



**PRACTITIONERS' TOOLS ON EU LAW**

## **ACCESS TO A LAWYER DIRECTIVE**

**ACCESS TO A LAWYER:  
A GENERAL APPROACH AND SPECIFIC ISSUES**

**WAIVER**

**DEROGATIONS**

## About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>

This toolkit is created as a part of the project “Litigating to Advance Defence Rights in Europe” funded by the European Union. The Project acknowledges the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights abuses. They operate on the front-line of the justice system, deciding which legal arguments to make and whether to apply EU law. The project aims to strengthen the ability of defence lawyers to effectively engage in litigation at domestic and EU levels where rights have been violated, and use EU law to tackle abuse of fundamental rights in criminal justice systems across the EU.



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# INTRODUCTION

## A. INTRODUCTION

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### 1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('EAW'). Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR' or 'the Convention').

However, cooperation was progressively undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU started in 2009 setting minimum standards for the procedural safeguards of suspects and accused persons to regulate certain aspects of criminal procedure through a programme called the '**Stockholm Roadmap**'.<sup>1</sup>

Whilst the original objectives of these measures is ensuring mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element. These cover the right to interpretation and translation,<sup>2</sup> the right to information,<sup>3</sup> and the right of access to a lawyer<sup>4</sup>, procedural safeguards for children<sup>5</sup>, the right to the presumption of innocence and to be present at trial<sup>6</sup> and the right to legal aid<sup>7</sup> (collectively, the '**Roadmap Directives**').

This toolkit focuses on Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings<sup>8</sup> (the '**Directive**'), which became directly applicable as from the end of the transposition deadline on 27 November 2016.

This toolkit includes a general approach on how to use the Directive in domestic proceedings and covers some specific issues of particular interest to defence practitioners: the participation of

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<sup>1</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p.1](#)).

<sup>2</sup> 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, ([OJ 2010 L 280, p. 1](#)).

<sup>3</sup> 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](#)).

<sup>4</sup> 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 ([OJ 2013 L 290, p. 1](#)).

<sup>5</sup> Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings ([OJ L 132, 21.5.2016, p.1](#)).

<sup>6</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings ([OJ L 65, 11.3.2016, p. 1](#)).

<sup>7</sup> Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ([OJ L 297, 4.11.2016 p.1](#); corrigendum OJ L91 5.4.2017, p.40).

<sup>8</sup> Note 4 above.

lawyers in police questioning; access to a lawyer in EAW proceedings; waiver of the right of access to a lawyer; and the scope for authorities to derogate from that right.

The Directive is an important piece of EU legislation. It builds upon the European Court of Human Rights ('**ECtHR**') ruling in *Salduz v. Turkey* of 2008,<sup>9</sup> which established the right of access to a lawyer in police questioning and led to a wave of reforms across Europe. However, the Directive should not be limited to the standards set by the ECtHR as the EU system of fundamental rights protection can go above and beyond the ECHR standards.<sup>10</sup>

## 2. Purpose of this toolkit

This toolkit is designed to give practical advice, mainly to defence practitioners, on how to use the Directive in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the LEAP network to date in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Directive. The toolkit compiles the latest relevant developments in the jurisprudence of Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights ('**ECtHR**') and identifies the key problems as regards the implementation of the Directive across the EU Member States. This toolkit also suggests arguments that can be used by lawyers in domestic criminal proceedings where national law or practice falls short of the standards set by the Directive.

Please refer to the [Using EU law in Criminal Practice Toolkit](#) for a general introduction on how to use EU law in national proceedings. A short overview of the basic principles of EU law is given in Section B of this introduction.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the [CJEU Preliminary Reference Toolkit](#).

Please also feel free to refer to the other materials on EU law produced by Fair Trials, notably:

- The [toolkit on the Right to Interpretation and Translation Directive](#);
- The [toolkit on the Right to Information Directive](#);
- The [toolkit on the Legal Aid Directive](#);
- The [toolkit on the Presumption of Innocence Directive](#);
- The [toolkit on the Charter of Fundamental Rights of the European Union](#);
- The online [legal training on pre-trial detention](#).<sup>11</sup>

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<sup>9</sup> ECtHR, *Salduz v. Turkey* App. No 36391/02, Judgment of 27 November 2008).

<sup>10</sup> Charter of Fundamental Rights of the European Union, Article 52(3).

<sup>11</sup> Follow our website on [EU law materials](#) for the upcoming and updated toolkits.

### 3. Scope of this toolkit

Part I of this toolkit is intended to support defence practitioners wishing to rely upon the Directive and provides two examples of areas where you might wish to use the Directive. The toolkit then discusses certain specific issues highlighted by the LEAP network as posing a particular challenge to the conduct of criminal defence: waiver of the right of access to a lawyer (Part II) and derogations on the right (Part III).

### 4. How to use this toolkit

#### a. How the content is organised

Each part of this toolkit starts with a presentation of the main issues. It then details the relevant provisions of the Directive and the related legal arguments before providing specific guidance on how to use them in practice.

As most of the provisions of the Directive leave considerable room for interpretation, we include other legal arguments when presenting the provisions of the Directive. Where possible, we highlight the interpretation given by the Court of Justice of the European Union (**'CJEU'**). However, there are currently a limited number of CJEU judgments interpreting the Directive.<sup>12</sup> Therefore, where necessary, we fill in the gaps with additional sources.

In particular, we include relevant references to the Charter of Fundamental Rights of the European Union (**'the Charter'**),<sup>13</sup> and in particular Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and right of defence) of the Charter.<sup>14</sup>

We also review Article 6 of the European Convention on Human Rights (**'ECHR'**)<sup>15</sup> and the relevant case-law of the European Court of Human Rights (**'ECtHR'**). One of the aims of the Directive was to articulate ECtHR standards, as they stood at the time of drafting of the Directive, as standards of EU law binding upon all EU Member States. ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECtHR standards do not fall below the scope of rights and limits of derogations set in the Directive.

Most issues of the Directive still remain open for interpretation; therefore this toolkit inevitably involves our own reading of the Directive standards. Based upon our understanding of the Directive, we make concrete suggestions about how to use its provisions in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court).

In order to distinguish clearly between these different levels of analysis:

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<sup>12</sup> This toolkit was published in August 2020.

<sup>13</sup> The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, ([OJ C 326, 26.10.2012, p. 391](#)).

<sup>14</sup> For further information on how to use the Charter, see Fair Trials' [Toolkit on Charter of Fundamental Rights of the European Union](#).

<sup>15</sup> Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.



Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border.

*Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border. They are presented in italics.*

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directives in the local legal context. We try to be up front about when we are making a suggestion with the symbol '→' or marking it with the title '**Litigation strategy**'.

## b. Terminology

In this toolkit, we use the term '**questioning**' to refer to questioning as to the facts of an offence by police, prosecutors and/or investigative judges; this may have the same meaning as the terms '**interview**' and '**interrogation**' in some jurisdictions.

## c. A word of caution

This toolkit is drafted based on certain assumptions. As mentioned above, we have endeavoured to identify these clearly in the body of the text. This is both in acknowledgment of the fact that there may be other points of view, and in order to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in criminal procedure in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. So, you will need to adapt our suggestions to work within your own local context.

## d. Keep in touch

With those qualifications, we encourage you to follow the steps in this toolkit, try out the arguments we propose and to let us know how you get on by contacting us via the contacts in the preface.

**We are keen to hear from you about your experience and to share lessons learned from others. We may also be able to offer support and assistance in individual cases.**

## B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW

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### 1. Supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. This is called the 'principle of supremacy' and it means that in case of contradiction between national law and EU law,

the latter takes precedence and under certain conditions can be invoked directly by individuals to claim their rights against the state.

## 2. Direct effect of EU law

EU law works through a system of 'decentralised' enforcement where the national court is the primary driver of compliance. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,<sup>16</sup> in which the European Court of Justice (now the CJEU) established the principle of 'direct effect'. The idea is that when obligations upon Member States are there to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was originally recognised for primary law (Treaties) when the obligation in question was 'precise, clear and unconditional' and 'does not call for additional measures' by Member States or the EU. It was then extended to regulations, and subsequently to directives.

## 3. Direct effect of Directives

Directives set objectives for Member States, who can decide by what means to reach them. Therefore, Member States need to give effect to directives by adopting national legislation that transposes the directives into national law. However, provisions of directives can have direct effect too, as was originally established by the CJEU in the *Van Duyn*<sup>17</sup> and *Ratti*<sup>18</sup> cases and more recently in *Difesa*:

'(...) [W]herever the provisions of a directive appear (...) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (...) A[n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (...)'.<sup>19</sup>

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

- 1) the transposition deadline of the directive has passed but the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;<sup>20</sup>
- 2) it is invoked against a state;
- 3) it gives rights to an individual; and

<sup>16</sup> CJEU, Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [ECLI:EU:C:1963:1](#).

<sup>17</sup> CJEU, Case 41/74 *Van Duyn* [ECLI:EU:C:1974:133](#).

<sup>18</sup> CJEU, Case 148/78 *Ratti* [ECLI:EU:C:1979:110](#).

<sup>19</sup> CJEU, Case C-236/92 *Difesa* [ECLI:EU:C:1994:60](#), paragraphs 8-10.

<sup>20</sup> CJEU, Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise*, [ECLI:EU:C:2002:435](#), para. 27.

- 4) it is **unconditional and sufficiently precise**, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

The first three criteria are clearly fulfilled for the Directive with regard to the different aspects of the right to access to a lawyer.

Even if a provision is arguably not ‘unconditional and sufficiently precise’ because it is spelled out in general terms and may require some interpretation, this does not necessarily prevent you from relying on it in national court. The CJEU has recognised that:

- The fact that a provision needs interpreting does not prevent it having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.<sup>21</sup>
- The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.<sup>22</sup>
- A provision which ‘limits the discretionary power’<sup>23</sup> of the Member State or impose Member States to ‘pursue a particular course of conduct’<sup>24</sup> may also be invoked in national courts. An individual may invoke such a provision to argue that the national authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.<sup>25</sup>

#### 4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of a directive in order to ensure its full effectiveness.

‘The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (...), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.’<sup>26</sup>

In this toolkit we occasionally refer to the preamble of the Directive, called the “**recitals**”, as an interpretative source. Recitals of directives have no legal binding force. They do not in themselves contain any enforceable rights or obligations and cannot alter the content of substantive

<sup>21</sup> CJEU, Case 41/74 Van Duyn, see above note 17, para.14.

<sup>22</sup> Ibid., Vand Duyn, para. 7.

<sup>23</sup> Ibid., para. 13.

<sup>24</sup> CJEU, Case 51/76 Verbond van Nederlandse Ondernemingen [ECLI:EU:C:1977:12](#), para. 23.

<sup>25</sup> Ibid., para. 24.

<sup>26</sup> CJEU, Case C-69/10 Samba Diouf [ECLI:EU:C:2011:54](#), para. 60.

provisions.<sup>27</sup> However, they explain the background and the objectives of each directive. They are therefore important for understanding the directive and can be used as an interpretative source.

## C. REVIEW OF ECtHR APPROACH TO DEFENCE RIGHTS

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The Directive builds upon the case-law of the ECtHR. One of the functions of the Directive is to articulate ECtHR standards, as they stood at the time of drafting of the Directive, as standards of EU law binding upon all EU Member States. In some key aspects such as derogations from early access to a lawyer and remedies for violations of access to lawyer, ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECHR standards (as interpreted by the ECtHR) do not fall below the scope of rights and limits of derogations set in the Directive.

### 1. Overall fairness and Article 6(3) ECHR guarantees

It is important to bear in mind that fair trial principles under Article 6 ECHR are developed by the ECtHR which rules on cases in a subsidiary capacity. In line with Article 1 of the ECHR, it falls to the states to secure the rights under the ECHR for those within their jurisdiction; the ECtHR mechanism is therefore available only when internal domestic remedies such as appeals have been exhausted.

