse: their presence “provides a fundamental safeguard against coercion and ill-treatment of suspected persons by the police”.²⁹ In practice, aside from their mere presence, lawyers can inquire about and identify signs of victimisation, request medical examinations and file claims on behalf of their clients. In that sense, access to a lawyer as early as possible after arrest provides an opportunity to dissuade and limit instances of police violence during arrest.³⁰
- **A guarantee to the protection of fair trial rights.** Access to a lawyer contributes to “the fulfilment of the aims of Article 6 (...) [O]ne of the lawyer’s main tasks at the investigation stages is to ensure respect for the right of an accused not to incriminate himself and for his right to remain silent.”³¹ The effectiveness of the right to a lawyer has direct repercussions on the accessibility to other fundamental procedural rights. Lawyers must be able to provide assistance which is concrete and effective, and not only abstract by virtue of their presence. In practice, prior to and during questioning, lawyers inform suspected persons of their rights and check that they have been and are respected – including the right to medical assistance, the right to silence, the right to interpretation services, the right to information on the charges, the right to call a third person, the right to have a lawyer participate during questioning – all of which are rights guaranteed by EU law. During questioning, they have a key role in making sure questions and answers are properly understood and recorded, as anything that is on the record may serve as evidence against the person at trial.³² Going beyond preparing for the questioning, lawyers can also verify the lawfulness of the detention and challenge it where necessary; check on the welfare of the suspect including any indications of vulnerability and take steps in preparing for pre-trial hearing and the defence case.³³ Ultimately, access to a lawyer must enable suspected persons to benefit from “the whole range of services specifically associated with legal assistance, pointing out discussion of the case, organisation of the defence, collection of evidence favourable to the suspected

²⁷ European Commission, [Impact Assessment accompanying the proposal for a Directive on the rights of access to a lawyer](#), *op.cit.*, p.8.

²⁸ See, e.g., ECtHR, [Beuze v. Belgium](#), No 71409/10, Judgment of 24 September 2009, §§117 et 134.

²⁹ ECtHR, [Beuze v. Belgium](#), No 71409/10, Judgment of 24 September 2009, §126.

³⁰ Extract from the 21st General Report of the CPT published in 2011, [Access to a lawyer as a means of preventing ill-treatment](#), §18.

³¹ ECtHR, [Beuze v. Belgium](#), No 71409/10, Judgment of 24 September 2009, §§125-128.

³² FRA, [Rights in practice](#), *op.cit.*, p. 35.

³³ ECtHR, [Beuze v. Belgium](#), No 71409/10, Judgment of 24 September 2009, §§136.

person, preparation for questioning, support [of an accused in distress] and checking of the conditions of detention".³⁴

Why remote assistance breaches the Directive

The Directive provides for a right to **meet** and **communicate** prior to questioning (Article 3(3)(a)). It also provides the right for suspected and accused persons to have a lawyer **present** during questioning and **participate effectively** (Article 3(3)(b)).

The right to meet. Recital 22 says it's possible for States to make practical arrangements concerning the duration and frequency of client-lawyer meetings. It also refers specifically to these applying "in the place" where the meeting happens, which indicates that the Directive envisages that an in-person meeting is required. It makes clear that practical arrangements regarding the right to meet "should not prejudice the effective exercise or essence of the right of suspects or accused persons to meet their lawyer".³⁵

The right to communicate. Recital 23 concerns the right to communicate with a lawyer, making it clear that this is distinct from the right to meet: "Such communication may take place at any stage, including before any exercise of the right to meet that lawyer." It is only in relation to the right to communicate with, and not to the right to meet a lawyer, that the Directive envisages that States may take practical arrangements regarding the "means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place".

The right to have a lawyer present and participate effectively. The use of the word "present" implies the physical presence of the lawyer during questioning. Recital 25 specifies the meaning of effective participation during questioning: "lawyers may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law".

The requirement of the physical presence of the lawyer before and during questioning is also clear from other provisions of the Directive.

