



ROADMAP PRACTITIONER TOOLS

ACCESS TO A LAWYER DIRECTIVE

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

WAIVER

DEROGATIONS

IMPLEMENTATION CHECKLIST FOR NATIONAL AUTHORITIES



About Fair Trials & LEAP

Fair Trials Europe (“Fair Trials”) is a public utility foundation based in Brussels which works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Working with the Legal Experts Advisory Panel (‘LEAP’) – a network of over 160 criminal justice and human rights experts including defence practitioners, NGOs and academics from 28 EU Member States – Fair Trials has contributed to the negotiations surrounding the adoption of the first three directives under the Roadmap for strengthening procedural rights.

LEAP, supported by Fair Trials, is now working to ensure effective implementation of the Directives, further to its February 2015 strategy *Towards an EU Defence Rights Movement*, including through practitioner training, litigation before the national courts, awareness-raising.

Contact

Ralph Bunche

Regional Director (Europe), Fair Trials
+32 (0)2 743 85 93
ralph.bunche@fairtrials.net

Libby McVeigh

Legal & Policy Director, Fair Trials
+44 (0)207 822 2370
libby.mcveigh@fairtrials.net

Acknowledgments

This Toolkit was produced by **Alex Tinsley** (barrister, England & Wales, LEAP member). Thanks to other LEAP members for the insights that form the basis for this Toolkit.

With financial support from:



Co-funded by the Criminal Justice
Programme of the European Commission



CLIFFORD
CHANCE

CONTENTS

INTRODUCTION	4
A. INTRODUCTION	4
1. Background	4
2. Scope of this Toolkit.....	5
a. Parts I-III – Toolkit for practitioners	5
b. Part IV – Implementation Check-List	5
3. How to use this Toolkit	5
a. How the content is organised	5
b. The ‘Using EU Law in Practice’ Toolkit	6
c. Before and after the implementation deadline.....	6
d. Terminology.....	6
e. A word of caution	6
f. Keep in touch	6
B. BEFORE THE DIRECTIVE: REVIEW OF ECHR PRINCIPLES.....	6
1. Overall fairness and Article 6(3) guarantees.....	6
2. Article 6(3) ECHR and trial stage issues	7
3. Article 6(3) ECHR and pre-trial issues	7
4. The right to silence under Article 6.....	8
5. The core principle in <i>Salduz v. Turkey</i>	8
C. THE DIRECTIVE AND ITS IMPLEMENTATION	9
I – THE RIGHT OF ACCESS TO A LAWYER.....	10
A. THE CORE ISSUE	10
B. THE ECHR BASELINE	10
1. The core <i>Salduz</i> principle	10
2. The core principle, developed	11
a. ‘Access to a lawyer’: the content of the right	11
b. ‘Incriminating statements’	11
c. ‘Used for a conviction’	12
C. RELEVANT PROVISIONS OF THE DIRECTIVE	12
D. USING THE DIRECTIVE IN PRACTICE.....	13
1. Assumption: direct effect of Article 3 and Article 12.....	13
2. The core device: Article 3 violation – Article 12 remedy	14
a. Establishing a violation of Article 3	14
b. Seeking a remedy under Article 12.....	15
i. The evidence in question	15
ii. The fruit of the poisoned tree	16
3. Some specific areas to explore	16
a. Effective participation in questioning.....	16
i. Identify and document the violation	17
ii. Seek remedies for the infringement	19
b. Cross-border (European Investigation Order) issues.....	19
i. Try to ensure the questioning is compatible with Article 3	20
ii. Identify and document the violation in the executing / requested state	20
iii. Seek remedies in the issuing / requesting state.....	21

II – WAIVER.....	22
A. THE ISSUE	22
B. THE ECHR BASELINE	22
C. RELEVANT PROVISIONS OF THE DIRECTIVE	24
D. USING THE DIRECTIVE IN PRACTICE.....	25
1. Establishing what actually happened	26
2. Challenging the waiver.....	26
a. Where to raise the point.....	26
b. The arguments to make.....	26
c. The issue of irrebuttable police records	27
III – DEROGATIONS	29
A. THE ISSUE	29
B. THE ECHR BASELINE	29
1. The core principle and debate	29
2. The case of <i>Ibrahim and Others v the United Kingdom</i>	29
C. RELEVANT PROVISIONS OF THE DIRECTIVE	30
D. USING THE DIRECTIVE IN PRACTICE.....	32
1. The geographical remoteness derogation	32
a. Geographical remoteness: a high threshold.....	32
b. Derogation on timing, not the substantive right	32
2. The substantive derogation	32
a. Identify the permissible ambit of the derogation.....	33
b. Deal with the information obtained within a valid derogation	33
IV – IMPLEMENTATION CHECK-LIST	35
A. ABOUT THIS PART	35
1. The implementation check-list	35
2. Who should do what with this check-list.....	35
a. LEAP Members.....	35
b. National authorities	35
c. Bar associations and other users	35
3. What LEAP can offer	35
B. IMPLEMENTATION CHECKLIST (1): CRIMINAL PROCEEDINGS	36
C. IMPLEMENTATION CHECKLIST (2): EAW PROCEEDINGS.....	45
CONCLUSION	47

INTRODUCTION

A. INTRODUCTION

1. Background

In the last decade, the EU Member States have been cooperating closely on cross-border issues, 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').

However, cooperation has been 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 has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Roadmap'.¹

Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives binding national authorities in all cases, including those which have no cross-border element. These cover the right to interpretation and translation,² the right to information,³ and the right of access to a lawyer⁴ (collectively, the 'Roadmap Directives').