In the specific context of Article 6 ECHR, this means that as a general rule a criminal trial must have taken place before the ECtHR can decide whether it was or was not fair. The ECtHR has developed a method of evaluation also known as the “overall fairness test” according to which it looks at the whole procedure to make that assessment:

*Compliance with the requirements of fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of the isolated consideration of one particular aspect or one particular incident.*<sup>28</sup>

Contrary to the general approach of the EU directives, the specific rights set out in Article 6(3) of the Convention – such as the right of access to a lawyer guaranteed by Article 6(3)(c) – are generally not seen as self-standing norms (rights) but specific aspects of the general right to a fair trial contained in Article 6(1) ECHR. Compliance with these various aspects of the right to a fair trial is factored into the assessment of the fairness of the proceedings as a whole:

*The guarantees in paragraph 3 (c) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in*

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<sup>27</sup> The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, Case 134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j. [ECLI:EU:C:2009:229](#), para. 16.

<sup>28</sup> ECtHR, [Pishchalnikov v. Russia](#), App. No 7025/04, Judgment of 24 September 2009, paragraph 64; ECtHR, [Beuze v. Belgium](#), App. No 71409/10, Judgment of 24 September 2009, paragraph 150.

*any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings.*<sup>29</sup>

## 2. Article 6(3) ECHR and trial stage issues

If an issue is raised under Article 6(3) ECHR concerning something that happens at trial, the overall fairness assessment will be focused on the court proceedings. Thus, it is common for the ECtHR to find violations of Article 6(3)(a) (the right to be informed of the charge) due to the late reclassification of an offence by a trial or appeal court vis-à-vis what was originally alleged in an indictment, leaving the person with no possibility to be heard in respect of the reclassified allegation.

This may, equally, apply in relation to the right of access to a lawyer under Article 6(3)(c). Thus, for instance, in 2016 the ECtHR found the United Kingdom in violation of Article 6(3)(c) ECHR due to a failure to provide access to a lawyer in proceedings for committal of a person to prison for contempt of court (proceedings which are considered criminal due to the penalty at stake).<sup>30</sup> The person had no legal representation and thus no ability to exercise rights available to them in those proceedings.

## 3. Article 6(3) ECHR and pre-trial issues

For present purposes, however, the focus is on pre-trial issues, not least what happens at the police station. The language of Article 6 ECHR focuses primarily on a fair trial by a court or tribunal. However, the overall fairness approach suggests that criminal proceedings in a specific case should be looked at as a single continuous process. Therefore, issues arising in pre-trial stage should, as much as possible, be raised and any violations remedied in the subsequent stages. This also means that specific issues relating to Article 6 arising in the pre-trial phase can be relevant under Article 6 only where they have an impact upon the fairness of the proceedings as a whole, including the court proceedings:

*Certainly the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that [Article 6] has no application to pre-trial proceedings (...) Other requirements of Article 6 – especially of paragraph 3 (art. 6-3) – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.*<sup>31</sup>

The result of this approach is that the ECtHR will take account of what takes place at the pre-trial stage in the specific areas governed by Article 6(3), but it will do so only once the national proceedings are over when it can assess the overall impact of the pre-trial issue. Essentially, if something goes wrong in the initial stages, primary responsibility rests with the Contracting States to put it right in the course of subsequent stages of criminal proceedings. The ECtHR will step in only afterwards to evaluate whether the initial violation could be and was remedied by the national

<sup>29</sup> For example, ECtHR, [Bandaletov v. Ukraine](#) App. No 23180/06, Judgment of 31 October 2013, paragraph 54.

<sup>30</sup> ECtHR, [Hammerton v. United Kingdom](#), App. No. 6287/10, Judgment of 17 March 2016, paragraph 143.

<sup>31</sup> For example, [Imbriosica v. Switzerland](#) App. No 13972/88, Judgment of 24 November 1993, paragraph 36.

courts. As a result, ECtHR complaints under Article 6(3) brought when the criminal case is still ongoing will usually be dismissed as inadmissible.<sup>32</sup>

The above point underlines that principles under Article 6(3)(c) concerning the right of access to a lawyer at the early stages of criminal proceedings will, by definition, be developed by reference to the proceedings as a whole. This is reflected in the core statement in *Salduz v. Turkey* which we will consider below: the violation of Article 6 – in the sense of the ECtHR finding a country in violation of the ECHR – only happens when the national system fails to remedy the earlier failure to provide access to a lawyer. So there is not, and essentially cannot be, a self-standing violation of Article 6(3)(c) arising from something that happens early in the proceedings alone. As we will see later, there may be an interest in arguing for a slightly different approach under the Directive.

#### 4. The right to silence and right not to incriminate oneself under Article 6 ECHR

Before considering the core principle around Article 6(3)(c), it is important to keep in mind that the right to silence and privilege against self-incrimination is also protected by Article 6 ECHR. Although it is not specifically mentioned in Article 6(3), the ECtHR has consistently recognised that it forms part of the requirements of a fair trial:

*The Court also reiterates that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.*<sup>33</sup>

This is important to bear in mind for present purposes because of the function the ECtHR sees in the role of the lawyer: it is – not exclusively, but in particular – to ensure respect for the right of the suspect not to incriminate himself. This is the clearest reason why early violations of the right of access to a lawyer should be remedied by declaring incriminating statements made without access to a lawyer inadmissible and why only exclusionary rules may be effective for this purpose. We will come back to this in the discussion concerning remedies below.

#### 5. The core principle in *Salduz v. Turkey*

Against the above legal framework, the ECtHR reached its decision in the key case of *Salduz v. Turkey*. As indicated in the 2019 European Commission's report on the transposition of the Directive<sup>34</sup> ('**Implementation Report**'), the ECtHR judgment in *Salduz* is taken into account in a

<sup>32</sup> The case of *Casse v. Luxembourg* App. No 40327/02, Judgment of 27 April 2006) is the only one the author knows of in which the ECtHR considered a violation of a specific guarantee of Article 6(3) in isolation. Fair Trials sought to persuade the ECtHR to follow this approach more generally in the case of *Candido Gonzalez Martin v. Spain* App. No 6177/10 (Admissibility decision of 15 March 2016) (see the [intervention](#)), but it declined to do so. *Casse v. Luxembourg* should probably be seen as an outlier; it is arguably more akin to a finding of a violation of the right to a trial within a reasonable time due to the failure ever formally to initiate proceedings at all.

<sup>33</sup> *Pishchalnikov v. Russia*, see above note 28, paragraph 71.

<sup>34</sup> [Report from the Commission to the European Parliament and the Council](#) on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with the third persons and with consular authorities while deprived of liberty, COM(2019) 560 final, 26 September 2019.

number of its provisions. Therefore, this toolkit places significant focus on the key principle spelled out in this judgment:

*Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (...) 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.*<sup>35</sup>

We will return to this principle in more detail below in Part I.<sup>36</sup> At this point it is useful to have in mind this summary of key points arising from the above ECtHR conclusion:

- the ECtHR's own role under Article 6 is to assess the fairness of the proceedings as a whole (the 'overall fairness test');
- Article 6(3) requirements, and the right to silence, are relevant also in pre-trial stage;
- in order to establish a violation of Article 6, it must be demonstrated that the restriction of defence rights at the pre-trial stage was not (or could not be) remedied at later stages and prejudiced the overall fairness of proceedings;
- in the case of the right of access to a lawyer, a violation of Article 6 in principle takes place where (a) access to a lawyer is not provided as from the first interrogation and (b) incriminating statements given by the suspect or accused in absence of a lawyer are used for a conviction.

A review of the impact of this case-law at the national level is beyond the scope of this toolkit. Suffice it to say that, from 2010-2015, there have been major decisions of Supreme / Cassation Courts of France, the United Kingdom, Ireland and the Netherlands among others which have led to significant, often panicked reforms of police custody systems.<sup>37</sup> Against this backdrop, it is clear why a Directive was needed to fix common minimum standards in this crucial area.

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<sup>35</sup> *Salduz v. Turkey*, cited above note 9, paragraph 55.

<sup>36</sup> See also Part III on derogations and why they should not be applied as a general rule.

<sup>37</sup> See, in this regard, D. Giannouloupoulos [LEAP member] '[Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries](#)', Human Rights Law Review 16 (2016) 1.

# I – THE RIGHT OF ACCESS TO A LAWYER

## A. THE CORE ISSUE

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You will be well aware of the ‘classic’ case of a violation of the right of access to a lawyer which lies at the heart of the principles we are concerned with: a suspect is questioned by police without a lawyer, who is consequently not present to help the suspect enforce their right to silence; the suspect, as a result, makes an incriminating statement which is recorded; and this statement is used against him later in the proceedings. *Salduz v. Turkey* provides an example: a young suspect was arrested by police on suspicion of terrorism charges and was not given access to a lawyer (no such right existed under national law at the time). He admitted certain conduct alleged against him, but later retracted these statements. Later, the national court, in assessing the merits of the case, took into account his earlier statement and found him guilty of the offence.

There are two basic issues arising out of this situation that need to be looked at in more detail:

- (1) the violation of the right of access to a lawyer, which takes place at the point the right is not guaranteed, typically during police questioning; and
- (2) the taking into account of the incriminating statements made in absence of a lawyer later, typically by the court deciding upon guilt or innocence.

The Directive addresses both aspects of the right of access to lawyer. Firstly, it sets out the scope, timing and content of the right to access to a lawyer in criminal proceedings and EAW proceedings. Secondly, in case of a violation of that right, it sets an obligation to provide an effective remedy. There is currently little CJEU jurisprudence<sup>38</sup> to guide the implementation of the Directive rights, therefore we will refer to relevant ECtHR jurisprudence where it does not fall short of the standards set in the Directive.

## B. CONTENT OF ‘ACCESS TO LAWYER’ IN CRIMINAL PROCEEDINGS AND ECHR BASELINE

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### 1. The core *Salduz* principle and the Directive

ECtHR in *Salduz* set a high standard for access to lawyer for suspects and accused persons from the time of the first interrogation by the police. It also clearly addressed the issue of remedy in case the right of access to a lawyer is violated. Considering that the Directive is largely based on this landmark judgment, it is useful to look at its core principle:<sup>39</sup>

*Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (...) 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.*

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<sup>38</sup> See Fair Trials’ “[Mapping CJEU Case Law on EU Criminal Justice Measures](#)”.

<sup>39</sup> We omit key language on exceptions which is discussed in Part III below.



The statement establishes a rule with two parts: (i) access to a lawyer is required as from the first interrogation by police (scope of the right); and (ii) use of incriminating statements made without access to a lawyer for a conviction infringes the right to a fair trial (remedy). As we will see below, Article 3 of the Directive seeks to articulate the first part as a rule of EU law; Article 12 reflects the second part by requiring remedies in respect of statements made in the context of violations of that rule.

## 2. The scope of the right to access to a lawyer

### a. 'Access to a lawyer': the timing

According to the Directive, access to lawyer has to be ensured without undue delay in all cases. As a minimum access to lawyer should be provided to suspects or accused persons from the earliest of the four situations listed in Article 3(2) in criminal proceedings:<sup>40</sup>

- (a) Before questioning by the police or by another law enforcement or judicial authority;
- (b) Upon carrying out by the investigating or other competent authorities of an investigative or other evidence-gathering act;
- (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.

The Directive and thus also the right to access a lawyer applies to suspected or accused persons in criminal proceedings from the time they are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a crime (Article 2(1) of the Directive). This notification does not need to be official or written. The Directive also covers cases where a witness becomes a suspect during questioning.<sup>41</sup> In addition, this right applies to any suspect or accused person irrespective of whether they are deprived of liberty.