- **Exception for minor offences and in the absence of questioning.** Recital 24 refers to the possibility to resort to telephone only assistance. It clearly limits this possibility to "minor offences" and to cases where the person would not be questioned at all by law enforcement authorities.³⁶ For other offences and where the person is to be questioned by law enforcement authorities, phone or remote legal assistance should not be provided.
- The use of the word "**attend**" in Article 3(3)(c) confirms the necessity of physical presence during investigative acts. It provides for the "lawyer to attend (...) investigative or evidence-

³⁴ ECtHR, [A.T. v. Luxembourg](#), No 30460/13, Judgment of 09 April 2015, §64.

³⁵ Recital 22 of the [Directive](#).

³⁶ Recital 24: "[i]n respect of certain minor offences, this Directive should not prevent Member States from organising the right of suspects or accused persons to have access to a lawyer by telephone. However, limiting the right in this way should be restricted to cases where a suspect or accused person will not be questioned by the police or by another law enforcement authority."

gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned". Moreover, recital 26 provides that "Member States may make practical arrangements concerning the **presence of a lawyer** during investigative or evidence-gathering acts."

- The wording and scope of possible **temporary derogations** under Article 3(5) and (6) also show that the right to a lawyer under the Directive requires the lawyer's physical presence (see next section).

The Directive is clear that a lawyer should be physically present. Although the right to communicate may be met through remote technology, the right to meet prior to questioning must be provided in person. In person assistance is also needed to fulfil the two objectives of the right to a lawyer as defined above. Any practical arrangements – including resorting to remote technology – that would fall short of providing for the physical presence of a lawyer prior to and during questioning would prejudice the effective exercise or essence of the rights of suspects or accused persons under the Directive.³⁷ This interpretation is further confirmed by the definition and scope of the authorised derogations under the Directive.

The pandemic does not provide grounds to derogate from the right to the in-person assistance of a lawyer

Under the Directive, the ability of Member States to restrict the right to a lawyer is strictly limited in time and to a specified set of circumstances provided under Articles 3(5) and 3(6), that the Court of Justice of the EU (CJEU) has determined to be exhaustive.³⁸ The decision to restrict the right to a lawyer may only be authorised on a case-by-case basis, either by a judicial authority or by another competent authority on condition that the decision can be submitted to judicial review.³⁹ It cannot be the object of a general prohibition, and the ground to derogate must be strictly provided in law.⁴⁰ Neither provision are applicable to the situation created by the pandemic. Moreover, the scope and definition of the possible derogations under the Directive reinforce the interpretation of Article 3(3) as requiring the physical presence of a lawyer prior to and during questioning.

Geographical remoteness

Article 3(5) provides for the possibility to temporarily derogate from the application of Article 3(2)(c) in exceptional cases where the person is detained in a geographically remote location, for example "in overseas territories or where the Member State undertakes or participates in military operations

³⁷ Recital 22, 23 and 25 of the [Directive](#).

³⁸ CJEU (Second Chamber), Case C-659/18, [Criminal proceedings against VW](#), judgment of 12 March 2020, §42 ("it is apparent from the scheme and objectives of Directive 2013/48 that the temporary derogations from the right of access to a lawyer which Member States may provide for are set out exhaustively in Article 3(5) and (6)").

³⁹ Article 8(2) of the [Directive](#). See also, ECtHR, [Ibrahim and Others v. the United Kingdom](#), Nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016, § 258 ("The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (...).")

⁴⁰ ECtHR, [Ibrahim and Others v. the United Kingdom](#), *ibid*.

outside its territory”.⁴¹ It allows Member States to temporarily derogate from the starting point of the right to a lawyer “without undue delay after deprivation of liberty” under Article 3(2)(b). As such, it only allows States to *delay* the prompt access to a lawyer after arrest. It does not, however, give ground to derogate from the right to access a lawyer prior to questioning under Article 3(2)(a). Accordingly, even in circumstances where the person is held in a geographically remote location, Member States may not question them without granting them access to a lawyer prior to and during questioning. Recital 30 clearly specifies that “[d]uring such a temporary derogation, the competent authorities should not question the person concerned or carry out any of the investigative or evidence-gathering acts...”.

