SAFEGUARDING THE RIGHT TO A FAIR TRIAL DURING THE CORONAVIRUS PANDEMIC:

ACCESS TO A LAWYER

The Covid-19 pandemic created a global health emergency, affecting people worldwide. States introduced sweeping measures to control the spread of the disease, including measures which have an impact on the functioning of criminal justice systems. Access to courts and prisons was severely restricted and non-urgent court hearings were postponed. Progressively, as the pandemic is contained, countries are starting to open up courts and prisons again. However, in many cases, emergency measures are being extended in time or may be reintroduced in the event of a new wave of the pandemic. These measures have serious implications for the ability of persons arrested or detained to exercise their defence rights, including to access a lawyer. Moreover, restrictions during the pandemic will have repercussions upon the effectiveness of defence rights once court proceedings resume, and courts grapple with the backlog on top of the pre-existing backlog of cases that many European courts face.

The health of all persons is paramount, and with prisons a potential "hotspot" for the spread of the virus, it is fundamental that the health of persons such as lawyers who come into contact with detainees is adequately protected. In the US, the Justice Collaborative Institute surveyed nearly 200 public defenders about how the COVID-19 pandemic has impacted their work and personal lives. The responses reveal the impact of the pandemic on their work and ability to communicate with their clients.[1]

We have seen some positive initiatives. For instance, the Bucharest Bar Association distributed protective equipment (gloves and masks) to lawyers.[2] However in France, for instance, the lack of protective equipment made available to lawyers in Paris led the Bar Council to decide to stop appointing state-paid lawyers (*commissions d'office*), which means that defendants may not be assisted by a lawyer. On 14 April 2020, an application was filed to order the government to provide masks and hydroalcoholic gel. The Court rejected the application, but nonetheless stated that the State should help lawyers get masks and should provide hydroalcoholic gel when social distancing is not possible, which is often the case, notably in police premises. There are also reports of inadequate protection in the Netherlands.[3]

But States cannot require lawyers or detainees to make a choice between the right to health and the right to legal assistance. Fair Trials has put together a toolkit to try to support lawyers make arguments to support the right to legal assistance despite the pandemic.

Fair Trials, May 2020

[1] See: https://tjcinstitute.com/research/when-every-sentence-is-a-possible-death-sentence-public-defenders-speak-from-the-front-lines-about-covid-19/. 85% of respondents believed their work as a public defender placed them or their families at risk of developing COVID-19; 84% did not think their local court system was doing enough to protect the health of their clients; and 96% said that COVID-19 has impacted their ability to effectively communicate with their clients.

[2] See: https://www.legalmarketing.ro/baroul-bucuresti-anunt-avocati-masti-si-manusi-de-protectie/.

[3] See: https://www.nrc.nl/nieuws/2020/05/13/rechten-verdachte-zijn-in-het-geding-a3999667.

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Introduction

The purpose of this toolkit is to equip lawyers with arguments to address threats we have identified to the right to a lawyer as a result of measures adopted in the context of the Covid-19 pandemic:

1) The right to access a lawyer
2) Effective (remote) legal assistance prior to and during police questioning
3) Confidentiality of client-lawyer communications
4) Access to the case file
5) Access to interpretation services
6) Remedies for evidence obtained in violation of rights in police custody

The first 5 sections seek to support urgent applications to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution). The last section envisages an application for evidentiary remedies at trial stage to address violations to defence rights that occurred during the lockdown.

We refer to the relevant EU standards as well as the jurisprudence of the European Court of Human Rights (**ECtHR**), the judicial body in charge of the interpretation of the European Convention of Human Rights (**ECHR**). The ECtHR's rulings on the right to a fair trial and defence rights have had a significant impact on the development of the following EU directives:

- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (**Access to a Lawyer Directive**).
- Directive 2012/13/EU on the right to information in criminal proceedings (**Information Directive**).
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (**Interpretation Directive**).
- Directive 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings (**Presumption of Innocence Directive**).

For reference, national authorities and courts are obliged to apply the provisions of EU law, even if national law conflicts with it, as EU law has primacy.[4] The effectiveness principle of the Court of Justice of the European Union (**CJEU**) and the *bona fide* principle stipulate that EU law should be implemented as quickly and effectively as possible. When a country does not transpose a directive or when the transposition is not consistent, directives are also directly applicable under certain conditions – which means that they can be invoked and relied upon directly and prevail over any conflicting national legislation.[5]

[4] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Official Journal of the European Union, C 115, 09 May 2008: "the Treaties and the law adopted by the Union on the basis of the Treaties shall prevail over the law of the Member States".
[5] For further information, see Fair Trials – Roadmap Practitioner Toolkit on using EU law in criminal practice available at: https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-.pdf.

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The right of access to a lawyer

The right to a lawyer is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights. The lawyer's presence at the initial stages of the criminal process serves as a 'gateway' to other rights and helps prevent prejudice to the suspect's defence. More generally, a lawyer's presence at the early stages of criminal proceedings helps a suspect to understand the legal situation and the consequences of choices made at this crucial stage.[6]

At normal times, outside any emergency, the very fact of being in custody adds significant hurdles to organising the defence. During the pandemic, we have heard reports from lawyers across the EU of difficulties to access clients. For instance, in Portugal**:** "*The simple task of preparing the proceedings is now seriously hampered, since defence lawyers cannot visit their clients in prison, unless in duly justified urgent matters and situations, and should not be conducting face-to-face meetings with clients also outside of prison*".[7]

In this section, we set out template arguments based on the relevant European Union and European Convention of Human Rights standards that govern the scope of the right to a lawyer, which we envisage may support applications to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) against decisions to refuse access to a lawyer in the following scenarios or administrative law challenges to blanket policies which prevent or restrict access to a lawyer:

1. During police custody: where a person is arrested and denied access to a lawyer due to general blanket restrictions on public health grounds in the police station;
2. In pre-trial detention: where a person is detained and denied access to a lawyer due to Covid-19 restrictions in the prison where the person is held.

Template arguments to support a challenge against a decision to refuse access to a lawyer during police custody

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to a client is based.]*

The right of access to a lawyer in criminal proceedings is a key component of the rights of the defence and, more broadly, of the right to a fair trial. It is, *inter alia*, enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), in Article 6(3)(c) of the European Convention on Human Rights ('the ECHR'), and in Article 14(3)(b) of the International Covenant on Civil and Political Rights.

[6] *A.T. v. Luxembourg,* App. No 30460/13, (Judgment of 09 April 2015), paragraph 64: "[A]n accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself."