This corresponds to the approach taken by the ECtHR, which looks beyond the formal status of the person. Article 6(3) ECHR applies to a person subject to a "criminal charge", within the autonomous Convention meaning of that term, i.e.:

*A 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.*<sup>42</sup>

The right to access to a lawyer applies until the conclusion of the criminal proceedings, i.e., the final determination of the question of whether the suspect or accused person has committed offence. This includes sentencing and, if applicable, subsequent appeals.

*In line with the ECtHR jurisprudence, the Directive also applies to situation where a person with other status, such as witness, becomes a suspect or accused person during*

<sup>40</sup> For EAW proceedings see Part I, Section 3(a) below.

<sup>41</sup> Article 2(3) of the Directive.

<sup>42</sup> ECtHR, [Simeonovi v. Bulgaria](#), App. No.21980/04, Judgment of 12 May 2017, paragraph 110.

*questioning by the police or by another law enforcement authority in the context of criminal proceedings. This is in line with the ECtHR approach, which is to look at the reality of the proceedings in question to determine the status of a person: the applicant was not officially declared a suspect in the criminal proceedings where her actions were being investigated and where she was questioned. Rather her procedural status – until the official charges were brought against her – was a witness. However, this is not a decisive factor to be taken into consideration. Indeed, the Court is compelled to look behind the appearances and investigate the realities of the procedure in question.<sup>43</sup>*

According to the Implementation Report in many Member States conformity with the scope of the right to access to a lawyer in terms of its starting point and duration is not explicit but can be inferred. In four Member States rights under the Directive are made dependent on a formal act, which is also a condition for acquiring the status of a suspect or accused person. In Romania, for example, the right of access to lawyer does not apply in the case of administrative leading to a police station, which normally precedes formal arrest.<sup>44</sup> In Bulgaria, police custody is not treated as a part of criminal procedure and, as such, even if a detainee can in principle have access to a lawyer in police detention, legal aid in practice is not free as detainees must reimburse legal aid costs later in the proceedings if convicted. There are no rules on how legal aid is provided during detention, and no system in place for appointing lawyers.<sup>45</sup>

## **b. ‘Access to a lawyer’: content of the right**

Article 3(3) the Directive provides a detailed description of the content of the right:

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

<sup>43</sup> ECtHR, [Kalēja v. Latvia](#), App. No. 22059/08, Judgment of 5 October 2017, paragraph 38.

<sup>44</sup> Ed Lloyd Cape, [“Inside police custody, An empirical study of suspects’ rights at the investigative stage of the criminal process in nine EU countries”](#), December 2018, p. 43 (Inside Police Custody Report).

<sup>45</sup> Fair Trials, [“Where’s my lawyer?”](#), October 2019, p.17.

- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the crime scene.

Exactly what ‘access to a lawyer’ means depends largely upon the role of the lawyer. This was expressed (somewhat obliquely) by the ECtHR in *Dayana v. Turkey*<sup>46</sup> soon after *Salduz*:

*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.*

Sometime later came the case of *A.T. v. Luxembourg*,<sup>47</sup> in which Fair Trials [intervened](#). The ruling established that the right of access to a lawyer includes the right to a private consultation prior to questioning by the investigative judge:

*‘The 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 (...)’ [our translation].*

In this toolkit we will pay special attention to two aspects of the right to access a lawyer: (1) confidentiality of communications between a lawyer and their client and (2) the lawyer’s effective participation during questioning.

However, the right to a lawyer also covers the following aspects:

- (1) having a lawyer participate in evidence-gathering procedures;<sup>48</sup>
- (2) all court proceedings;
- (3) all proceedings related to initial or continued detention of the suspect or accused person.

### **c. Right to meet and communicate in private**

Confidentiality of communication between suspects or accused persons and their lawyer is one of the key aspects of effective legal assistance and one which, in principle, should be non-derogable under the Directive. In order to be in a position to give effective legal assistance, it is essential for

<sup>46</sup> ECtHR, [Dayanan v. Turkey](#) App. No 7377/03, Judgment of 13 October 2009, paragraph 31.

<sup>47</sup> ECtHR, [A.T. v. Luxembourg](#) App. No 30406/13, Judgment of 9 September 2015.

<sup>48</sup> The Directive refers to the minimum level of protection that Member States must provide. Article 3(3)(c) lists only some of investigative and evidence-gathering acts where lawyer’s presence cannot be denied where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned.

lawyers to have a confidential space to talk with their client. Without the guarantee that communications are kept confidential, legal assistance lose its usefulness: suspect and accused person would lack the trust<sup>49</sup> necessary to make full and frank disclosure to their lawyers; in turn, lawyers would lack sufficient, and possibly important, information to provide comprehensive legal advice to their client or to represent them effectively.<sup>50</sup> It is during these confidential consultations that crucial discussions can take place to prepare the defence adequately.

According to Article 4 of the Directive, the requirement of confidentiality covers all forms of communications between the lawyer and the suspect or accused person permitted under national law:

Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided under this Directive. Such communication shall include meetings, correspondence, telephone conversation and other forms of communication permitted under national law.

Recital 33 in the preamble of the Directive gives a more detailed explanation as to the content of Member States' obligations in ensuring the right to 'meet and communicate in private':

Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right to access to a lawyer provided for in this Directive, without derogation. (...) The obligation to respect confidentiality not only implies that 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 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 the Directive, "objective and factual circumstances" pointing to suspicion that the lawyer is involved with the suspect or the accused person in a criminal activity.<sup>51</sup> Although the preamble of the Directive is not in itself binding, it can be used as an interpretative source (see more above in Section A).

Similar considerations apply to communication with the lawyer in the trial stage, in particular in the courtroom. The courtroom architecture should not interfere with the confidentiality of communication between the lawyer and the accused during the trial. In *Mariya Alekhina and others v. Russia*, the ECtHR stated found that glass docks, an increasingly present feature in courtrooms in some Member States, impact the right to effective legal assistance:

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<sup>49</sup> See ECtHR, [André v France](#), Application n°18603/03, Judgement of 24 July 2008, paragraph 41: "professional secrecy [...] is the basis of the relationship of trust existing between a lawyer and his client."

<sup>50</sup> Council of Bars and Law Societies of Europe (CCBE), [CCBE Recommendations: On the protection of client confidentiality within the context of surveillance activities](#), 2016, p. 9.

<sup>51</sup> 33<sup>rd</sup> recital of the preamble of the Directive.

*The Court reiterates that a measure of confinement in a courtroom may affect the fairness of a trial, as guaranteed by Article 6 of the Convention. In particular, it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance. It has 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.<sup>52</sup>*

The Implementation Report shows that conformity issues in connection with the confidentiality of communication exist in seven Member States. These issues are mostly connected with allowing derogations for the confidentiality requirement, and restrictions on the length and method of communication between the lawyer and the suspect or accused person.<sup>53</sup> Time restrictions were also reported by the lawyers and defendants in a 2019 report done by European Union Agency for Fundamental Rights ('FRA'), while defendants and lawyers in **Poland** noted that places used for a meetings, such as corridors, did not allow for confidentiality of the conversation.<sup>54</sup> Fair Trials' research has also found that these meetings can take place in presence of other people (including the police) or in the corridors outside or even inside the courtroom.<sup>55</sup>

#### **d. Effective participation in questioning**

Recital 25 in the preamble to the Directive essentially repeats the content of Article 3(3) but includes one additional detail:

(25) (...) During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.

The ECtHR has established 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 next phase in this discussion therefore seems likely to focus on the extent of the lawyer's participation in questioning. In *Soytemiz v. Turkey* the ECHR stated:

*'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>56</sup>*

If the issue concerns your participation in questioning, it must be the case that you are physically present at the point of questioning (as opposed to the sort of violation which results in your being

<sup>52</sup> ECtHR, [Mariya Alekhina and others v. Russia](#), App. No 3804/12, Judgment of 17 July 2018, para. 168; see also Fair Trials, '[Innocent until proven guilty](#)', Report, June 2019, p. 33.

<sup>53</sup> Implementation Report, see above note 34, sections 3.3.2.1 and 3.4.

<sup>54</sup> European Union Agency for Fundamental Rights, '[Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#)', Report, 2019 pp. 48-49(FRA Report on rights in practice).

<sup>55</sup> Fair Trials, "[Where is my Lawyer?](#)", October 2019, p.19.

<sup>56</sup> ECtHR, [Soytemiz v. Turkey](#), App. No 57837/09, Judgment of 27 November 2018, paragraph 44.

absent outright). This means that there is action that you can take at that point to try to ensure that the violation of the Directive is properly identified at that stage to rely on this later.

According to a 2019 report done by European Union Agency for Fundamental Rights ('FRA'), in many countries the participation of lawyer in questioning is still restricted to essentially passive presence. For example, the report indicates that in the Netherlands official guidelines state that a lawyer may make a statement only at the start and at the end of the questioning and may make corrections in the minutes of the questioning. In Austria, lawyers are unable to intervene in the questioning of defendants and, for this reason, tend to choose not to be present and instead make sure to advise their clients before the questioning.<sup>57</sup>

The Implementation Report also highlights the questionable effectiveness of lawyer's participation in the questioning in 16 Member States. The European Commission notes that lawyers might not be in a position to put their questions directly to the person being questioned and may be restricted to submitting requests, observations and reservations to the public prosecutor.<sup>58</sup>

#### e. Incriminating statements

Although the Directive does not cover incriminating statements, it needs to be read in conjunction with Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. It requires Member States to respect the right to silence and the privilege against self-incrimination. Article 7(1) and (2) of this directive puts an obligation on Member States to ensure:

1. (...) that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.
2. (...) that suspects and accused persons have the right not to incriminate themselves.

EU law does not provide more detailed guidance on what constitutes an incriminating statement, therefore ECtHR jurisprudence on this issue is useful.<sup>59</sup>

The concept of an 'incriminating statement', the use of which for a conviction or sentence will infringe the right to a fair trial, is, in a classic case, fairly simple. For example, in *Salduz* and many subsequent cases, the ECtHR has dealt with confessions by the persons charged, who effectively admit committing the offence.

However, it is important to bear in mind that there may be more to the concept than this. In particular, statements not directly incriminatory *per se* may be adverse to a person's defence if they are used in that way (e.g. denials in different terms which are contrasted to impugn a suspect's credibility). The ECtHR recognised this in the context of criminal proceedings where use was made of earlier statements obtained under non-criminal compulsory powers:

*Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions*

<sup>57</sup> FRA Report on rights in practice, see above note 54, pp. 55-56.

<sup>58</sup> Implementation Report, see above note 34, section 3.3.2.2.

<sup>59</sup> See also Recital 27 of the Directive on the presumption of innocence.

*of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful.*<sup>60</sup>

The case of *A.T. v. Luxembourg* is an example of denials of an offence within criminal proceedings (specifically, in police questioning) being used in this way to show the accused was telling different versions of his story and to undermine his credibility. What still remains to be clarified is the extent to which it may also apply to *evidence* (e.g. from an identity parade), where there is no communicative information from the suspect at all. This may, again, be an area where the Directive has more to offer than the existing ECtHR case-law.

#### **f. ‘Used for a conviction’**

As established above, the violation of Article 6 ECHR arises only where the incriminating statement obtained in the absence of a lawyer is ‘used for a conviction’. This is, sadly, an area where there is ambiguity in the case-law which, eight years after *Salduz*, is still unresolved.

Fair Trials has put forward an assessment of the case-law in this area.<sup>61</sup> There may be other readings of the case-law, but the different approaches identified were the following:<sup>62</sup>

- *Incriminating statements may not ‘have a bearing’ upon the merits decision.*
- *All effects of the defence rights infringement had to be ‘completely undone’.*

In this area, there is scope for argument both under the existing ECtHR case-law and the Directive and it remains to be settled whether an incriminating statement obtained without a lawyer can, in any circumstances, be used for a conviction in some way without infringing Article 6.