The temporary derogation is only possible provided that (i) the person is held in a geographically remote location; and (ii) the geographical remoteness makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty. It also specifies that Member States should “arrange for communication via telephone or video conference unless this is impossible”. Remote assistance here is a last resort means to ensure the right to communicate with a lawyer where geographical remoteness makes the prompt physical access to a lawyer impossible. It does not constitute an alternative to the right to meet a lawyer prior to questioning.

Finally, the reference to the possibility to derogate to the starting point of the right (without undue delay after arrest) in case of geographical remoteness clearly shows that remote assistance was not envisaged as an option to implement the right to a lawyer under the Directive. There would be no need to make references to such situations should remote assistance be understood as an acceptable means of providing access to a lawyer in all circumstances.

Urgent need or immediate action required

Article 3(6) provides that in “exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights (...) to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings”.

These grounds to derogate do not cover a public health emergency. Even if it could be argued that Covid-19 presents a risk of serious adverse consequences for the life or physical integrity of a person, the element of “urgency” would be lacking (“where there is an urgent need to avert...”). Moreover, applying the general principle of proportionality, a derogation under Article 3(6)(a) must be strictly necessary to achieve its objective. Proceeding to questioning would only be justified to the extent that it would bring closure to the urgent need to avert serious adverse consequence for the life or physical integrity of a person. Recital 31 makes clear that questioning in such extreme circumstances should be limited to addressing the two imperious objectives listed under Article 3(6), nothing more.

⁴¹ Recital 30 of the [Directive](#).

Research shows that remote assistance inevitably frustrates the aims of the right to a lawyer

It is generally accepted that the presence of a lawyer is key to prevent police pressure and coercion.⁴² Empirical research shows a clear causal link between police intimidation and the absence of a lawyer in the interrogation room.⁴³ Research also shows that the presence of a lawyer positively impacts a person's ability to exercise their right to silence.⁴⁴ Remote assistance does not provide this check on police. It is not dissuasive of police pressure, whether subtle or not. It appears also that permitting telephone consultations prior to questioning has a negative impact on the likelihood that a lawyer will be present for assistance during questioning.⁴⁵

The pandemic has provided an opportunity to research the impact of remote assistance before and during questioning on the rights of suspected persons. Our research highlights major problems with anything that falls short of in-person assistance:

- **Establishing trust.** Lawyers need to build a trusting relationship with their clients so that they can advise them effectively – for example on whether to exercise their right to silence – and to start preparing a defence. Trust is also needed for client to inform their lawyers about abuse or coercion by law enforcement. Lawyers told us that remote assistance made it harder to interact with their client and to build a trusting relationship, in particular with new or vulnerable clients.⁴⁶ They pointed out the negative impact of the absence of non-verbal communication.⁴⁷
- **Confidentiality of the consultations.** The confidentiality of client-lawyer communication is a right under the Directive,⁴⁸ and a prerequisite to effective communication between lawyers and their clients. Our research showed that lawyers and their clients had serious concerns about the confidentiality of their communication, which also reduced the time of pre-

⁴² See, e.g., Extract from the 21st General Report of the CPT published in 2011, [Access to a lawyer as a means of preventing ill-treatment](#), §18 ; ECtHR, [Beuze v. Belgium](#), No 71409/10, Judgment of 24 September 2009, §126.

⁴³ See e.g., Verhoeven W-J and Stevens L., "[The Lawyer in the Dutch Interrogation Room](#)", *op.cit.* p. 87; Verhoeven W-J, "[The complex relationship between interrogation techniques, suspects changing their statement and legal assistance. Evidence from a Dutch sample of police interviews](#)", in. *Policing and Society*, 28:3, 2018, p.312.

⁴⁴ FRA, [Presumption of Innocence and Related Rights](#), p. 80; Verhoeven W-J and Stevens L., "[The Lawyer in the Dutch Interrogation Room](#)", *op.cit.*, p. 87; Verhoeven W-J, "[The complex relationship between interrogation techniques, suspects changing their statement and legal assistance](#)", *op.cit.*, p.309.