[7] See: https://www.fairtrials.org/news/commentary-covid-19-what-does-all-mean-your-ability-defend-your-clients%E2%80%99-right-fair-trial-%E2%80%93.

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Directive 2013/48/EU

The present case invites the Court to also consider EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ("Directive 2013/48")[8], the objective of which according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, *inter alia* to have access to a lawyer.

The scope of that directive is defined in Article 2 thereof, which provides, in paragraph 1, that the directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2013/48 is therefore applicable in the present case.

Article 3(1) of Directive 2013/48 requires Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.[9]

Article 3(2) of Directive 2013/48 specifies the moment from which this right must be granted. Member States must ensure that suspects[10] or accused persons have a right to consult with a lawyer *prior* to questioning by the police or another law enforcement or judicial authority:

> "*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
>
> *(a) before they are questioned by the police or by another law enforcement or judicial authority;*
> *(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
> *(c) without undue delay after deprivation of liberty;*
> *(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*"

Notwithstanding national law, Article 3(2) of Directive 2013/48 creates a right to access a lawyer without undue delay, which the applicant can rely upon directly in these proceedings on the basis of the direct effect of EU law.

Absence of permissible grounds for derogation

It is necessary, next, to determine whether Directive 2013/48, read in the light of Article 47 of the Charter, allows Member States to derogate from the right of access to a lawyer, which must, in

[8] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048.
[9] Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.
[10] Note that the Access to a Lawyer Directive does not define the concept of "suspect".

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principle, be guaranteed to a suspect, on account of general social distancing measures.

Article 3 of the directive provides that a temporary derogation from the right of access to a lawyer is possible in three sets of circumstances, referred to, respectively, in Article 3(5), Article 3(6)(a) and Article 3(6)(b) thereof:

> *5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.*
>
> *6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 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."*

This list of permissible derogations is exhaustive as established by the CJEU stating that "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)."[11]

The CJEU further specified that: "to interpret Article 3 of Directive 2013/48 as allowing Member States to provide for derogations from the right of access to a lawyer other than those which are exhaustively set out in that article would run counter to those objectives and the scheme of that directive and to the very wording of that provision and (…) would render that right redundant."[12]

The applicant submits that the derogations envisaged in EU law do not apply in the present circumstances, and that a public health emergency is not one of the reasons for derogating from the right of access to a lawyer set out exhaustively in the directive. Therefore, the existence of a public health emergency cannot justify the applicant being deprived of the exercise of the right of access to a lawyer.

[Even if the Court would be inclined to consider such a restriction permissible under Article 3(6)(a) (serious adverse consequences for the life of a person), Article 8(1) of the Access to a Lawyer Directive specifies that such temporary derogation must meet the following conditions:

(a) the derogation must be proportionate and not go beyond what is necessary;
(b) the derogation must be strictly limited in time;
(c) the derogation cannot be based exclusively on the type or the seriousness of the alleged offence; and

[11] Judgment of the Court (Second Chamber) of 12 March 2020, *Criminal proceedings against VW*, Case C-659/18, paragraph 42.
[12] *Ibid*, paragraph 45.

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(d) the derogation must not prejudice the overall fairness of the proceedings.]

Further, Article 8(2) requires that such derogations may be authorised only by a duly reasoned decision taken 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.

European Convention of Human Rights

The legal obligations created by Directive 2013/48 reflect human rights norms articulated in the European Convention on Human Rights and affirmed in the case-law of the European Court of Human Rights ('the ECtHR'). According to Recital 12, Directive 2013/48 "build[s] upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the [ECtHR], which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer".

Article 6(3)(c) ECHR provides that:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[13]

In *Dayanan v. Turkey*, the ECtHR held as follows:

> "An accused person is entitled, *as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned*. Indeed, the *fairness of proceedings* requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. (…) Counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."[14]

In *Beuze v. Belgium*,[15] the ECtHR elaborated on the content of the right of access to a lawyer. It distinguished two minimum requirements as being: (1) the right of contact and consultation with a lawyer prior to the interview, which also includes the right to give confidential instructions to the lawyer, and (2) physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings. Such presence must ensure legal assistance that is effective and practical.

The ECtHR also recognises that it is possible for access to legal assistance to be, exceptionally,

[13] *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), paragraph 51; *Ibrahim and Others v. the United Kingdom* [GC], App. Nos. 50541/08 50571/08 50573/08 40351/09, (Judgment of 13 September 2016) 255; *Simeonovi v. Bulgaria* [GC], App. No. 21980/04, (Judgment of 12 May 2017) paragraph 112; *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), paragraph 123.
[14] *Dayanan v. Turkey*, App. no. 7377/03, (Judgment of 13 October 2009), paragraph 32.
[15] *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), paragraphs 133-134.

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delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages. In the first stage, the ECtHR evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case. In other words, the ECtHR must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.[16]

In *Beuze v. Belgium*,[17] the ECtHR explained that a general and mandatory (in that case statutory) restriction on access to a lawyer during the first questioning cannot amount to a compelling reason: such a restriction does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. The assessment of whether there was a compelling reason must also involve the assessment of necessity, in this case, whether less restrictive measures, such as access to a lawyer on a remote basis, could have been provided. In any event, the onus is on the Government to demonstrate the existence of compelling case-specific reasons to restrict access to a lawyer.

In the absence of a compelling reason based on an individual assessment of the defendant's circumstances, the authorities' decision to refuse access to a lawyer is a violation of Article 6(3) of the ECHR.

Conclusion

The conditions for applying a temporary derogation to the right to access a lawyer have, therefore, not been met in the present circumstances. The [relevant authority]'s decision to refuse access to a lawyer to the applicant on the grounds of general public health measures is not valid in the light of Directive 2013/48, interpreted in the light of the ECHR.

The applicant submits that, in the light of the current social distancing rules, this obligation requires that Member States adopt the necessary measures to facilitate access to a lawyer by alternative means, including through the use of technology that enables remote participation. [Alternatively, to have adequate measures in place in police stations that would enable lawyers to attend interviews in-person safely.] The authorities' failure to do so infringes Directive 2013/48 and jeopardises the overall fairness of the proceedings under Article 6 of the ECHR.

The obligation of ensuring access to a lawyer during police custody prior to questioning devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to access a lawyer during police custody prior to questioning, which is an EU law right guaranteed by Directive 2013/48. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to a lawyer during police custody prior to questioning.

In conclusion, the applicant requests that this court orders the [relevant authorities] to provide the necessary facilities to ensure timely and effective access to a lawyer during police custody prior to questioning.