### **C. ‘ACCESS TO LAWYER’ IN EAW PROCEEDINGS**

The Directive is seemingly less detailed with regard to access to a lawyer in EAW proceedings than it is about domestic criminal proceedings. However, the same rights to be advised, defended and represented by a lawyer applicable to domestic proceedings are also extended to EAW proceedings.<sup>63</sup>

In addition, the Directive establishes the right to ‘dual’ legal representation, namely, a right to a lawyer in both the executing and the issuing Member States.<sup>64</sup> The role of the lawyer in the issuing

<sup>60</sup> ECtHR, [Saunders v. United Kingdom](#) App. No 19187/91, Judgment of 17 December 1996).

<sup>61</sup> See [Fair Trials’ intervention](#) in *A.T. v. Luxembourg*, March 2014.

<sup>62</sup> A third approach suggested that evidence obtained in breach of Article 6(3)(c) could be used if it were not the central platform amid a complex of evidence. The relevant Chamber judgment (ECtHR, [Dvorski v. Croatia](#) App. No 25703/11, Judgment (First Section) of 28 November 2013, which Fair Trials criticised, was reversed by the Grand Chamber (see ECtHR, [Dvorski v. Croatia](#) App. No 25703/11, Judgment (Grand Chamber) of 20 October 2015).

<sup>63</sup> FRA Report on rights in practice, see above note 54, p.62.

<sup>64</sup> See also [“Commission Notice — Handbook on how to issue and execute a European arrest warrant”](#) (OJ C 335, 6.10.2017), Section 11.3.



Member State is key to assist the lawyer in the executing country (where the person is based pending extradition) by providing relevant information and advice that help the requested person exercise their rights more effectively. For example, in case such as *Aranyosi and Robert Căldăraru*<sup>65</sup> with prison conditions in the issuing state at the centre of the argument, a lawyer in the issuing state will be better placed to provide the lawyer in the executing state with relevant information and jurisprudence from the issuing state. Legal representation in the issuing Member State before the transfer of the person arrested is also important, as it can help prevent surrender in the first place. For example, in many instances, it is possible that the lawyer in the issuing state can secure revocation of the EAW by arranging that the charges are dropped before its execution<sup>66</sup> or that alternative, less restrictive, measure be issued instead, such as a European Investigation Order.<sup>67</sup>

In accordance with Article 2(2) of the Directive, requested persons have a right to access to a lawyer in EAW proceedings from the time of their arrest in the executing Member State. Article 10 of the Directive sets out the content and the scope of that right. In this context Article 10 (2) states that in issuing Member State the requested persons have:

- (a) the right to access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;
- (b) the right to meet and communicate with the lawyer representing them;
- (c) the right for their lawyer to be present and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority.

In principle the same guarantees applicable to the possibility to provide effective legal assistance in criminal proceedings should apply to EAW proceedings in the executing Member State. This means that the lawyer-client communications are covered by confidentiality and the lawyer must be able to provide legal assistance effectively, which includes being able to participate in extradition hearings, ask questions, request clarifications, make statements and participate effectively in other procedural acts.<sup>68</sup>

The Implementation Report notes that certain issues related to the correct transposition of the Directive arise from *mutatis mutandis* application of rules governing criminal proceedings. Such issues include a rather vague reference to the possibility to contact a lawyer ‘by any means available’ and time restrictions for consultations with the lawyer. Although Article 10 of the Directive does not provide for such possibility, some Member States have applied derogations permitted in criminal proceedings also to EAW proceedings.<sup>69</sup> In some Member States, such as Austria and France, reports

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<sup>65</sup> CJEU, Case C-404/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, [ECLI:EU:C:2016:198](#).

<sup>66</sup> FRA Report on rights in practice, see above note 54, p.64.

<sup>67</sup> For more on the European Investigation Order, please refer to the “[Preliminary Reference Toolkit](#)”.

<sup>68</sup> Recital 42 of the Directive; see also Implementation Report, above note 34, section 3.10.

<sup>69</sup> Implementation Report, above note 344, section 3.10.1.



highlight the lack of assistance in contacting a lawyer for EAW proceedings, as well as language barriers making it impossible to consult with the lawyer effectively.<sup>70</sup>

More prominent systemic implementation and practical problems exist regarding the appointment of lawyers in the issuing Member State. According to the Implementation Report, five Member States do not clearly ensure that the requested person receives information about such possibility without undue delay. In four Member States the right, and presumably a mechanism, to appoint a lawyer in the issuing Member State is not found in legislation at all.<sup>71</sup> FRA findings also indicate that access to a lawyer in the issuing state is problematic, as authorities simply inform the requested persons of their right to access a lawyer, but provide no practical assistance, leaving it for the requested persons, their relatives or the lawyer of the executing state to make the necessary arrangements. In Bulgaria and Greece no information is provided as appointment of a lawyer is considered to be a matter of the issuing state only.<sup>72</sup>

#### D. REMEDIES

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Failure to provide access to a lawyer or undue restrictions placed on effective exercise of the right to legal assistance as provided for in the Directive will result in a breach that engages the obligation to provide an appropriate remedy under Article 12:

1. Member States shall 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.
2. Without prejudice to national rules and systems on the admissibility of evidence, 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 (...), the rights of the defence and the fairness of the proceedings are respected.

The rule in Article 12(1) is a standard expression of general EU law. Article 47 of the EU Charter of Fundamental Rights puts a clear obligation on the EU Member States to ensure an effective remedy for infringement of rights protected by EU law. However, the concept of remedies is a broad one and leaves Member States substantial discretion in the choice of such remedy. As observed in the Implementation Report, remedies chosen by the Member States include a wide range of measures, from exclusion of evidence obtained in violation of Directive rights to compensatory mechanisms and various forms of liability for state agents.<sup>73</sup> Some states give wide discretion to choose the remedy to courts, while some even prohibit the application of the exclusionary rule.<sup>74</sup>

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<sup>70</sup> FRA Report on rights in practice, see above note 54, p.64.

<sup>71</sup> Implementation Report, above note 34, section 3.10.2.

<sup>72</sup> FRA Report on rights in practice, see above note 54, p.65.

<sup>73</sup> Implementation Report, above note 34, section 3.12.

<sup>74</sup> Anneli Soo, '(Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study', *Utrecht Law Review*, Vol.14, Iss.1, 2018, p.20.

EAW proceedings are even more problematic in terms of remedies. In a study done by Anneli Soo, a researcher of Maastricht University, it was observed that in most of the EU countries no specific remedies apply for violations of access to lawyer in the executing state, which means that only general remedies such as appeal of the decision to execute is available.<sup>75</sup> In **Bulgaria** and the **Czech Republic**, remedies are subject to legislative action. **Slovenia** had amended its legislation according to which the court may no longer rely on statements made by requested persons if the investigative judge failed to inform the requested person of his/her rights, including the right of access to a lawyer, or if the requested person issued a statement in the absence of counsel.

Recital 50 of the preamble of the Directive refers to the *Salduz* principle as guidance for Member States in choosing the appropriate remedy. As mentioned above, in that case the ECtHR established a general principle according to which the use of incriminating statements given without access to a lawyer for conviction will irretrievably prejudice the rights of defence and result in a violation of the right to a fair trial. At the same time, the Directive seems to allow the use of such statements for other purposes, e.g., as justification for urgent investigative acts to prevent commission of other offences or serious adverse consequences for any person.<sup>76</sup>

It is worth noting that in our view, the ECtHR jurisprudence on evidentiary standards, especially regarding evidence obtained in breach of defence rights, is increasingly falling below the standards that guided the drafting of the Directive. This was observed also by the dissenting judges in *Farrugia v. Malta*, where they argued persuasively that a finding of no violation of the right to a fair trial in a case where incriminating statements made the absence of a lawyer were used for conviction must be considered ‘a retrogression’ rather than advancement of the right to a lawyer.<sup>77</sup> For a more detailed line of argumentation in this regard, see Part I on requesting a remedy and Part III on derogations.

Nevertheless Article 12(2) provides a little more detail as to what is required in criminal proceedings specifically. It refers to the ‘assessment of statements’ made or of evidence obtained in breach of the right to a lawyer, pointing clearly to a need for a specific remedy in the criminal proceedings which ensures such evidence itself is the focus of the remedy. As set out below, this is the ‘hook’ or mechanism by which to enforce the Directive when it is not complied with at the earlier stage. It has been argued that, in order for a remedy to be effective, accused persons should be put, as far as possible, back in the position in which they would have been if a violation of the right to counsel had not occurred. Therefore, only the exclusionary rule, application of the doctrine of ‘fruit of the poisonous tree’, and if necessary, a retrial could serve as effective remedy for breaches of Directive rights.<sup>78</sup> For more details on this line of argumentation see Part I on requesting a remedy.

## E. USING THE DIRECTIVE IN PRACTICE

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<sup>75</sup> Ibid., p.46.

<sup>76</sup> Recital 50 of the Directive.

<sup>77</sup> Joint dissenting opinion of judges Serghides and Pinto de Albuquerque in ECtHR, *Farrugia v. Malta*, App. No. 63041/13, Judgment of 4 June 2019).

<sup>78</sup> Anneli Soo, ‘(Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study’, *Utrecht Law Review*, Vol.14, Iss.1, 2018, p.47.

## 1. Direct effect of the Directive

It is possible that a violation of the Directive will happen because national law is not in conformity with its provisions. Suppose, for instance, that national law grants a suspect the right to consult with a lawyer, but excludes the lawyer from the questioning itself (as was the situation in the Netherlands until March 2016). In that situation, you will not be able to establish a violation of national law so as to claim any remedies available under national law. In order to enforce your right to be present in the questioning, you need to rely directly on the Directive (in this example Articles 3 and 12) relying on its 'direct effect' as a measure of EU law.

As explained above, the direct effect of EU legislation is a principle developed by the CJEU<sup>79</sup> to enable the individuals to rely directly on the rights created by EU legislation, provided that the relevant provisions and corresponding obligations for the Member State are 'precise, clear and unconditional' and 'do not call for additional measures' by Member States or the EU.

Article 3 imposes requirements which, in our opinion, are sufficiently clear and precise to have direct effect. They are obviously intended to create enforceable rights for individuals. Article 12, although it may require some interpretation by the CJEU, should also be assumed to have direct effect as it is an expression of the general right to an effective remedy protected by Article 47 of the Charter, which is directly applicable. In any case, the Articles 47 and 48 of the Charter of Fundamental Rights (right to a fair trial and rights of the defence) are directly applicable and there is no doubt you can invoke those together with Article 12 of the Directive.<sup>80</sup>

- ➔ Take as your starting point that the relevant provision of Article 3 of the Directive (e.g. right to a private conversation with the lawyer) has direct effect. If need be, contact Fair Trials for further assistance.
- ➔ Take as your starting point that Article 12 has direct effect. It can be invoked together with Article 47 of the Charter as a basis for claiming a remedy for the violation Directive rights.

## 2. The core argument: violation of Directive rights → Article 12 remedy

We will take a violation of the core article governing the access to lawyer in criminal proceedings – Articles 3 – as an example for this section, but the same principles are equally applicable to other rights set in the Directive. Below we will give an example of different kinds of violations of the right of access to a lawyer under Article 3 (e.g. outright absence of a lawyer; restriction of possibilities to consult effectively; restrictions on the lawyer's participation in questioning). But in order to challenge these sorts of violations we need to consider the key tool you can use where you believe a violation is taking place. In the case of a violation of the right of access to a lawyer protected by Article 3 of the Directive, Article 12 requires a remedy. Accordingly, in order to use the Directive, you need to:

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<sup>79</sup> CJEU, Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [ECLI:EU:C:1963:1](#).

<sup>80</sup> For more on the application of EU Charter see Fair Trials' "[Preliminary Reference Toolkit](#)", Section V.

- (a) establish that the violation has taken place; and
- (b) seek a remedy before the trial court (or another forum).