⁴⁵ Justicia report, [Inside Police custody II](#), p. 48, 2018 ("lawyers may make inappropriate use of telephone consultations in order to avoid personal attendance").

⁴⁶ Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.6.

⁴⁷ According to one lawyer, it is "extremely hard to build a relationship suitable to gain the client's trust over the telephone. Add the pressures of the police station environment and people being scared for the health implications, and the impact on justice is severe", *ibid.*

⁴⁸ Article 4 of the [Directive](#). See also, ECtHR, [Sakhnovskiy v. Russia](#), No. 21272/03, Judgment of 2 November 2010, §104 (the ECtHR has expressed major concerns about a person's ability to talk to their lawyer only by means of video communications because these connections may provide insufficient confidentiality to lawyer-client communications).

questioning consultation.⁴⁹ Generally, lawyers felt that they could not discuss crucial and sensitive matters with their clients due to inadequate technical facilities.⁵⁰ In some cases, calls were facilitated by police officers who remained present and could, therefore, overhear the conversation between people in custody and their lawyers.⁵¹

- **Police pressure and coercion.** Coercion can be subtle. For lawyers, being present and sensitive to non-verbal cues is key. During the pandemic, lawyers told us that they were unable to check police coercive techniques and possible pressure.⁵²
- **Participation of lawyers during questioning.** Our research in the UK showed that lawyers providing remote assistance during the pandemic were more passive and less likely to intervene. Some appeared to be distracted or doing something else while participating in the interview, such as eating, answering other phone calls, and even driving.⁵³
- **Understanding legal advice.** Lawyers can often pick up on someone's level of understanding by reading their body language and facial expressions. They reported that it was difficult, if not impossible, to make this assessment remotely.⁵⁴ This was particularly the case for vulnerable people and people who did not speak the interviewing officer's language.⁵⁵ They were less likely to ask questions when they did not understand, or to stop the interview for further legal advice or when they had trouble hearing what their lawyer was saying.⁵⁶
- **Vulnerable people.** If all arrested people are in a situation of *de facto* vulnerability,⁵⁷ Member States must take into account the specific vulnerabilities of suspected and accused people under the Directive.⁵⁸ Research shows that while remote assistance negatively impacts the right to a fair trial generally, some people are particularly at risk due to their specific needs, which may involve difficulties in communication, suggestibility, and cognition.⁵⁹ Identifying specific vulnerabilities is key to addressing them adequately. The failure to do so may lead to

⁴⁹ Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.7. See also, Transform Justice, [Defendants on video – conveyor belt justice or a revolution in access?](#), 2017, p.12.

⁵⁰ Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.7.

⁵¹ *Ibid.*, p.8.

⁵² A lawyer explained: "the physical absence of the lawyer (...) is a real problem in the balance of power between the police officers and the suspected person. Outside the COVID period, some services are already doing everything to dissuade the respondent from hiring a lawyer, even officially appointed (...) It is easy to imagine the consequences in a pandemic period", Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.8.

⁵³ Fair Trials, [Not remotely fair? Access to a lawyer in the police station during the Covid-19 pandemic](#), 2021, p.22.

⁵⁴ *Ibid.*, p.21.

⁵⁵ Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.11

⁵⁶ *Ibid.*

⁵⁷ ECtHR (GC), [Rooman v. Belgium](#), *op.cit.*, § 143; ECtHR, [Premininy v. Russia](#), *op.cit.*, § 73

⁵⁸ Article 13 of [the Directive](#).

