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

ACCESS TO A LAWYER

Confidentiality of client-lawyer communications

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.

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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.
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 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. 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.

\[\text{\footnotesize \cite{Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Official Journal of the European Union, C 115, 09 May 2008: “the Treaties and the law adopted by the Union on the basis of the Treaties shall prevail over the law of the Member States”}}\]

\[\text{\footnotesize \cite{For further information, see Fair Trials – Roadmap Practitioner Toolkit on using EU law in criminal practice available at: https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-.pdf}}\]
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.6

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”)7, 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,

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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.\(^8\)

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.\(^9\)

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)\(^10\) of the Convention.”\(^11\) 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.”\(^12\)

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\(^8\) Judgment of 5 June 2018, Kolev and Others, C-612/15, EU:C:2018:392, paragraph 103.

\(^9\) 33rd recital of the preamble of the Directive.

\(^10\) 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 […]”


\(^12\) Mariya Alekhina and others v. Russia, App. No. 3804/12 (Judgment of 17 July 2018), para. 168
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 (...).”\(^{13}\)

The right to confidential communication between the suspect or accused person and their lawyer may only be restricted in exceptional circumstances.\(^ {14}\) 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.”\(^ {15}\)

Limitations to the right to confidential communication between a defendant and their lawyer may be justified by the existence of “compelling reasons”,\(^ {16}\) for example, to prevent a risk of collusion or due to the lawyer’s professional ethics or unlawful conduct.\(^ {17}\) 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].

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\(^{13}\) *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.”

\(^{14}\) *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.

\(^{15}\) *Sakhnovskiy v. Russia* [GC], App. no. 21272/03, (Judgment of 02 November 2010), § 102.

\(^{16}\) *Moroz v. Ukraine*, App. no. 5187/07, (Judgment of 18 September 2017), §§ 67-70.