[16] *Ibrahim and Others v. the United Kingdom* [GC], App. Nos. 50541/08 50571/08 50573/08 40351/09, (Judgment of 13 September 2016), paragraph 257.
[17] Beuze v. Belgium [GC], App. No. 71409, (Judgment of 9 November 2018), paragraphs 142-144 and 160-165.

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Effective (remote) legal assistance before and during police questioning

As sweeping measures have been introduced to enforce social distancing, Member States are finding ways to keep their courtrooms, police stations, and prisons running whilst minimising person-to-person contact. In many countries, this means lawyers are not attending in person police interrogations or meeting with their clients before the interrogation. Instead, Member States are looking towards the greater use of video-link and telephone hearings.

In the Netherlands lawyers are only allowed to visit clients in detention on urgent matters, with lawyers being required to file reasoned requests for a visit.[18] In Spain legal assistance through videoconference is encouraged, but not implemented due to lack of equipment.[19] In France, the Paris bar council stopped appointing legal aid lawyers due to lack of personal protective equipment,[20] while in Romania the bar association started to distribute masks and gloves to the lawyers.[21]

But with restrictions on physical presence in place and lack of availability or proper functioning of technology to ensure remote legal assistance, the right to access a lawyer during police custody can be severely restricted. The official questioning by police or another investigating authority is a critical step in many criminal procedures, where statements obtained during questioning are later used in court. This is why effective legal consultation prior to and during police questioning is key. EU law establishes the right of suspects and accused persons to *effective* legal representation.[22] This includes the ability for suspects and accused persons to meet and have effective communication with their lawyer in private before and during questioning by the police.

In this section, we set out European Union and European Convention of Human Rights law arguments that may be used to support an application to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) to require that police authorities ensure that a detained person has a right to effective communication with their lawyer, either by providing the necessary protective equipment or by setting up effective technology to enable legal assistance before and during questioning.

This approach was successful, for instance, in Northern Ireland, where a lawyer sought judicial review of the police authority's decision to refuse to put in place "some form of digital mechanism such as Skype or Zoom" for the interview to enable the effective participation of the person's lawyer.[23]

[18] Fair Trials "Short Update: Restrictions on access to a lawyer in the Netherlands."
[19] Fair Trials "Short Update: Diverging approaches in Madrid police stations and courts on remote justice measures."
[20] Fair Trials "Short Update: Courts remain closed in France and access to a lawyer is restricted due to COVID-19."
[21] Fair Trials "Short Update: Bucharest Bar Association distributes masks and gloves to lawyers."
[22] Directive 2013/48/EU, Arts. 3(1) and 3(1)(a) and Directive 2016/343, Art. 8.
[23] See: https://www.irishlegal.com/article/solicitor-acts-remotely-for-client-in-police-interview-in-northern-ireland-first.

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Template arguments to support request to ensure effective lawyer-client communication

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to a client is based*.]

The right of access to a lawyer in criminal proceedings is a key component of the rights of the defence and, more broadly, of the right to a fair trial. It is, *inter alia*, enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), in Article 6(3)(c) of the European Convention on Human Rights ('the ECHR'), and in Article 14(3)(b) of the International Covenant on Civil and Political Rights.

The present case invites the court to also consider EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ("Directive 2013/48")[24], the objective of which according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to a lawyer.

The scope of Directive 2013/48 is defined in Article 2 thereof, which provides, in paragraph 1, that it applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2013/48 is therefore applicable in the present case.

Article 3(1) of Directive 2013/48 requires Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.[25]

Article 3(2) of Directive 2013/48 specifies the moment from which this right must be granted. Member States must ensure that suspects[26] or accused persons have a right to consult with a lawyer *prior* to questioning by the police or another law enforcement or judicial authority:

> "*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
> *(a) before they are questioned by the police or by another law enforcement or judicial authority;*
> *(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
> *(c) without undue delay after deprivation of liberty;*
> *(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*"

[24] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048.
[25] Judgment of 5 June 2018, Kolev and Others, C-612/15, EU:C:2018:392, paragraph 103.
[26] Note that the Access to a Lawyer Directive does not define the concept of "suspect".

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Notwithstanding national law, Article 3(2) of Directive 2013/48 guarantees the right to access a lawyer without undue delay before questioning by the police. The applicant therefore asks this Court to set aside the decision of the authorities to delay access to counsel and proceed with questioning, and require the authorities to provide protective equipment/remote technology [complete as relevant].

Moreover, Article 3(3)(b) of Directive 2013/48 specifies that the suspect has the right to request that the lawyer is present during questioning by the police. Recital 25 of Directive 2013/48 emphasises that "Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings".

Therefore, Directive 2013/48 establishes that access to lawyer does not guarantee only formal presence of a lawyer, but also an unrestricted opportunity for the lawyer to provide assistance that is effective in practice.

The obligations set in EU law need to be interpreted in the light of the jurisprudence of the European Court of Human Rights in relation to Article 6 ECHR and specifically paragraph 3(b) of Article 6 that states: "everyone charged with a criminal offence has the following minimum rights: (..) (b) to have adequate time and facilities for the preparation of his defence."

In *A.T. v. Luxembourg*, the European Court of Human Rights emphasised that counsel must be able to provide assistance which is concrete and effective, and not only abstract by virtue of his presence by enabling the accused:

> "to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely."[27] Further, "the right to be assisted by a lawyer requires not only that the lawyer is permitted to be present, but also that he is allowed to actively assist the suspect during, inter alia, the questioning by the police and to intervene to ensure respect for the suspect's rights".[28]

The state's duty under Article 6(3)(b) ECHR to ensure the accused's right to mount a defence in criminal proceedings includes an obligation to provide adequate facilities and organise the proceedings in such a way as not to prejudice the accused's ability to concentrate and apply mental dexterity in defending his position.

The European Court of Human Rights has specified that the "facilities" provided to an accused include consultation with his lawyer.[29] The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence.[30]

[27] *A.T. v. Luxembourg,* App. No 30460/13, (Judgment of 09 April 2015), paragraph 64.
[28] *Soytemiz v. Turkey,* App. No 57837/09 (Judgment of 27 November 2018), paragraph 44.
[29] *Campbell and Fell v. the United Kingdom*, App. Nos. 7819/77 7878/77 (Judgment of 18 June 1984), paragraph 99; *Goddi v. Italy*, App. No. 8966/80 (Judgment of 9 April 1984), paragraph 31.

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In conclusion, Directive 2013/48, read in the light of Article 47 of the Charter and Article 6 ECHR, requires Member States to ensure timely and effective access to a lawyer before and during police questioning.