### a. Establishing a violation of access to lawyer

There are many ways in which a violation of Article 3 might occur. We have already pointed to some of the problems of transposition and practice in above sections. For example, national law may provide for access to a lawyer but this may not have been provided in your case in practice. National law may not provide access to a lawyer in a certain context. Or national law may define the lawyer's intervention in a way which you see as narrower than the content of the right in the Directive. Whatever the violation at issue, you need to establish that it has taken place, and ideally establish it as early as possible as an issue under the Directive. Members of the collective *Asociacion Libre de Abogados* in Spain, for instance, made a point of referring explicitly to the Directive when attending police questioning and disputing the limits Spanish police sought to impose upon them.<sup>81</sup>

- ➔ Establish how you say the Directive has been infringed:
- Identify the issue in terms of the Directive (e.g. refusal to provide access to a lawyer before the questioning because the law does not foresee it).
  - If you are present at the time of the questioning (e.g. you are not able to consult privately with the client before questioning), you should make sure this is identified as an issue in terms of the Directive at the point at which it arises. Take the approach of the *Asociacion Libre de Abogados* and make sure your objections based on the Directive are recorded by the relevant official.
  - If you are not present at the relevant time (e.g. the person was denied the right to call you at all), make sure at the first opportunity that this is identified and recorded as an issue under the Directive.

### b. Seeking a remedy under Article 12

#### i. The evidence in question

Article 12 is a broad provision which requires interpretation by the CJEU, and there are no decisions on this to date.<sup>82</sup> For the time being, the working assumptions within LEAP are essentially as follows. First, the requirement for an effective remedy necessarily implies that the remedy be sought before a court. 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, and a simple prosecutorial challenge would not meet this requirement. It is true that there are areas in which the CJEU has seen non-judicial remedies as sufficient but in the context of the protection of fundamental rights, effective judicial protection is a general principle of the EU legal order and it simply cannot be asserted that such an issue could be resolved otherwise than by access to a court capable of delivering an effective remedy.

<sup>81</sup> The police, somewhat surprisingly, complained to the Madrid Bar Association about this, which [dismissed](#) the complaint without further action.

<sup>82</sup> See Fair Trials' "[Mapping CJEU Case Law on EU Criminal Justice Measures](#)".

In terms of the type of remedy the court must offer, Article 12(2) points clearly 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 without a lawyer present, in violation of the Directive. The most typical context to which this refers is the decision-making as to the merits of the accusation (though see the comments in Fair Trials’ [“Using EU law in Criminal Practice Toolkit”](#) about pre-trial remedies). Despite the reservation with regard to the national rules and systems on the admissibility of evidence, it seems relatively clear from the wording of Article 12(2) that the provision is pointing to systems of remedies which relate to the admission of evidence.

Bear in mind the ECtHR’s view that the role of the lawyer is (in particular) to ensure respect for the suspect’s right not to incriminate himself. The prejudice in a breach of, for example, Article 3 of the Directive arises from the collection of evidence from the suspect without that protection. It follows that only a remedy which prevents that evidence being taken into consideration is ‘effective’ in the meaning of Article 47 of the Charter. Despite the fact that the latest ECtHR jurisprudence seems to be deviating from *Salduz* principle, it should nevertheless be relied on before the national courts. Strong argument in support of that conclusion was given by concurring judges in *Dvorski v. Croatia*, where they stated:

*“Since the “exclusionary rule” has been established for the protection of privilege of against self-incrimination, the use of evidence collected in breach of this basic privilege will always render the trial unfair, irrespective of any other circumstances in the case. (..) If a tainted self-incriminatory statement is not excluded prior to trial, such an error in itself should be seen as a violation of the Convention without there being any need to assess the overall fairness of the proceedings. (..) No other legal remedy could rectify such errors and ultimately ensure the fundamental rights to fair trial.”<sup>83</sup>*

If remedies in national law (e.g. exclusion of evidence or nullity) achieve this, they will be effective. If they do not (e.g. merely declaratory remedies or where the court is able to factor the evidence into its decision, notwithstanding the breach) they may not be effective and the court will have to use the Directive and the Charter as a basis for removing the evidence from consideration. If exclusion is possible at the pre-trial stage, it should be noted that in his concurring opinion in *Dvorski v. Croatia*, judge Zupančič argued that the exclusionary rule should be applied in a way such that the evidence is excluded from the case file and never comes to the attention of the sitting court. If the evidence is seen by a judge, it may still affect his/her decision making on a subconscious level thus rendering the remedy ineffective.<sup>84</sup>

We believe that these arguments would help keep the Directive standards in line with the *Salduz* principle and suggest:

- ➔ Claim a remedy in respect of the violation of the Directive.
- ➔ Argue:

<sup>83</sup> Joint concurring opinion of judges Kalaydjieva, Pinto de Albuquerque and Turković in ECtHR, [Dvorski v. Croatia](#), App. No 25703/11, Judgment of 20 October 2015).

<sup>84</sup> Concurring opinion of judge Zupančič in *Dvorski v. Croatia*, see above note 83, para. 12.

- Article 12 requires an effective remedy for infringements of the rights protected by Article 3 of the Directive, an expression of the general obligation on Member States to provide effective judicial protection of EU law rights under Article 47 of the Charter. In order to be effective, such a remedy must have the effect of restoring the fairness of the proceedings and reversing the harm done by the collection of evidence in breach of the right of access to a lawyer.
- Accordingly, the relevant act should either be declared null, or the evidence obtained as a result of the breach should be excluded if these remedies are available under national law.
- If there is no such remedy (e.g. in Sweden), Article 47 requires the court to take no account of evidence obtained in breach and to avoid basing its decision upon it directly or indirectly. The court is under a duty to do everything that lies within its jurisdiction to ensure the useful effect of EU law. By whatever means it chooses to achieve it, the end result must be that the evidence is not taken into consideration for a conviction.

## ii. *The fruit of the poisonous tree*

In order to ensure the full effect of the Directive, should national remedies also extend to the ‘fruit of the poisonous tree’? By that term, we mean the doctrine according to which evidence obtained indirectly for the breach of Directive rights (e.g. physical evidence obtained from a confession made following a breach of the right of access to a lawyer) should be treated as if it were itself obtained in violation of defence rights. Article 12(2) expressly refers to both ‘statements made by suspects or accused persons’ and ‘evidence obtained in breach of their right to lawyer’, therefore our assumption is that the fruit of the poisonous tree doctrine should apply. Otherwise the rights contained in the Directive would be deprived of their effectiveness. So:

- ➔ Argument: the Directive would be deprived of useful effect if the fruit of the poisoned tree (that is, evidence obtained as a result of violations of Directive rights) were not treated in the same manner as the contaminated evidence itself. Nullity and exclusionary rules should operate to remove this evidence from consideration too.

## 3. Practical examples where arguing a violation of the Directive

In this section, we provide a few examples of particularly interesting areas where you could explore using the Directive.

### a. Example 1: Effective participation in questioning

We have explained the core content of effective participation above. In short, effective participation in questioning means that you are able to be present during the questioning and, wherever necessary, advise your client during the questioning, ask questions, request clarifications and make statements, which should be recorded in accordance with national law.

### *i. Identify and document the violation*

An important step in invoking the Directive rights effectively in national procedure is to establish a violation if one has occurred. What constitutes a violation? The Directive includes the standard reference to national law, so it is clear that it is not setting exhaustive rules about participation in questioning: this is left to each system. However, there is also a requirement to ensure that such procedures do not prejudice the effective exercise and essence of the right concerned. What is meant by ‘the right concerned’ is not pre-defined for all situations. But what is already established about the role of the lawyer should be borne in mind – including, but not limited to, securing the suspect’s right to silence and right not to incriminate himself (see the ECtHR case-law discussed above).<sup>85</sup>

It seems particularly arguable that limitations upon the lawyer’s participation which, in effect, prevent the lawyer protecting the suspect’s right to silence and right not to incriminate himself would be inconsistent with the Directive. This would include, in particular, rules which have the effect of a lawyer being unable practically to advise silence (as such) in questioning. This seems particularly important where a lawyer’s initial advice, in private consultation, is to advise silence. If the effect of the questioning is to cause a suspect to change their mind and give evidence, particularly self-incriminatory evidence, any restrictions placed upon the lawyer’s role and ability to intervene or give advice during the questioning would be particularly worthy of consideration.

But you should also bear in mind the broad meaning of ‘incriminating statements’ identified above (including denials, statements of facts etc.). If the lawyer identifies issues (e.g. an answer given which could potentially be used against the suspect) but is not able to address it through his participation, this might raise an issue too. You would, in particular, expect this to be addressed in the treatment of the evidence obtained in this way (see the comments on Article 12 below).

We would suggest that you look both at the law and how it is applied in your case.

➔ Look at the law:

- Does the national rule fundamentally limit the lawyer’s ability to participate?
- Is the lawyer’s freedom to intervene clearly articulated in the law?
- Does the national rule provide powers for excluding the lawyer on the basis of their interference with the questioning?

➔ Look at what actually happens in the questioning:

- Do the questions lead to the suspect departing from his initial choice to remain silent?
- Are you able to advise the client not to answer specific questions?
- Are you able to ask for clarifications in respect of areas where the answers given by the suspect risk being considered incriminatory?

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<sup>85</sup> In *A.T. v. Luxembourg*, see above note 47, paragraph 64, the ECtHR stated regarding the other functions of a lawyer: “[F]airness 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.”



These are ideas about what to look for in terms of how the restriction on your participation may result in a breach of the suspect's rights. There is then a separate question as to what steps you wish to take to ensure your concerns are noted. The main point here, we suggest, is to ensure that the fact of the interference with your participation and its incompatibility with the Directive is noted at this stage whilst being mindful of the need to protect the privilege of your own advice.

- ➔ Get the issue recorded
  - Take a clear note of any intention expressed by the client not to answer questions during the questioning.
  - Take your own notes of ways in which your participation is impeded.
  - Have a copy of the Directive with you and show the officer Article 3(3)(b).
  - Note the questions which you might have wanted to ask to clarify those of the questioning authority, or objections you had to the phrasing of certain questions, if you were not allowed to make these.
  - Ask for your observations to be noted clearly in the records taken by the questioning authority, including references to the Directive if possible.

## *ii. Seek remedies for the infringement*

As noted above, the appropriate remedy for the infringement of the right of access to a lawyer should be (at a minimum) one which ensures the relevant evidence is not taken into account for the purposes of a conviction. To the greatest extent possible, the argument has to be that the limitation on the lawyer's participation is, in effect, equivalent to denying the lawyer's presence outright and should lead to a similar consequence.

- ➔ Seek a remedy (see earlier comments / the Fair Trials' ["Using EU law in Criminal Practice Toolkit"](#))
- ➔ Argue:
  - The lawyer has a wide-ranging role which, in the particular context of police questioning, relates in particular to the protection of the suspect against infringements of his right to silence and against self-incrimination (see the *Salduz* and *Dayanan* cases). The limitations placed upon the lawyer's participation in this case (either due to the legal limits or the application of the law) meant that the lawyer was unable to exercise that function effectively.
  - There has therefore been a breach of Article 3(3)(b) of the Directive.
  - Accordingly, in accordance with Article 12, in the assessment of statements made by the suspect, the rights of the defence and fairness of proceedings must be respected. This should be read in light of *Salduz* principle according to which a breach of Article 6 occurs where incriminating statements obtained in absence of a lawyer are used for a conviction. The ECtHR has also already made clear that the failure to enable a lawyer to be present in questioning will lead to a breach of Article 6 on that basis (*Navone and Others v. Monaco*). Due to the restrictions applied in this case, the position is comparable to the absence of the lawyer and incriminating statements must not be used for a conviction. Exclusionary / nullity rules must therefore be used to remove the statements (and evidence obtained on the basis of those statements) from consideration altogether.



