



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

### **ACCESS TO A LAWYER**

#### ***Access to effective legal assistance***

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**

---

<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>

---

<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>.

## 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.<sup>6</sup> In Spain legal assistance through videoconference is encouraged, but not implemented due to lack of equipment.<sup>7</sup> In France, the Paris bar council stopped appointing legal aid lawyers due to lack of personal protective equipment,<sup>8</sup> while in Romania the bar association started to distribute masks and gloves to the lawyers.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

---

<sup>6</sup> Fair Trials "[Short Update: Restrictions on access to a lawyer in the Netherlands.](#)"

<sup>7</sup> Fair Trials "[Short Update: Diverging approaches in Madrid police stations and courts on remote justice measures.](#)"

<sup>8</sup> Fair Trials "[Short Update: Courts remain closed in France and access to a lawyer is restricted due to COVID-19.](#)"

<sup>9</sup> Fair Trials "[Short Update: Bucharest Bar Association distributes masks and gloves to lawyers.](#)"

<sup>10</sup> Directive 2013/48/EU, Arts. 3(1) and 3(1)(a) and Directive 2016/343, Art. 8.

<sup>11</sup> See: <https://www.irishlegal.com/article/solicitor-acts-remotely-for-client-in-police-interview-in-northern-ireland-first>.

### **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")<sup>12</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 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.<sup>13</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>14</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."*

<sup>12</sup> Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

<sup>13</sup> Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.

<sup>14</sup> Note that the Access to a Lawyer Directive does not define the concept of "suspect".

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.”<sup>15</sup> 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”.<sup>16</sup>

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.<sup>17</sup> The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence.<sup>18</sup>

---

<sup>15</sup> *A.T. v. Luxembourg*, App. No 30460/13, (Judgment of 09 April 2015), paragraph 64.

<sup>16</sup> *Soytemiz v. Turkey*, App. No 57837/09 (Judgment of 27 November 2018), paragraph 44.

<sup>17</sup> *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.

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.

---

<sup>18</sup> *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.