The applicant submits that, in the light of the current social distancing rules, this obligation requires that Member States adopt the necessary measures to facilitate access to a lawyer by alternative means, including through the use of technology that enables remote participation. [Alternatively, to have adequate measures in place in police stations that would enable lawyers to attend interviews in-person safely.] The authorities' failure to do so infringes Directive 2013/48 and jeopardises the overall fairness of the proceedings under Article 6 of the ECHR.

The obligation of ensuring access to a lawyer during police questioning devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to access a lawyer during police questioning, which is an EU law right guaranteed by Directive 2013/48. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to a lawyer during police questioning.

In conclusion, the applicant requests that this court orders the [relevant authorities] to provide the necessary facilities to ensure timely and effective access to a lawyer prior to and during police questioning.

[30] *Bonzi v. Switzerland*, App. No. 7854/77 (Commission decision of 12 July 1978); *Can v. Austria*, App. No. 9300/81, (Commission report of 12 July 1984), paragraph 52.

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Confidentiality of lawyer-client communications

In many countries, authorities are looking towards the greater use of video-link and telephone hearings to permit access to a lawyer from police stations and prisons on a remote basis (by telephone or video-link). Such measures were introduced to address the Covid-19 pandemic, but we are seeing a potential extension in time. Although remote access is better than no access at all, and may be necessary and proportionate during the health crisis, it comes also with risks to the effectiveness of defence rights.

In particular, the introduction of such measures brings into question the confidentiality of communications between clients and lawyers where for instance there is no guarantee that the phone lines will be secure and protected or that telephones are located in a sufficiently discrete location to ensure that no-one can overhear a suspect or accused person's conversation with their lawyer.[31]

In this section, we set out legal arguments based on European Union and European Convention of Human Rights standards to support an application to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) to request that the relevant police or prison authorities make available to detained persons adequate facilities to speak to their lawyer in a confidential setting, prior to police questioning or to prepare for a court hearing.

Template arguments to support request to ensure confidential lawyer-client communication

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to a client is based*.]

The right of access to a lawyer in criminal proceedings is a key component of the rights of the defence and, more broadly, of the right to a fair trial. It is, inter alia, enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), in Article 6(3)(c) of the European Convention on Human Rights ('the ECHR'), and in Article 14(3)(b) of the International Covenant on Civil and Political Rights.

The present case invites the court to consider EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ("Directive 2013/48")[32], the objective of which according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to a lawyer.

The scope of Directive 2013/48 is defined in Article 2 thereof, which provides, in paragraph 1, that it applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise,

[31] https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf.
[32] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048.

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that they are suspected or accused of having committed a criminal offence.

Directive 2013/48 is therefore applicable in the present case.

Article 3(1) of Directive 2013/48 requires Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.[33]

Further, Article 4 of Directive 2013/48 confers a right to confidentiality in respect of lawyer-client communications "in the exercise of the right of access to a lawyer provided for under th[e] Directive". The communication covered by this provision includes "meetings, correspondence, telephone conversations and other forms of communication permitted under national law."

Recital 33 stresses the importance of the confidentiality of the lawyer-client communication as "key to ensuring the effective exercise of the rights of the defence" and "an essential part of the right to a fair trial." It further requires Member States to make arrangements to ensure the confidentiality of communications of people deprived of liberty: "Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality."

The right to confidential communication can only be restricted in exceptional circumstances and only if justified by 'compelling reasons', which means, for the purposes of Directive 2013/48, "objective and factual circumstances" pointing to suspicion that the lawyer is involved with the suspect or the accused person in a criminal activity.[34]

It is submitted that there is no such compelling reason in the present circumstances. It is clear therefore from Directive 2013/48 that the authorities have an obligation to ensure that arrangements are in place to allow for the applicant to communicate with legal counsel in a confidential setting.

Moreover, the state is required to make confidential facilities available under Article 6 of the ECHR. The right to effective legal assistance includes, *inter alia*, the accused's right to communicate with his lawyer in private. The European Court of Human Rights has recognised that the right to confidential communications with their lawyer "is part of the basic requirements of a fair trial in a democratic society and an important safeguard of the rights of the defence which follows from Article 6 para. 3 (c)[35] of the Convention."[36] It further stressed that "an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness."[37]

[33] Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.
[34] 33rd recital of the preamble of the Directive.
[35] Art. 6(3)(c) ECHR: "Everyone charged with a criminal offence has the following minimum rights: […] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require […]."
[36] *S. v. Switzerland*, App. Nos. 12629/87 13965/88 (Judgment of 28 November 1991) paragraph 48; *Campbell v. the United Kingdom*, App. No. 13590/88 (Judgment of 25 March 1992), paragraph 46.
[37] *Mariya Alekhina and others v. Russia*, App. No. 3804/12 (Judgment of 17 July 2018), para. 168

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In *A.T. v. Luxembourg*, the European Court of Human Rights confirmed that the right of access to a lawyer includes the right to a private consultation prior to questioning by the investigative judge: "[t]he Court emphasises the importance of a consultation between counsel and client before the first questioning by the investigative judge. It is at this point that *crucial discussions can take place*, even if this means no more than counsel reminding the person of their rights (…) Counsel must be able to provide assistance which is concrete and effective, and not only abstract by virtue of his presence (…)."[38]

The right to confidential communication between the suspect or accused person and their lawyer may only be restricted in exceptional circumstances.[39] In *Sakhnovskiy v. Russia,* the Grand Chamber of the European Court of Human Rights held that "any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances."[40]

Limitations to the right to confidential communication between a defendant and their lawyer may be justified by the existence of "compelling reasons",[41] for example, to prevent a risk of collusion or due to the lawyer's professional ethics or unlawful conduct.[42] In the present circumstances, there are no compelling reasons limit the right to confidential communication.

The obligation of ensuring confidential communications devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to confidential communications, which is an EU law right guaranteed by Directive 2013/48. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of confidential communication with legal counsel.

In conclusion, the applicant asks this court to require that the [relevant authorities] make available adequate facilities to ensure that the applicant can communicate confidentially with legal counsel in the preparation of trial/questioning [as relevant].

[38] *A.T. v. Luxembourg*, App. No. 30460/13, (Judgment of 9 April 2015) (paragraph 64): "A suspect should be granted access to legal assistance from the moment he is taken into police custody or otherwise remanded in custody, whether interrogations take place or not. The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely."

[39] *Sakhnovskiy v. Russia* [GC], App. no. 21272/03, (Judgment of 02 November 2010), § 102; *Kempers v. Austria*, App. no. 21842/03, (Judgment of 27 February 1997); or *Lanz v. Austria*, App. no. 24430/94, (Judgment of 31 January 2002), § 52.