- This includes directly incriminatory statements such as confessions. It also includes statements not directly incriminatory per se, but on which reliance can be placed to undermine the suspect's credibility (*A.T. v. Luxembourg*; *Saunders*). In order to ensure the fairness of the proceedings, these should not be relied upon in any way detrimental to the accused.

## **b. Example 2: Cross-border (European Investigation Order) issues**

There is already some recognition in the case-law of the ECtHR that the questioning of a person in one country in the absence of a lawyer (or a valid waiver of that right) may lead the country that subsequently uses confessions obtained in that context to infringe Article 6 ECHR:

***Stojkovic v. France and Belgium***<sup>86</sup> concerned a case in which a person was questioned in Belgium by virtue of a letter rogatory issued by a French investigative judge, indicating that the person should be heard as an 'assisted witness', that is a person who is not formally accused but against whom there is evidence plausibly supporting their participation in an offence. The person was heard in Belgium without the assistance of a lawyer, despite requesting one, and without being advised of his right to silence. Subsequently, in France, the person was advised by a lawyer and remained silent before the judge. However, his earlier statements were held against him and he was indicted and convicted at trial, which the ECtHR found infringed Article 6(3)(c).

The relevance of this issue is brought into focus by Directive 2014/41/EU on the European Investigation Order (EIO), which allows one Member State (issuing/requesting Member State) to request another Member State (executing Member State) to carry out investigative acts for ongoing criminal proceedings in the former. Although a reference is made to the Directive in the EIO directive, it does not expressly apply to EIO proceedings, and the legislation does not govern in any detail the procedural safeguards which should be applied at the point of executing an EIO. It seems possible that issues around access to a lawyer might therefore arise. In this event, the point is to use the assumption that violations of Article 3 engage the obligation to apply remedies of Article 12, only relying on a violation in another country.

### ***i. Try to ensure the questioning is compatible with Article 3***

As a lawyer of the issuing Member State (state where the main criminal proceedings are taking place), you will be in a much stronger position if you ensure that questioning in another country takes place in accordance with Article 3 in the first place. This will, for instance, ensure that your client is properly able to exercise their right to remain silent. If you are already instructed in the country where the criminal proceedings are taking place, you should seek to ensure that any letter rogatory (letter of request) or EIO issued specifies that the person should be heard in accordance with the requirements of Article 3 of the Directive. You should also contact a colleague in the executing country (contact Fair Trials if you need assistance in finding a lawyer in that jurisdiction). If you are instructed in the issuing Member State it is important to undertake these steps because, if the person (who, as shown in the ECHR example, is formally questioned as a witness, but has evidence against them pointing to a potential involvement in the offence) is then for some reason

<sup>86</sup> ECtHR, [Stojkovic v. France and Belgium](#) App. No 25303/08, Judgment of 27 October 2011).

not heard in the presence of a lawyer, you will be in a stronger position to argue against the use of the evidence obtained in the main criminal proceedings (see point iii below).

- ➔ Ensure the letter rogatory / EIO specifies that the person should be heard as a suspect and with the right of access to a lawyer. Inform the judicial authority concerned that you will, in due course, argue against the use of any evidence obtained if the procedure is not compatible with Article 3 of the Directive.
- ➔ Contact a lawyer in the executing country through networks like LEAP or (for Council of Europe countries) the European Criminal Bar Association.

## ***ii. Identify and document the violation in the executing / requested state***

It is possible that a person might not be heard with a lawyer, despite your best efforts. National law or practice in the other country might not provide for this, or, more fundamentally, there may be no legal aid available to pay for it. If, for whatever reason, the person is heard without a lawyer present in the executing / requested state, this should be relatively simple to establish. This should appear on the face of the record, and the client will be able to tell you what happened.

You may, equally, suspect that the person has been recorded as having ‘waived’ their right in a manner incompatible with the Directive (as to which see Part II – the same arguments will apply in this context). In that case, you will have to enquire as to how the person was notified of any rights they did have and whether their relinquishment was compatible with the Directive.

- ➔ Establish how the questioning was incompatible with Article 3:
  - Was there simply no right to a lawyer in the executing state, due to a legal, practical or funding reason?
  - Was the right relinquished in a way which did not comply with the Directive (see Part II for the relevant enquiries to make)?

## ***iii. Seek remedies in the issuing / requesting state***

The logic of the *Stojkovic v. France and Belgium* case is that, though France did not author the impugned questioning, it was nevertheless its responsibility under Article 6 ECHR to secure the fairness of the proceedings before its own courts. A similar logic should apply under the Directive. The issuing Member State (where you act) has the obligation to guarantee the rights under the Directive and, in case of failure to do so, is bound by the obligation under Article 12 to provide appropriate remedy. Namely, it must ensure that if a statement (or any other investigative activity) was taken in violation of Directive rights, the courts of the issuing Member State have to make sure that the fairness of the proceedings is respected in the ‘assessment of statements’ made by the suspect. It cannot discharge that obligation if it takes into account incriminating statements which have been collected in violation of Article 3, even if another Member State is responsible for the questioning. In fact, should make little difference whether the other country is or is not bound by the Directive: what matters is that the local court of the main criminal proceedings is so bound.

- ➔ Seek a remedy (see earlier comments / Fair Trials’ [“Using EU law in Criminal Practice Toolkit”](#))
- ➔ Argue:

- The Directive imposes a result obligation upon the Member State to ensure that the fairness of the proceedings is respected. A direct violation of the Directive in questioning by the Member State's own authorities would fall to be remedied in the assessment of any statements obtained in that context so as to achieve the result of the Directive. The same obligation arises in respect of statements obtained in questioning in another country carried out in a manner incompatible with the Directive. Drawing an artificial distinction between the two would lead to results incompatible with the Directive and deprive it of useful effect (see, by analogy, the ECtHR case of *Stojkovic v. France and Belgium*).

## II – WAIVER

### A. THE ISSUE

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We discussed above the situations where a violation of the Directive can actually be established (i.e. where access to a lawyer was denied). We have also given two practical examples focused on participation of the lawyer in questioning and cross-border issues to draw attention to steps that should be taken in order to be able to invoke Directive rights more effectively.

A common concern that needs to be highlighted is that the right, though available in law and practice, is ‘waived’ in circumstances which cast doubt upon the waiver’s reliability. This is one of LEAP’s biggest defence rights concerns. The following concerns have been expressed:

- The manner in which rights are notified means suspects do not sufficiently appreciate the importance of obtaining legal advice, or the consequences of renouncing the right.
- Police incentivise the waiver of the right of access to a lawyer by emphasising the delays and complication that will arise from asking for a lawyer.
- Rules of evidence ascribe irrebuttable probative value to police records indicating the waiver was given freely, so that it is impossible to argue otherwise.

The existing ECtHR case-law, reviewed below, includes fairly comprehensive standards requiring the waiver to be given unequivocally, knowingly and intelligently before it can be considered effective. However, it appears that at present national laws do not provide sufficient grounds for arguing that the waiver was ineffective. On its face, Article 9 of the Directive appears to do little more than reiterate the ECHR standard but we believe there are arguments worth exploring. It should be noted that this part overlaps to some extent with the Right to Information Directive; occasional reference is made below to existing comments in Fair Trials’ [Toolkit on the Right to Information Directive](#).

### B. THE DIRECTIVE AND THE ECHR BASELINE

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The key provision of the Directive is Article 9, which appears largely based on the ECtHR case-law (see below):

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 (...):
  - (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
  - (b) the waiver is given voluntarily and unequivocally.

2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

A little further detail is provided by recitals 39-41 in the preamble:

(39) Suspects or accused persons should be able to waive a right granted under this Directive provided that they have been given information about the content of the right concerned and the possible consequences of waiving that right. When providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition.

(40) A waiver and the circumstances in which it was given should be noted using the recording procedure in accordance with the law of the Member State concerned. This should not lead to any additional obligation for Member States to introduce new mechanisms or to any additional administrative burden.

(41) Where a suspect or accused person revokes a waiver in accordance with this Directive, it should not be necessary to proceed again with questioning or any procedural acts that have been carried out during the period when the right concerned was waived.

It is also worth bearing in mind paragraph 11 of the Commission recommendation on procedural safeguards for vulnerable persons suspected or accused of in criminal proceedings.<sup>87</sup>

11. If a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with [the Directive] should not be waived.

The European Commission has identified serious shortcomings with the transposition of the requirements of Article 9(1) in Member States. For example, according to the Implementation Report, it is often the case that suspects and accused persons do not have clear information on the consequences of the waiver. In two Member States legislation on waivers is provided for only in the context of rules about what is considered in these member States as “mandatory defence”, thus rendering the defence no longer mandatory.<sup>88</sup> In the absence of CJEU jurisprudence on the waiver of the right to access to a lawyer, it is useful to look at the standards developed in the ECtHR jurisprudence.

According to ECtHR case-law, certain defence rights, e.g. the right to be present at trial or the right to silence, can be waived. But, as the ECtHR itself notes, the conditions under which a person is

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<sup>87</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings ([OJ 2013 C 387, p. 8](#)).

<sup>88</sup> Implementation Report, see above note 34, para. 3.9.

deemed to have validly waived their rights are particularly relevant in relation to the right of access to a lawyer protected by Article 6(3)(c).

*'Neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards (...). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (...).'<sup>89</sup> In addition, the waiver should not run counter to any important public interest.'<sup>90</sup>*

When their procedural rights are not effectively conveyed to the suspect or the accused person, the ECtHR finds that the waiver is not effective, as it considers that the decision to waive the right was not taken on a properly informed basis. Consequently, the reliance on statements obtained in that context is equivalent to relying on statements obtained through denial of access to a lawyer and can cause prejudice to the fairness of the proceedings as a whole. The court has pointed to various factors, both objective and subjective, relating to the notification of rights which affect the validity of a waiver of the right of access to a lawyer and to counsel:

- *the fact that rights were notified in a language other than the suspect's native language, without the assistance of an interpreter;*<sup>91</sup>
- *the fact of the notification being given only orally in the form of a standard caution (which barely serves the purpose of acquainting the suspect with the content of the rights);*<sup>92</sup>
- *the 'stressful situation' and 'quick sequence of the events' leading to questioning of the suspect;*<sup>93</sup>
- *a 'certain confusion' in the mind of the suspect at the point of questioning;*<sup>94</sup>
- *the young age of the suspect;*<sup>95</sup>
- *the suspect's level of literacy;*<sup>96</sup>
- *familiarity with police encounters;*<sup>97</sup> and
- *drug dependency of the suspect.*<sup>98</sup>

<sup>89</sup> ECtHR, [Saman v. Turkey](#) App. No 35292/05, Judgment of 5 April 2011).

<sup>90</sup> ECtHR, [Sejdovic v. Italy](#), App. No 56581/00, Judgment of 1 March 2006, para. 86.

<sup>91</sup> ECtHR, [Saman v. Turkey](#), cited above note 89, paragraph 35.

<sup>92</sup> ECtHR, [Panovits v. Cyprus](#) App. No 4268/04, Judgment of 11 December 2008, paragraph 74.

<sup>93</sup> ECtHR, [Zaichenko v. Russia](#) App. No 33720/05, Judgment of 1 February 2007, paragraph 55.

<sup>94</sup> ECtHR, [Stojkovic v. France and Belgium](#), cited above note 86, paragraph 53.

<sup>95</sup> ECtHR, [Panovits v. Cyprus](#), cited above note 92, paragraph 67.

<sup>96</sup> ECtHR, [Kaciu and Kotorri v. Albania](#), Apps. Nos 33192/07 and 33194/07, Judgment of 25 June 2013, para. 120.

<sup>97</sup> ECtHR, [Pishchalnikov v. Russia](#), cited above note 28, paragraph 80.

<sup>98</sup> ECtHR, [Plonka v. Poland](#), App. No 20310/02, Judgment of 31 March 2009, para. 38.