⁵⁹ Fair Trials, [Not remotely fair?](#), *op.cit.*, p.7 ; Fair Trials, [Justice under lockdown in Europe](#), *op.cit.*, p.11 ; Transform Justice, [Defendants on video – conveyor belt justice or a revolution in access?](#), *op.cit.*, 2017, p.11; Center for Court Innovation, [How video changes the conversation : social science research on communication over video and implications for the criminal courtroom](#), 2020, pp. 7-8 ; Gudjonsson, G. H. , "[Psychological vulnerabilities during police interviews: Why are they important?](#)", in *Legal and Criminological Psychology*, vol. 15, 2011, pp. 165–171.

inequality of arms, unfair treatment, and the inability of a person to receive a fair trial.⁶⁰ The police are generally not able or willing to identify and assess special vulnerabilities.⁶¹ In practice, it often falls to lawyers to assess the specific vulnerabilities of their clients during their first meeting.⁶² Lawyers are also able to assess whether their clients have been the subject of violence or questioned prior to their arrival. Research during the pandemic shows that it is simply impossible to make such assessments over the phone.⁶³ Remote assistance further isolates and disadvantages vulnerable people and jeopardizes their effective access to fair trial rights.

Recommendations

It is clear the European legislator envisaged the right to access a lawyer as the right to have a lawyer physically present in police custody, prior to and during questioning. The Directive's recitals indicate that practical arrangements can be made to facilitate the right to communicate with a lawyer through remote technology, without prejudice to the effectiveness of the right, but this does not apply to the right to meet a lawyer prior to questioning. During questioning, the right to have "a lawyer be present and participate effectively" speaks for itself. The scope and definition of the derogations allowed under the Directive further confirm and reinforce this interpretation. Had the European legislator understood remote assistance as an adequate means to provide access to a lawyer, the Directive would not include a provision detailing States' margin of action in exceptional cases of geographical remoteness.

What this means in practice is that Member States cannot choose between in person or remote assistance, whether before or during questioning, as two means of implementing their obligations under the Directive. Remote assistance, on the phone or via video link, is not a proxy for in-person assistance.

Accordingly, a system that relies on phone assistance instead of in-person assistance breaches the Directive. So does a system that incentivises remote over in-person assistance. When suspected persons request the assistance of a lawyer and are only provided with a lawyer on the phone or via video-link, it is a violation of their rights under the Directive. When suspected persons are offered a choice between phone or in-person assistance, choosing phone assistance should be regarded as a waiver of their right to a lawyer and Article 9 of the Directive (Waivers) should apply.

⁶⁰ The EC Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02) calls upon Member States to strengthen the procedural rights of the latter and to ensure that that vulnerable persons are promptly identified and recognised as such. See European Commission, [Recommendation of 27 November 2013 on procedural safeguard for vulnerable persons suspected or accused in criminal proceedings](#), 2013/C 378/02.

⁶¹ Ludwig Boltzmann Institute, [Dignity at trial – enhancing procedural safeguards for suspects with intellectual and psychological disabilities](#), p.15.

⁶² *Ibid.*, pp.59-64.

⁶³ In the UK, the Equality and Human Rights Commission ('EHRC') published an interim report on video hearings and their impact on effective participation in April 2020. It concluded that video hearings are unsuitable for disabled people, such as those with learning difficulties, cognitive impairment or a mental health condition. See, Equality and Human Rights Commission, 'Preventing the health crisis from becoming a justice crisis', 22 April 2020.

We call on the European Commission to:

- Issue guidance to Member States on the scope of the right of access to a lawyer, in particular on the obligation to make available in-person legal assistance prior to and during questioning.
- Issue guidance to Member States on the definition and scope of the grounds for derogations provided under the Directive, in particular in relation to the situation created by the health crisis.
- As part of the implementation assessment of the Directive on the right of Access to a Lawyer and Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,⁶⁴ investigate and address the practice of remote assistance, and how it disparately impacts vulnerable suspected persons.
- Initiate infringement proceedings where necessary.

⁶⁴ The presence of a lawyer has a direct impact on a person's ability to exercise their right to silence. See, FRA, [Presumption of Innocence and Related Rights](#), p. 80; Verhoeven W-J and Stevens L., "[The Lawyer in the Dutch Interrogation Room](#)", *op.cit.*, p. 87; Verhoeven W-J, "[The complex relationship between interrogation techniques, suspects changing their statement and legal assistance](#)", *op.cit.*, p.309.