[40] *Sakhnovskiy v. Russia* [GC], App. no. 21272/03, (Judgment of 02 November 2010), § 102.

[41] *Moroz v. Ukraine*, App. no. 5187/07, (Judgment of 18 September 2017), §§ 67-70.

[42] *S. v. Switzerland*, App. no. 12629/87; 13965/88, (Judgment of 28 November 1991), § 49; *Rybacki v. Poland*, App. no. 52479/99, (Judgment of 13 April 2009), § 59.

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Access to the case file

When a client is arrested and detained, beyond information about charges, lawyers will need access to the case file as quickly as possible to review what inculpatory evidence is on file and start developing a defence strategy and getting the person released. Depending on the level of access, the case file will usually include at least the reasons and the circumstances of the arrest, sometimes also the criminal record of the person.

To address the health crisis, many countries have implemented restrictions on access to case files. In Belgium for instance, all non-urgent requests of access to files were suspended. This will inevitably impact on equality of arms as the time and facilities to prepare the file may not be adequate for instance there is no secure manner for online access to the file.[43] In Portugal, consulting the case files in the Prosecutor's office or in Court may only be done after making a special application to that authority and, if permitted, after scheduling a specific time and date in order to avoid too many persons being present in the facilities.[44]

In this section, we set out the relevant European Union and European Convention of Human Rights standards that may be invoked to apply to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking access to the case file or challenging a refusal to provide access to the case file in two sets of circumstances:

(1) where a person has been arrested and faces pre-trial detention (or an extension of a pre-trial detention order) and is seeking access to the case file to challenge such detention; and
(2) an application to access the case file other than to seek to challenge detention.

Template arguments to support request for access to case file to challenge detention

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to the case file is based.]*

The subject matter of EU Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ("Directive 2012/13")[45], according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to information in the case file.

The scope of that directive is defined in Article 2 thereof, which provides, in paragraph 1, that that directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2012/13 is therefore applicable in the present case.

[43] See: https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf.
[44] See: https://www.fairtrials.org/news/commentary-covid-19-what-does-all-mean-your-ability-defend-your-clients%E2%80%99-right-fair-trial-%E2%80%93.
[45] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

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Article 7(1) of Directive 2012/13 stipulates that, at any stage of the criminal proceedings where a person is arrested or detained, Member States are obliged to: "ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers."

Recital 30 further explains that "[d]ocuments and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR."

It is therefore necessary to refer to the European Convention of Human Rights (the "ECHR") as the applicant is facing pre-trial detention. Due to the issue of detention being at stake, the case-law relating to Article 5(4) ECHR (review of continued detention) is also relevant in this context. The European Court of Human Rights has recognised that equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention.[46] Not all documents have to be disclosed, but those which are needed in order to challenge the lawfulness of detention effectively must be provided.[47]

Moreover, Article 6 ECHR is also of relevance for the accused's access to the case file and the disclosure of evidence, "and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1."[48] In *Beuze v. Belgium*, the European Court of Human Rights recognised that the lack of access the file may affect the overall fairness of the proceedings: "depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation (…)."[49]

In line with the jurisprudence of the European Court of Human Rights, the main guiding principle for interpreting the obligation under Directive 2012/13 to disclose 'essential documents' before the judicial review of arrest or detention should, therefore, be equality of arms in the review process. Lawyers should have access to information on the case file as early as possible to start developing a defence strategy. To challenge detention this means, for example, being in a position to show that detention is not justified because the necessary evidence has already been gathered and there is no possibility to tamper with it, or more generally, to question the reasonableness of suspicion. In a well-established line of case-law, the European Court of Human Rights has repeatedly stated:

> "*Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness, in the*

[46] *Korneykova v. Romania,* App. No. 39884/05 (Judgment of 19 January 2012), paragraph 68.
[47] *Lamy v. Belgium*, App. No. 10444/83 (Judgment of 30 March 1989), paragraph 29; Case of Schops v. Germany, App. No. 25116/94 (Judgment of 13 February 2001), paragraph 44.
[48] *Rowe and Davis v. the United Kingdom* [GC], App. No. 28901/95, (Judgment of 16 February 2000), paragraph 59; *Leas v. Estonia*, App. No. 59577/08, (Judgment of 6 March 2012), paragraph 76.
[49] *Beuze v. Belgium* [GC], App. No. 71409/10, (Judgment of 9 November 2018), paragraph 135.

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sense of the Convention, of his client's detention. The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention."[50]

It is clear from Directive 2012/13 that Article 7(1) is subject to no derogation. Article 7(4) provides grounds for restricting access to material evidence, but states specifically that this applies only as a derogation to the disclosure of material evidence under Articles 7(2) and (3). Derogations under Article 7(4) relate to the disclosure of material evidence beyond that which is necessary for challenging detention and are themselves expressed as being 'without prejudice to [Article 7(1)]'.

This interpretation of Directive 2012/13 is consistent with the European Court of Human Rights' case-law on Article 5(4) ECHR, which has recognised that even if evidence is confidential for reasons such as national security, the protection of that material cannot come at the expense of substantial restrictions on the rights of defence. The relevant evidence will have to be disclosed, perhaps with allowances made for its confidential nature:[51]

'The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions of the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer'. [52]

The powers available under national law for prosecutors / the court [as applicable] to restrict access to the case file must be interpreted in light of this obligation under both Directive 2012/13 and the ECHR. It is clear that sanitary measures cannot justify such a restriction. The failure to provide these documents undermines the exercise of rights of defence and the ability of the applicant to challenge effectively his arrest/detention.

The obligation of ensuring access to the case file devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to access the case file, which is an EU law right guaranteed by Directive 2012/13. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to the case file.

In conclusion, the applicant requests that the court order immediate access to the following documents/materials: [identify and enumerate].

[50] *Turcan and Turcan v. Moldova*, App. No. 39835/05 (Judgment of 23 October 2007).
[51] *Dochnal v. Poland*, App. no. 31622/07 (Judgment of 18 September 2012), paragraph 87.
[52] *Chruściński v. Poland*, App. no. 22755/04 (Judgment of 6 November 2007), paragraph 56.

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Template arguments to support request for access to case file (other than challenging detention)

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to the case file is based.]*

The subject matter of EU Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ("Directive 2012/13")[53], according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to information in the case file.

The scope of that directive is defined in Article 2 thereof, which provides, in paragraph 1, that that directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2012/13 is therefore applicable in the present case.

Article 7(2) of Directive 2012/13 requires that Member States ensure a right of access to "all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence".