In addition to the above, there are some specific comments on the right to legal assistance specifically protected by Article 6(3)(c), which were made in the case of *Pishchalnikov v. Russia*:

*The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard.<sup>99</sup>*

A further instalment in this line of case-law came in 2015 with a judgment in the case of *Zachar and Čierny v. Slovakia*,<sup>100</sup> in which Fair Trials [intervened](#) to underline the concerns raised by LEAP members around waivers of the right of access to a lawyer discussed above. The ECtHR reviewed the existing principles and made some significant factual findings:

*The Court observes that any instructions as regards the applicants' procedural rights were given to them via the first pages of the pre-printed forms on which their pre-trial statements had been transcribed. Such instructions went as far as informing the applicants, without providing any commentary or further explanation, that they had the right to remain silent and the right to choose a lawyer. Conversely, there has been no allegation or other indication that any individualised advice about their situation and rights was provided to the applicants.<sup>101</sup>*

Though it is not referred to specifically, the ECtHR had been referred to the Right to Information Directive in this case and it appears to have taken account of the absence of a *separate* document with information about rights (distinct from questioning transcripts) and it appears to have deemed it necessary for the applicants (who were facing potentially heavy penalties) to receive 'individualised' advice about their situation and rights. This finding post-dates the Directive and may actually add usefully to the content of the Directive.

Based on the above guidelines we can observe that information about the right to a lawyer and about the consequences of the waiver of this right has to be provided to the suspect or accused 'orally or in writing'. The Right to Information Directive governs the provision of information to suspects and is clear that, for a person deprived of liberty, information must be provided in writing as a Letter of Rights. We think that the information required in Article 9 of this Directive should be included within the written content of the Letter of Rights where the latter must be given. The point of the Letter of Rights is to enable people to exercise their rights, and the possibility of waiving is part of that.

The Directive requires 'clear and sufficient information' about the 'content of the right and the possible consequences of waiving it'. This adds to the general requirement of the notification of rights / Letter of Rights which must be given under the Right to Information Directive. Whereas that measure regulated only the manner of delivery of the information, here the EU standard begins to govern its content, which must cover the content of the right and the consequences of waiving it. The aim of this part of Article 9, in our view, is obviously to ensure that the 'knowing and intelligent' waiver standard is adhered to by ensuring the suspect has the right information.

<sup>99</sup> ECtHR, *Pishchalnikov v. Russia*, cited above 28, paragraph 78.

<sup>100</sup> ECtHR, *Zachar and Čierny v. Slovakia* App. No 29376/12, Judgment of 21 July 2015).

<sup>101</sup> *Ibid.*, paragraph 70.

The requirement for the waiver to be ‘voluntary and unequivocal’ appears to reflect the general standard of the ECtHR case-law above. Article 9(2) requires the recording of the circumstances of the waiver in order to ensure that doubts arising as to its validity – including before the courts later – can be properly considered.

The European Commission has highlighted serious problems with the transposition of Article 9(1) and (2). The main issue is that the information provided to the suspects or accused persons does not go beyond what is required by the Access to Information Directive; in particular, it lacks information on the consequences of the waiver.<sup>102</sup>

## C. USING THE DIRECTIVE IN PRACTICE

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What you essentially want to do with the Directive is challenge the admission or use of evidence which has been collected as a result of a waiver which you deem to be invalid. The basic argument is that the absence of the lawyer is in fact a violation of Article 3<sup>103</sup> of the Directive, because the waiver was not compatible with Article 9. Accordingly, remedies should be applied under Article 12.

### 1. Establishing what actually happened

You will be well familiar with the sorts of circumstances which clients will say led them to waive their right to a lawyer under national law: police pressure; indications of more lenient disposals if a lawyer is not sought etc. The key is to collect this information with the standards of the Directive in mind:

- ➔ Find out from your client what happened and organise the information in light of the requirements of the Directive and underlying case-law:
- Look at what substantive information was given. In many cases, you will be able to consider the Letter of Rights: does this adequately reflect the content of the right and the consequences of waiving it? For example, does it specify that a person would have the right to meet in private with their lawyer and discuss their case?
- Look at the circumstances: bear in mind recital 39 of the Directive; the line of ECtHR case-law above; and the Commission recommendation on vulnerable suspects. Are there characteristics of the person which ought to have been taken into account in the assessment of a purported waiver?
- Look at the record made. This is required to cover the ‘circumstances under which the waiver was given’. You would expect this, for instance, to confirm that the person was given a Letter of Rights and an opportunity to consider it and to address how account was taken of specific vulnerabilities of the accused (e.g. whether a medical examination was carried out or the support of a third party sought).
- Get your client’s version of events. This piece of evidence will be important for the purposes of challenging the validity of the waiver that is recorded. Find out who said what, in what context, how much of it was recorded etc.

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<sup>102</sup> Implementation Report, see above note 34, section 3.9.

<sup>103</sup> Or Article 10 in the EAW proceedings.



## 2. Challenging the waiver

### a. Where to raise the point

As noted above, the essential argument is that because the waiver is invalid, the absence of a lawyer is in fact an infringement of Article 3 of the Directive, so the evidence should be treated accordingly under Article 12 - the national remedies system. This is, therefore, a point that you will raise before the relevant court: a pre-trial instance, or the trial court itself, if that is where procedural violations are addressed. The same arguments would equally feature in any appeal based on the Directive if the relevant first-instance forum takes an inappropriate approach to assessing the waiver.

→ Raise your points in the same place you would normally argue that the absence of a lawyer vitiates the procedural act concerned and the evidence obtained, wherever this be. The remedy you seek is the same as in those cases.

### b. The arguments to make

The arguments should, in our view, be two-fold: they should highlight any failures to comply with the safeguards specified in the Directive (e.g. failure to provide full information especially on the consequences of the waiver, take account of vulnerabilities etc.); and they should be based on the client's own alternative record. These are essentially factual arguments (based on your review of the facts as above) but there are some general legal points which can be made:

- Argue:
- The ECtHR has already made clear that the right to counsel is a 'prime example' of a procedural right requiring the protection of the knowing and intelligent waiver standard, due to its role as a gateway right (see *Pishchalnikov v. Russia*).
  - The Right to Information Directive imposed a key safeguard around waivers by requiring provision of information on rights in the form of a Letter of Rights if the person is deprived of liberty. In parallel, Article 9(2) of the Directive establishes that a waiver of the right to a lawyer cannot be valid unless prior information is given. It follows logically that the failure to comply with the Right to Information Directive (in particular the provision of a Letter of Rights) renders the waiver of the right of access to a lawyer invalid. The Right to Information Directive itself confirms that a Letter of Rights should be translated in accordance with Interpretation & Translation Directive, so provision of information in the suspect's language should be seen as a precondition for a valid waiver.
  - Even if information is given, it must be 'clear and sufficient' under Article 9(2) and it must cover the content of the right and the consequences of waiving it. A mere notification that a person has a right to a lawyer will not suffice.
  - Article 9(2), read with recital 39, points towards an individualised recording of the circumstances of the waiver taking into account the suspect's personal situation. The provision appears to aim to place the court in a position to satisfy itself, later on, that a waiver has been validly given in the specific case. The failure to take note of specific circumstances in the recording (e.g. that the suspect understood he faced a potentially lengthy sentence) calls into doubt the validity of the waiver.

- If the court cannot satisfy itself that the waiver is valid in the specific case, the absence of a lawyer should be treated as a breach of Article 3 and, accordingly, remedies applied pursuant to Article 12 of the Directive.

### c. The issue of irrebuttable police records

LEAP members and attendees at Fair Trials trainings (particularly from France and Luxembourg) have often pointed to the issue of police records being treated as conclusive or irrebuttable: if the minutes say the right was waived, the contrary cannot be proved.

The structure of Article 9 points towards the need for an individualised record of the circumstances of the waiver, which can only be in order to enable the court to satisfy itself that the waiver is valid. This recognises that the police record of a waiver may be a disputed fact. Procedural rules which prevent submission of evidence to rebut the police records – even if the suspect gives a detailed and credible account – would appear problematic. In this case we believe that the ‘effectiveness’ case-law of the CJEU may be relevant. An instructive example is the Opinion of Advocate-General Sharpston in Case C-187/10 *Unal*.<sup>104</sup>

**Case C-187/10 *Unal*** concerned the exercise by a Turkish national of certain rights derived from an EU-Turkey agreement which forms part of EU law. His residence permit had been revoked retroactively on the basis that he was found, on the basis of local population records, not to have been living with the person mentioned in his permit when he sought an extension. His attempts to demonstrate that he was still living with the person at the relevant time (including a letter from the person herself) were rejected, as the records were essentially regarded as conclusive. The substantive issue before the court was whether the permit could be withdrawn retroactively, but the Advocate-General noted that the evidential issue fell to be assessed under the principles of equivalence and effectiveness, noting as follows [these are the standard statements]: ‘it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding [rights derived from EU law]. The Member States, however, are responsible for ensuring that those rights are effectively protected in each case. The detailed procedural rules governing those actions (...) must not render practically impossible or excessively difficult the exercise of rights conferred by EU law’. It was left to the national court to determine whether or not the rules it applied made it practically impossible for Mr Unal to prove he had lived where he said he did.

The above is an example of how the effectiveness principle may be brought into play by rules which make it impossible for a person to adduce the evidence needed to invoke their EU law rights. It is a case-by-case question of fact whether the national rule has this effect or not, but it seems clear that a similar approach could be applied here. If it is effectively impossible – because no evidence, however credible, can rebut the police protocol – the person may be deprived of an opportunity to challenge the waiver. An argument can be made to that effect:

<sup>104</sup> CJEU, Case C-187/10 *Unal* [ECLI:EU:C:2011:623](https://eur-lex.europa.eu/eli/joc/2011/623).

➔ Argue: A rule of national law which, in effect, renders the police protocol / minutes conclusive and prevents presentation of any evidence to the contrary should be regarded as incompatible with the principle of effectiveness if they render practically impossible the exercise of the right envisaged by Article 3 of the Directive. Such a rule has to be interpreted in such a way as to enable the person validly to dispute the waiver. If it cannot be so interpreted, it should be set aside.

## III – DEROGATIONS

### A. THE ISSUE

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Are there circumstances in which a person, despite wishing to be assisted by a lawyer, can be questioned without one? This is a live issue but the answer in the Directive appears to be that there are very limited circumstances in which this might happen.

This is not currently an issue which has raised major concerns within LEAP, save in some specific jurisdictions (Spain and the United Kingdom), but it appears particularly important in light of current threats facing Europe which may at the very least lead to the increased use of existing exceptions in national law or, potentially, the creation of further possibilities of this kind.

The issue is very simple: access to a lawyer is denied, meaning this key protection against self-incrimination is removed, but this time there is a legal basis for it. The key question is when this can be done, and what use may be made of the evidence obtained in the lawyer's absence.

### B. THE DIRECTIVE AND THE ECHR BASELINE

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#### 1. The core principle and debate

It is clear that in exceptional circumstances during the pre-trial stage of criminal proceedings, the Directive permits derogation temporarily from the requirement that the suspect or accused person should have effective assistance of a lawyer. If such circumstances are established, the questioning can proceed in the absence of a lawyer, but the question whether evidence obtained in such circumstances may be used for a conviction is left open. Article 3(5) and 3(6) provide:

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.

The provision is supplemented by Article 8, entitled 'general conditions for applying temporary derogations', which further provides:

1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall
  - (a) be proportionate and not go beyond what is necessary;
  - (b) be strictly limited in time;
  - (c) not be based exclusively on the type or the seriousness of the alleged offence; and
  - (d) not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Article 3(5) or (6) 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. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.

Recital 30 provides further detail on the derogation permitted in Article 3(5):

(30) In cases of geographical remoteness of the suspect or accused person, such as in overseas territories or where the Member State undertakes or participates in military operations outside its territory, Member States are permitted to derogate temporarily from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. During such a temporary derogation, the competent authorities should not question the person concerned or carry out any of the investigative or evidence-gathering acts provided for in this Directive. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, Member States should arrange for communication via telephone or video conference unless this is impossible.

