



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

ACCESS TO A LAWYER

Access to remedies

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.

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>.



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.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>.



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")⁶, 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.⁷

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

⁶ Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

⁷ Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 103.



Member States must ensure that suspects⁸ 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.

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

⁸ Note that the Access to a Lawyer Directive does not define the concept of “suspect”.



Member States may provide for are set out exhaustively in Article 3(5) and (6).”⁹

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.”¹⁰

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:

- (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.

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”.

⁹ Judgment of the Court (Second Chamber) of 12 March 2020, Criminal proceedings against VW, Case C-659/18, paragraph 42.

¹⁰ *Ibid*, paragraph 45.



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.¹¹

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.”¹²

In *Beuze v Belgium*,¹³ 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.¹⁴

In *Beuze v. Belgium*,¹⁵ 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.

¹¹ *Salduz v. Turkey* [GC], § 51; *Ibrahim and Others v. the United Kingdom* [GC], § 255; *Simeonovi v. Bulgaria* [GC], § 112; *Beuze v. Belgium* [GC], § 123.

¹² *Dayanan v. Turkey* App. no. 7377/03, (Judgment of 13 October 2009), § 32.

¹³ *Beuze v. Belgium*, <https://hudoc.echr.coe.int/eng?i=001-187802>, paragraphs 133-134.

¹⁴ *Ibrahim and Others v. the United Kingdom* [GC], paragraph 257.

¹⁵ Paragraphs 142-144 and 160-165.



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.¹⁶

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

¹⁶ 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 Juizes Portugueses* (C-64/16), paragraph 35.



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



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.¹⁷

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.

¹⁷ *Razvozhayev 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.