In accordance with Article 7(3) of the same directive, access has to be provided in due time to exercise defence rights. The exercise of defence rights includes responding to steps taken by investigative authorities at the pre-trial stage, including by supplying exculpatory evidence, adapting the defence strategy or even seeking the dismissal of the case if this is available under national law.

The applicant submits that Articles 7(2) and (3) of Directive 2012/13 have a direct effect and, read together with Article 47 of the Charter, which contains the principle of equality of arms in its scope, can be relied on in national proceedings by this court.

The right of access to the case file can be restricted on grounds provided for by Article 7(4), in particular relating to the needs of an ongoing investigation. However, there must be a genuine need of the investigation justifying the non-disclosure of information and the restriction on access to the case file must kept to the minimum necessary to meet that need. As stated in recital 32 of Directive 2012/13: "any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the [European Convention on Human Rights] and as interpreted by the European Court of Human Rights."

European Court of Human Rights has also given a number of judgments under Article 6(3)(b) of the

[53] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

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European Convention on Human Rights ('the ECHR') in relation to complaints that the failure to provide access to the case file in a timely manner before trial has deprived the applicants of the 'time and facilities to prepare a defence': '[T]he "facilities" to be provided to everyone charged with an offence include the possibility of being informed, for the purposes of preparing his defence, of the result of the investigations carried out throughout the proceedings. The Court reiterates that it has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached'.

This implies a requirement upon the authority to justify the refusal of access by reference to concrete and substantiated elements justifying the application of this restriction such as to enable effective judicial review, or, if the authority is a judge, for it to motivate its decision by reference to such matters. The reasons given for refusal of access should also include the evaluation of necessity, namely, whether access to case file could have been ensured electronically or by other means.

The powers available under national law for prosecutors / the court [as applicable] to restrict access to the case file must be interpreted in light of this obligation under both Directive 2012/13 and the Charter.

In the present circumstances, there is no such justification. It is clear that sanitary measures cannot justify such a restriction. The failure to provide these documents undermines the exercise of rights of defence and the ability of the applicant to challenge the lawfulness of investigative steps [complete as appropriate].

The obligation of ensuring access to the case file devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to access the case file, which is an EU law right guaranteed by Directive 2012/13. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to the case file.

In conclusion, the applicant requests that the court order immediate access to the following documents/materials: [identify and enumerate].

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Access to interpretation services

In order to ensure the effective legal representation of suspects in police interviews and in pre-trial hearings, it is key that interpreters are provided so that lawyers are able to communicate with their clients, where they are not able to speak the same language.

However, social distancing measures imposed during the Covid19 pandemic may affect ability of interpreters to attend police stations or courts.

In this section, we set out arguments based on European Union and European Convention of Human Rights standards to support an application to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking access to interpretation services or challenging a refusal to provide access to interpretation services.

Template arguments to support request for access to interpretation services

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access interpretation is based.]*

The subject matter of EU Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings ("Directive 2010/64"),[54] according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to interpretation and translation in criminal proceedings.

The scope of that directive is defined in Article 2 thereof, which provides, in paragraph 1, that that directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2010/64 is therefore applicable in the present case.

Article 2(1) of Directive 2010/64 requires Member States to provide interpretation services without delay during the criminal proceedings, including police questioning:

> "suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings."

That right of defence must encompass the right to understand and answer questions during police questioning in custody in a manner which fully puts the accused person's version of events before the investigative authorities, in order that they can consider them prior to deciding whether to pursue proceedings/charge the person.

[54] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0064.

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Further, Article 2(2) of Directive 2010/64 requires the availability of interpretation for communication between the suspect and their legal counsel:

> "Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications."

In this context, the Court of Justice of the European Union in its preliminary ruling in *Covaci* interpreted Article 2(1) and (2) of Directive 2010/64 as referring to the *oral interpretation of oral statements*. It further stated that a suspect in criminal proceedings called upon to make oral statements (e.g. before the court or to his legal counsel) should be entitled to do so in his own language.[55]

Directive 2010/64 further specifies, in Article 2(6), that:

> "Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings."

Directive 2010/64 does not envisage any acceptable derogation to this right.

In the context of the current restrictions due to the public health emergency, it may be appropriate to provide interpretation services on a remote basis through communication technology. However, a total restriction on access to any such service is in violation of the State's obligation pursuant to Directive 2010/64.

The legal obligations under Directive 2010/64 reflect human rights norms articulated in the European Convention on Human Rights (the "ECHR") and affirmed in the case-law of the European Court of Human Rights. Recitals 14 and 33 of Directive 2010/64 confirm that the case law relating to the ECHR should be used in the interpretation of the directive, where appropriate:

> "(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.
>
> (…)
>
> (33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as

[55] Case C-216/14 – Judgment of the Court (First Chamber) of 15 October 2015, Criminal proceedings against Gavril Covaci, Request for a preliminary ruling from the Amtsgericht Laufen, paragraphs 30 and 33. http://curia.europa.eu/juris/document/document.jsf;jsessionid=7478FD9E775E9AA495C6433B2E25EB53?text=&docid=169826&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11556414.

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interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union."

The right to assistance of an interpreter during criminal proceedings is laid down in Article 6(3) ECHR.

It is established in the case law of the European Court of Human Rights that: "an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial."[56]

In addition, there is an obligation pursuant to Article 5(2) ECHR to promptly inform anyone who is arrested, in a language which he understands, of the reasons for his arrest and of any charge against him. The European Court of Human Rights has held that it is "important for the suspect to be aware of the right to interpretation, which means that he must be notified of such a right when "charged with a criminal offence". This "notification should be done in a language the applicant understands."[57]

An interpreter "should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right". Initial "defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole."[58]

For the European Court of Human Rights, the "obligation to appoint an interpreter arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if they are neither a national nor a resident of the country in which the proceedings are being conducted. It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made."[59]

It is not considered sufficient if the accused's lawyer knows the language used in court but not the accused. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.[60]

The right to interpretation requires a quality of interpretation which enables the accused not simply to partially understand but to "actively participate" in the proceedings. The European Court of Human Rights found a violation of Article 6 ECHR where: "it has not been established in the present case that the applicant received language assistance which would have allowed him to actively participate in the trail against him. This, in the Court's view, is sufficient to render the trial as a whole unfair."[61]

[56] *Baytar v. Turkey*, App. no. 45440/04, (Judgment of 14 January 2015), paragraph 49.
[57] *Vizgirda v. Slovenia*, App. no. 59868/08, (Judgment of 28 November 2018), paragraphs 86-87.
[58] *Baytar v. Turkey*, App. no. 45440/04, (Judgment of 14 January 2015), paragraphs 50, 54-55.
[59] *Vizgirda v. Slovenia*, App. no. 59868/08, (Judgment of 28 November 2018), paragraph 81.
[60] *Kamasinski v. Austria*, App. no. 9783/82, (Judgment of 19 December 1989), paragraph 74; *Cuscani v. the United Kingdom*, App. no. 32771/96, (Judgment of 24 December 2002), paragraph 38.
[61] *Vizgirda v. Slovenia*, App. no. 59868/08, (Judgment of 28 November 2018), paragraph 102.