And recital 31 provides further detail on the derogation in Article 3(6):

(31) Member States should be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning 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.

Also keep in mind Article 12(2) of the Directive:

2. Without prejudice to national rules and systems on the admissibility of evidence, 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.

We discuss these provisions in further detail in the paragraphs below under the two types: the geographical remoteness derogation (Article 3(5)) and the substantive derogation (Article 3(6)).

At present, ECtHR case-law seems to increasingly lower the standard for access to lawyer as it stood and was relied on in the drafting process of the Directive. This means more leeway is given to the states to derogate the obligation to guarantee access to lawyer under the ECHR. Therefore, our recommendation is to keep relying on *Salduz* as the core jurisprudence for interpretation of the right of access to a lawyer and permissible derogations under the Directive. The core statement in *Salduz* includes additional text (omitted earlier) relating to possible exceptions. In full, it reads:

*Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, **unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right**. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (...) 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.*

The statement openly recognises that there may be situations in which access to a lawyer might be validly refused. However, there is debate (as yet unresolved) as to the expression ‘in principle’. Does it mean that the rule is subject to an exception, whereby evidence obtained in the *justified* absence of a lawyer can validly be used for a conviction? Or does it mean that as an issue of principle, statements obtained in absence of a lawyer cannot be used for a conviction?

## 2. The case of *Ibrahim and Others v the United Kingdom* and subsequent jurisprudence

In the absence of CJEU case-law, we can turn to the ECtHR. The ECtHR has found ‘compelling reasons’ for restricting the right to access to a lawyer in *Ibrahim and others v. the United Kingdom*, and it considered that with the presence of attendant safeguards it was permissible for incriminating statements made by suspects in the absence of a lawyer to be used for a conviction without infringing Article 6 ECHR.

*Ibrahim and Others v. United Kingdom* concerned the application of a statutory scheme in the UK which grants police officers powers to conduct a ‘safety interview’, that is, questioning in the absence of a lawyer which is justified by urgent risks to the public. In the aftermath of attempted bombings in London, police used these powers to question several suspects to establish whether there were other unexploded bombs hidden in the underground metro system. The suspects told lies to mislead the police. When the suspects later asserted that their bombs had never been intended to explode, it was pointed out that had this been true, they would have mentioned the fact at the time they were questioned. It was alleged that the use of their statements

*given in the absence of lawyers infringed Article 6. The Chamber found that ‘compelling reasons’ had indeed existed for restricting the right. It further found that the admission of the evidence did not lead to a breach of Article 6, as the system was carefully regulated; the evidence was obtained in fair circumstances; there were sufficient procedural safeguards including directions given to the jury; and there was other evidence to support the finding of guilt.<sup>105</sup>*

Fair Trials [intervened](#) in the case to make arguments broadly consistent with those supplied here. We would however stress that, whatever is found by the ECtHR, this does not mean the Directive cannot, and indeed, does not provide greater protection than reflected in recent ECtHR case law.

This is especially important to remember in the light of subsequent ECtHR jurisprudence in cases *Beuze v. Belgium*<sup>106</sup> and *Doyle v. Ireland*.<sup>107</sup>

- The case of *Beuze v. Belgium* concerned a Belgian national who was taken into custody in France on the basis of an EAW. After being surrendered to Belgium he was questioned by police and by the investigative judge in the absence of a lawyer. His statements were later used in trial where he was found guilty of murder by the jury and sentenced to life imprisonment. In this case the ECtHR did not find any compelling reasons for denial of the access to a lawyer, but proceeded to assessment of overall fairness of the criminal proceedings nevertheless.
- In *Doyle v. Ireland*, in our view, the ECtHR further limited the standard for access to a lawyer under ECHR. The case concerned an applicant complaining that he was not allowed to have his counsel present during his police interrogations. One of the central issues in the case concerned potential threats or inducement used by the police during the interviews. In this case the ECtHR considered a video recording to be a sufficient safeguard against coercion thus reducing the role of a lawyer and the need for his/her physical presence during questioning.

Regardless of the latest ECtHR jurisprudence, we encourage you to rely on the *Salduz* principle (discussed in detail above in Part I), on which the Directive is largely based, in your arguments before the national authorities and courts. Fair Trials’ [intervention](#) in *Beuze* can lend some further arguments in that effort.

## C. USING THE DIRECTIVE IN PRACTICE

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### 1. The geographical remoteness derogation

#### a. Geographical remoteness: a high threshold

Recital 30 of the Directive refers to ‘overseas territories or where the Member State undertakes or participates in military operations outside its territory’ as examples of what is meant by geographical

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<sup>105</sup> ECtHR, [Ibrahim v. the United Kingdom](#), App. Nos 50541/08 50571/08 50573/08 40351/09, Judgment of 13 September 2016).

<sup>106</sup> ECtHR, *Beuze v. Belgium*, see above note 28.

<sup>107</sup> ECtHR, [Doyle v. Ireland](#), App. No 51979/17, Judgment of 23 May 2019).

remoteness. One example frequently relied upon by the Council of the EU is that of French Guyana (in South America), though LEAP does not entirely accept this: there, as in the Falkland Islands, it is possible to have systems in place to ensure access to a lawyer. More instructive are the cases in which the ECtHR has been willing to accept delays in production of arrested persons before a judge when they are arrested on the high seas in anti-piracy operations.<sup>108</sup> Arrests on oil-rigs to which the Member State's jurisdiction extends might be another example. Essentially this should be seen as a truly exceptional derogation. In particular, it is not one that can be relied upon to delay access to a lawyer when the arrest happens in a rural area with fewer lawyers.

## **b. Derogation on timing, not the substantive right**

In the exceptional cases that geographical remoteness applies, Article 3(5) provides a ground for derogating only from the timing of access to a lawyer; it does not permit derogation from the substantive content of the right, i.e. the right of the person to have their lawyer with them in questioning, private consultations etc. As is recognised explicitly in recital 30, it is not permissible to question a person where access to a lawyer has been delayed on the basis of the geographical remoteness. If questioning is carried out in that context, there will simply be a violation of Article 3 and a remedy will have to be applied in application of the core device introduced in Part I.

➔ If the suspect is arrested in an area of geographical remoteness, e.g. in the context of an overseas operation, this alone justifies only a delay in providing access to a lawyer. It does not justify questioning without a lawyer. If this takes place, this constitutes a breach of Article 3 and you should follow the steps in Part I.

## **2. The substantive derogation**

The issues raised in the *Ibrahim and Others* case are more relevant under Article 3(6). That provision does, by contrast, allow derogation from the rights in paragraph 3 generally, including for instance the right to a private consultation and the right for the lawyer to be present and participate in questioning. This means that police may question the suspect without access to a lawyer, leaving you, the lawyer, with a challenge if any incriminatory statements are made in that context.

### **a. Identify the permissible ambit of the derogation**

As a starting point, it is worth establishing, based on the available records, whether a restriction of access to a lawyer that is presented as a legitimate derogation exceeded reasonable limits. Firstly, was there a 'necessity' or 'compelling reasons' to restrict access to lawyer. For instance, in the *Ibrahim and others* the ECtHR stated that:

*The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case.*<sup>109</sup>

<sup>108</sup> For more on this see the [ECtHR Q&A](#).

<sup>109</sup> ECtHR, *Ibrahim v. the United Kingdom*, see above note 105, paragraph 258.



In that case the ECtHR found that the government, in the immediate aftermath of terror attacks, had convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case. However, in relation to the second aspect of the limits of a derogation, while it may have been justifiable to question the suspects without lawyers initially, the exclusion of the lawyer became impermissible once the lawyer had actually arrived at the police station and was prevented from seeing the client by choice of the officers concerned. Such conclusion under the Directive would mean that statements obtained in this context are not covered by a derogation and thus should be regarded as having been obtained in breach of Article 3, thereby requiring a remedy under Article 12.

- ➔ Having regard to Article 8, identify the extent to which questioning proceeded unnecessarily in the absence of a lawyer.
- Was information found enabling the authorities to avert any danger they may have supposed to exist prior to the derogation? Did the questions asked address that urgent need to avert the danger referred to?
- Did questioning begun in urgency continue after the arrival of a lawyer, indicating that the derogation was maintained for longer than necessary?
- ➔ Statements or evidence obtained as a result of questioning outside the permissible ambit of the derogation should be treated as having been obtained in breach of Article 3, and remedies applied accordingly in line with Article 12.

#### **b. Deal with the information obtained within a valid derogation**

The core of the issue lies in the evidence obtained during the period when the derogation was valid. In *Ibrahim and Others v. United Kingdom*, for instance, there was unquestionably a period following arrest where it was reasonable to question the suspects without lawyers if the situation is looked at in light of Article 3(6). An immediate risk existed, and suspects were questioned in that time with a view to averting that risk. What use can be made of incriminating statements made in this context?

Fair Trials' position is that the answer lies in the provisions of recital 31, providing that questioning 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. Recital 32 refers in this context also to 'substantial jeopardy to criminal proceedings' in the form of 'destruction or alteration of essential evidence or interference with witnesses'. This underlines that the *purpose* of the derogation is not investigative: it is preventive. This is further supported by Recital 32:

Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

This is what justifies the questioning taking place without a lawyer present. In the context of criminal proceedings, criminal procedure standards are required and so the absence of a lawyer means the statements cannot be used for a conviction.

We suggest this follows from the wording of Article 12(2). That provision would not need to refer to Article 3(6) at all if it was intended that statements could be used. It would be sufficient that the statements were not obtained in breach of Article 3 (since a derogation was validly applied) and there would be no need for a remedy. Instead, despite the validity of the derogation, meaning there is no breach of Article 3 as such, Article 12(2) specifies that a remedy is needed in the assessment of the statements made by the accused. This suggests evidence obtained under this derogation should be treated in the same way as evidence obtained in breach of Article 3 outright: it cannot be used for conviction or sentence. Accordingly, that is the line we encourage you to take:

→ Argue: Article 3(6) permits questioning without a lawyer but only for a specific, preventive purpose linked to urgent risks of harm to others. It means the absence of a lawyer will not be a breach of Article 3 itself. However, as is clear from Article 12(2), a remedy is still nevertheless needed in respect of evidence obtained in this context. Accordingly, in line with the generic approach discussed in Part I, the evidence obtained should not be used for a conviction.

## FINAL REMARKS

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. The Directive establishes the right to access a lawyer as early as police custody, recognising that this right is key to ensure the fairness of the entire proceedings. The Directive sets a higher standard than that currently established by the ECtHR jurisprudence.

The transposition of the Directive in the law of Member States has broadly been completed. However, as shown by [Fair Trials' research](#), the [Implementation report](#) and [FRA's report on rights in practice](#), there are still many outstanding issues that undermine the effectiveness of the rights guaranteed by the Directive. Some of these issues relate to the very core of the right to access to a lawyer, such as: the application to persons without a formal status as a suspect or accused person, confidentiality of consultations, the opportunity of the lawyer to actively intervene in questioning, and the validity of a waiver in the absence of sufficient information.

It is the role of practitioners to use the Directive and to make sure that it is enforced by domestic courts across the EU. We hope that this toolkit will support the efforts of lawyers across Europe, all of whom are invited to:

- [Contact us](#) for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the [Using EU law toolkit](#), our [Preliminary reference Toolkit](#) and our online training [video on the preliminary ruling procedure in criminal practice](#).
- Visit our website [www.fairtrials.org](http://www.fairtrials.org) regularly for updates on key developments relating to the Directives, and news about in-person trainings and [updates on relevant case-law](#).
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper "[Towards an EU Defence Rights Movement](#)" for concrete ideas on articles, litigation, conferences etc.