



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

### **ACCESS TO A LAWYER**

#### ***Blanket refusal to access 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.<sup>1</sup>

We have seen some positive initiatives. For instance, the Bucharest Bar Association distributed protective equipment (gloves and masks) to lawyers.<sup>2</sup> 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.<sup>3</sup>

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**

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<sup>1</sup> 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.

<sup>2</sup> See: <https://www.legalmarketing.ro/baroul-bucuresti-anunt-avocati-masti-si-manusi-de-protectie/>.

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

## Introduction

This template is part of a toolkit which aims to equip lawyer with arguments to address threats to the right to a lawyer as a result of measures adopted in the context of the Covid-19 pandemic, and in particular:

- 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 templates 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 template 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>4</sup> 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".

<sup>5</sup> 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>.

## 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.<sup>6</sup>

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*".<sup>7</sup>

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.

<sup>6</sup> *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."

<sup>7</sup> 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>

## **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”)<sup>8</sup>, 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.<sup>9</sup>

Article 3(2) of Directive 2013/48 specifies the moment from which this right must be granted. Member States must ensure that suspects<sup>10</sup> 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 principle, be guaranteed to a suspect, on account of general social distancing measures.

<sup>8</sup> Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

<sup>9</sup> Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.

<sup>10</sup> Note that the Access to a Lawyer Directive does not define the concept of “suspect”.

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).”<sup>11</sup>

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.”<sup>12</sup>

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

<sup>11</sup> Judgment of the Court (Second Chamber) of 12 March 2020, *Criminal proceedings against VW*, Case C-659/18, paragraph 42.

<sup>12</sup> *Ibid*, paragraph 45.

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.<sup>13</sup>

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."<sup>14</sup>

In *Beuze v. Belgium*,<sup>15</sup> 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, 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

<sup>13</sup> *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.

<sup>14</sup> *Dayanan v. Turkey*, App. no. 7377/03, (Judgment of 13 October 2009), paragraph 32.

<sup>15</sup> *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), paragraphs 133-134.

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.<sup>16</sup>

In *Beuze v. Belgium*,<sup>17</sup> 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.

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<sup>16</sup> *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.

<sup>17</sup> *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), paragraphs 142-144 and 160-165.