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The right to interpretation of sufficient quality extends to pre-trial questioning. Interpreting Article 6(3)(e) ECHR, which sets out the right to have the free assistance of an interpreter if a person charged with a criminal offence cannot understand or speak the language used in court, the European Court of Human Rights confirmed in *Hacioglu v Romania* that the right to adequate interpretation extends to pre-trial questioning:

> "The Court reiterates that paragraph 3(e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings…".[62]

In *Amer v. Turkey*, an interpreter had not been present during the police questioning of the applicant, who claimed to have a limited knowledge of Turkish. Noting that crucial evidence had been gathered during that questioning and referring to the subsequent proceedings before the domestic court, the European Court of Human Rights found that:

> "the verification of the applicant's need for interpretation facilities at the time of his questioning by the police should have been a matter for the domestic court to adequately examine which a view to reassuring themselves that the absence of an interpreter [when the applicant was] in police custody would not have prejudiced the applicant's right to a fair trial."[63]

If interpretation is not provided at the police station, and the resulting record is subsequently used to prosecute the suspected person, this would cause the proceedings to be unfair, and violate Directive 2010/64.

Therefore, the applicant seeks to rely on Article 2(5) of Directive 2010/64 which sets out a right for suspects or accused persons to challenge the lack of access to interpretation services:

> "to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings."

The obligation of ensuring interpretation devolves on this court. This is a function of Article 48(2) of the EU Charter of Fundamental Rights, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to interpretation at the police station, which is an EU law right guaranteed by Directive 2010/64. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for absence of interpretation at police stations.

In conclusion, the applicant requests that this court order the [relevant authorities] to make interpretation services available on a remote basis if necessary for consultation with legal counsel and during police questioning [as appropriate].

[62] Hacioglu v Romania, Application no. 2573/03 (Judgment of 11 January 2011), paragraph 88.
[63] Amer v. Turkey, Application no. 25720/02, (Judgment of 13 January 2009), paragraph 83.

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Remedies for evidence obtained in violation of rights in police custody

Progressively, courts are re-opening and hearings are resuming. This is a key time for lawyers to review case materials and investigative acts such as police interrogations that took place during the lockdown rules. What if it emerges that the suspect made a confession during an interrogation without the presence of the lawyer, because of the social distancing rules applied by police authorities? Can such evidence stand up in court and be used against the person?

In this last section, we set out arguments based on European Union and European Convention on Human Rights standards to support an application for an evidentiary remedy at trial.

Template arguments to support request for remedies

[*The arguments below can be incorporated into submissions at trial to seek to obtain the exclusion of evidence obtained in violation of the defence rights.]*

The right of access to a lawyer in criminal proceedings is a key component of the rights of the defence and, more broadly, of the right to a fair trial. It is, inter alia, enshrined in Article 47, second paragraph, of the Charter of Fundamental Rights of the European Union ('the Charter'), in Article 6(3)(c) of the European Convention on Human Rights ('the ECHR'), and in Article 14(3)(b) of the International Covenant on Civil and Political Rights.

The present case invites the court also to consider EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ("Directive 2013/48")[64], the objective of which according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings, inter alia to have access to a lawyer.

The scope of that directive is defined in Article 2 thereof, which provides, in paragraph 1, that that directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Directive 2013/48 is therefore applicable in the present case.

Right to a lawyer

Article 3(1) of Directive 2013/48 requires Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.[65]

Article 3(2) of Directive 2013/48 specifies the moment from which this right must be granted.

[64] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048.
[65] Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.

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Member States must ensure that suspects[66] or accused persons have a right to consult with a lawyer *prior* to questioning by the police or another law enforcement or judicial authority:

> "*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*
>
> *(e) before they are questioned by the police or by another law enforcement or judicial authority;*
> *(f) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
> *(g) without undue delay after deprivation of liberty;*
> *(h) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*"

Notwithstanding national law, Article 3(2) of Directive 2013/48 creates a right to access a lawyer without undue delay, which the applicant can rely upon directly in these proceedings on the basis of the direct effect of EU law.

No applicable derogations

It is necessary, next, to determine whether Directive 2013/48, read in the light of Article 47 of the Charter, allows Member States to derogate from the right of access to a lawyer, which must thus, in principle, be guaranteed to a suspect, on account of general social distancing measures.

In that regard, Article 3 of that directive provides that a temporary derogation from the right of access to a lawyer laid down in the directive is possible in three sets of circumstances, referred to, respectively, in Article 3(5), Article 3(6)(a) and Article 3(6)(b) thereof:

> *5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.*
>
> *6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 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."*

As established by the Court of Justice of the EU, "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

[66] Note that the Access to a Lawyer Directive does not define the concept of "suspect".

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Member States may provide for are set out exhaustively in Article 3(5) and (6)."[67]

The Court of Justice of the EU further specified that: "to interpret Article 3 of Directive 2013/48 as allowing Member States to provide for derogations from the right of access to a lawyer other than those which are exhaustively set out in that article would run counter to those objectives and the scheme of that directive and to the very wording of that provision and (…) would render that right redundant."[68]

The derogations envisaged in EU law do not apply in the present circumstances, and that a sanitary emergency is not one of the reasons for derogating from the right of access to a lawyer set out exhaustively in that directive. Therefore, the sanitary emergency cannot justify the defendant being deprived of the exercise of the right of access to a lawyer.

Even if the Court would be inclined to consider such a restriction permissible under Article 3(6)(a) (serious adverse consequences for the life of a person), Article 8(1) of Directive 2013/48 specifies that such temporary derogation must meet the following conditions:

(e) the derogation must be proportionate and not go beyond what is necessary;
(f) the derogation must be strictly limited in time;
(g) the derogation cannot be based exclusively on the type or the seriousness of the alleged offence; and
(h) the derogation must not prejudice the overall fairness of the proceedings.

Further, Article 8(2) requires that such derogations may be authorised only by a duly reasoned decision taken 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.

Recital 31 of Directive 2013/48 specifies that "questioning [without a lawyer] may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence."

The conditions for applying a temporary derogation to the right to access a lawyer have, therefore, not been met in the present circumstances. The [relevant authority]'s decision to refuse access to a lawyer to the defendant on the grounds of general sanitary measures is not valid in the light of EU law, and irretrievably prejudices the rights of the defence.

European Convention of Human Rights

The legal obligations created by Directive 2013/48 reflect human rights norms articulated in the European Convention on Human Rights (ECHR) and affirmed in the case-law of the European Court of Human Rights (ECtHR). According to Recital 12, Directive 2013/48 "build[s] upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the [European Court of Human Rights], which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer".

[67] Judgment of the Court (Second Chamber) of 12 March 2020, Criminal proceedings against VW, Case C-659/18, paragraph 42.
[68] *Ibid*, paragraph 45.

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Article 6 § 3 (c) ECHR provides that:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[69]

In *Dayanan v. Turkey*, the ECtHR held as follows:

> "An accused person is entitled, *as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned*. Indeed, the *fairness of proceedings* requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. (…) Counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."[70]

In *Beuze v Belgium*,[71] the ECtHR elaborated on the content of the right of access to a lawyer. It distinguished two minimum requirements as being: (1) the right of contact and consultation with a lawyer prior to the interview, which also includes the right to give confidential instructions to the lawyer, and (2) physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings. Such presence must ensure legal assistance that is effective and practical.

The ECtHR also recognises that it is possible for access to legal advice to be, exceptionally, delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages. In the first stage, the ECtHR evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case. In other words, the ECtHR must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.[72]

In *Beuze v. Belgium*,[73] the ECtHR explained that a general and mandatory (in that case statutory) restriction on access to a lawyer during the first questioning cannot amount to a compelling reason: such a restriction does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons. In any event, the onus is on the Government to demonstrate the existence of compelling reasons to restrict access to a lawyer.

[69] Salduz v. Turkey [GC], § 51; Ibrahim and Others v. the United Kingdom [GC], § 255; Simeonovi v. Bulgaria [GC], § 112; Beuze v. Belgium [GC], § 123.
[70] *Dayanan v. Turkey* App. no. 7377/03, (Judgment of 13 October 2009), § 32.
[71] *Beuze v. Belgium,* https://hudoc.echr.coe.int/eng?i=001-187802, paragraphs 133-134.
[72] *Ibrahim and Others v. the United Kingdom* [GC], paragraph 257.
[73] Paragraphs 142-144 and 160-165.

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In the absence of a compelling reason, the authorities' decision to refuse access to a lawyer is a violation of Article 6(3) ECHR.

Violation of Directive 2013/48 and Article 6 ECHR

The authorities' failure to do ensure the defendant could exercise his right to a lawyer prior and during police questioning infringes Directive 2013/48 and jeopardises the overall fairness of the proceedings under Article 6 ECHR.

Court's duty to order an effective remedy

The obligation of ensuring access to a lawyer during police custody prior to questioning devolves on this court. This is a function of Article 48(2) of the Charter, which provides that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Having regard to Article 51 of the Charter, the requirement of Article 48(2) applies to the right to access a lawyer during police custody prior to questioning, which is an EU law right guaranteed by Directive 2013/48. Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to a lawyer during police custody prior to questioning.

Article 12 of Directive 2013/48 obliges states 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".

Though Article 12(1) does not refer specifically to a judicial remedy, Article 47 of the Charter requires an effective remedy before an impartial tribunal. Effective judicial protection is a general principle of the EU legal order and this court has a duty to ensure that rights protected in EU law are effective.[74]

Recital 49 of Directive 2013/48 states that "Member States should put in place adequate and effective remedies to protect the rights that are conferred upon individuals by this Directive."

Evidentiary remedy

When considering which remedy may be appropriate to address the failure of the authorities to ensure that the defendant had access to legal counsel before and during questioning by the police, it is important to recall the purpose of Directive 2013/48. As stated in Recital 52:

> "This Directive upholds the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the

[74] The CJEU interprets Article 47 of the EU Charter as requiring that: "The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, Unibet, C 432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, DEB, C 279/09, EU:C:2010:811, paragraphs 29 to 33).", CJEU judgment of 28 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16), paragraph 35.

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person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. This Directive should be implemented in accordance with those rights and principles."

It is, therefore, the duty of this court to order a remedy that ensures that the Directive is implemented in accordance with the fundamental right to a fair trial and the rights of the defence.

Although Directive 2013/48 does not specify the type of remedy the court must offer, Article 12(2) points to the use of evidence obtained in breach of the right of access to a lawyer, showing that remedies must be applied in the context of 'the assessment of statements' made by the suspect or accused, or of evidence obtained by the breach:

> "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 authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected."

The most typical context to which this refers is the decision making as to the merits of the accusation. It seems clear from the wording of Article 12(2) that the provision is pointing to systems of remedies which relate to the admission of evidence.

This interpretation is supported by Recital 50 of Directive 2013/48, which requires that:

> "Member States should ensure that 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 from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. (…) [T]his should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence."

In the present circumstances, the remedy must necessarily consist in the exclusion of the statements made by the defendant without his lawyer present.

Remedies for violations of Article 6 ECHR

As indicated above, the legal obligations created by Directive 2013/48 reflect human rights norms articulated in the ECHR and affirmed in the case-law of the European Court of Human Rights. According to Recital 12, Directive 2013/48 "build[s] upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the [ECtHR], which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer".

Further, Recital 50 specifies that the ECtHR's jurisprudence is relevant to assess statements made by suspects or accused persons in breach of their right to a lawyer:

> "In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be

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irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

While Article 6(3) ECHR guarantees the right to access to a lawyer, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for the regulation under national law.

However, the ECtHR has suggested that the exclusion of evidence may be the appropriate remedy in certain cases.[75]

Conclusions

In the present case, the authorities violated their obligation pursuant to Directive 2013/48 to provide access to counsel and failed to rely upon a valid ground for derogation. In view of such a failure, it is the court's duty to order a remedy. In the defendant's view, an effective remedy must necessarily consist in the exclusion of the statements made by the defendant without his lawyer present during police questioning.

[75] *Razvozzhayev v. Russia* and *Udaltsov v. Ukraine*, App. Nos. 75734/12, 2695/15 and 55325 (Judgment of 19 November 2019) paragraph 256; *Titarenko v. Ukraine*, App. No. 31720/02 (Judgment of 20 September 2012), paragraph. 86; *Baytar v. Turkey*, App. No. 45440/04 (Judgment of 14 October 2014), paragraph 58.

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