This Toolkit discusses Directive 2013/48/EU on the Right of access to a lawyer in criminal proceedings⁵ (the/this 'Directive'), which must be transposed into national law by 27 November 2016. It includes a general approach to using the Directive and covers some specific issues of particular interest to LEAP: the participation of lawyers in police questioning; waiver of the right of access to a lawyer; and the scope for authorities to derogate from that right. It builds upon the comments on this Directive in the 'Using EU law in criminal practice' Toolkit⁶ of 2015.

The Directive is an important piece of legislation. It follows the ECtHR case of *Salduz v. Turkey* (2008),⁷ which established the right of access to a lawyer in police questioning and led to significant reform across the region. The Directive has already had an impact on the development of that line of case-law at the ECtHR (see *A.T. v. Luxembourg*⁸) and on the way it is applied nationally (see the references in Part I below). You may feel that it is your duty as a lawyer to see what the Directive means for your own cases in this evolving legal context.

¹ 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](#)).

² 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](#)).

³ 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](#)).

⁴ 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](#)).

⁵ Note 4 above.

⁶ Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/>.

⁷ *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008).

⁸ *A.T. v. Luxembourg* App. No 30460/13 (Judgment of 9 April 2015).

2. Scope of this Toolkit

a. Parts I-III – Toolkit for practitioners

This Toolkit is partly directed at practitioners using the Toolkit from 27 November 2016 after its implementation deadline. In Part I it seeks to put forward a general approach for using the Directive, and two example areas where you might wish to use it. It 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).

b. Part IV – Implementation Check-List

Part IV, directed at authorities responsible for the implementation of the Directive, provides general comment on all aspects of the Directive to facilitate an initial review of national law. This ‘calling card’ forms part of LEAP’s continuing strategy to participate actively in the implementation of the Roadmap Directives. LEAP will place a particular focus upon this aspect in the second half of 2016 and early in 2017 while the legislative phase is likely to still be ongoing in many Member States.

3. How to use this Toolkit

a. How the content is organised

Much of the content of the Directive is derived from the case-law of the European Court of Human Rights (**‘ECTHR’**). Indeed one of the functions of the Directive is to articulate those standards as EU law. Accordingly, for each thematic area, the Toolkit reviews relevant lines of ECTHR case-law.

We then consider the provisions of the Directive itself. Most provisions of the Directive leave considerable room for interpretation, and at the time of writing⁹ there are not yet many rulings of the Court of Justice of the EU (**‘CJEU’**) on this Directive. Accordingly, everything you see written against a white background is, in effect, our own reading of the law.

Based upon our understanding of the Directive, we then make concrete suggestions about how to use it 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:

Provisions of the ECHR and citations from case-law of the ECTHR appear in yellow shading, with a single border, to represent their nature as an irreducible minimum. They are presented in italics.

Provisions of European Union law or citations from the case-law of the CJEU appear in green shading, with a double border, to represent their nature as complementary, possibly more extensive protection.

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directive in the local legal context. We try to be up front about when we are making a suggestion with the symbol ‘→’.

⁹ This Toolkit is published in Spring 2016.

b. The ‘Using EU Law in Practice’ Toolkit

This Toolkit may be used alongside the ‘Using EU Law in Practice’ Toolkit which contains explanations of the assumptions made about the legal effects of the Roadmap Directives. It also contains an introduction to the concept of ‘invoking the Directive’ through reliance upon remedial mechanisms such as invalidity of procedural acts, exclusion / disregarding of evidence and so on.

c. Before and after the implementation deadline

The ‘Using EU Law in Practice’ Toolkit, further, contains comments about the use of the Directive in the time prior to its implementation deadline of 27 November 2016. Practitioners interested in using the Directive in court prior to that date should refer to those parts of that Toolkit. Parts I-III of this Toolkit, with arguments as to how to invoke the Directive, assumes that the deadline has passed (meaning provisions can be directly effective). Only Part IV of this Toolkit, addressed to implementation authorities, is aimed at the implementation phase.

d. 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.

e. 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.

f. 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 will be keen to hear from you about your experience and to share lessons learned from others.

B. BEFORE THE DIRECTIVE: REVIEW OF ECHR PRINCIPLES

1. Overall fairness and Article 6(3) 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 Contracting States to secure the rights under the ECHR for those within their jurisdiction; the ECtHR mechanism is therefore available only when internal remedies have been exhausted.

In the specific context of Article 6, this means that a criminal trial (in general) has to have taken place before it can be decided whether it was fair or not. The ECtHR has developed a consistent line of principle 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.*¹⁰

In this context, 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 but specific aspects of the general right to a fair trial contained in Article 6(1), and are 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 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.*¹¹

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

If an issue is raised under Article 6(3) 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 a 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). 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. It follows from the overall fairness approach 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

¹⁰ [Pishchalnikov v. Russia](#), App. No 7025/04 (Judgment of 24 September 2009).

¹¹ For example [Bandaletov v. Ukraine](#) App. No 23180/06 (Judgment of 31 October 2013), paragraph 54.

*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.*¹²

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, and the ECtHR will step in only afterwards. As a result, ECtHR complaints under Article 6(3) brought when the criminal case is still ongoing will usually be dismissed as inadmissible.¹³

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 under Article 6

Before considering the core principle around Article 6(3)(c), it is important to remind oneself that the right to silence is also protected by Article 6. 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.*¹⁴

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 in the way incriminating statements made in the absence of a lawyer are handled, and why only exclusionary rules may be effective for this purpose. We will come back to this in the discussion concerning remedies below (see Part I).

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*, on which this Toolkit will place a significant focus:

¹² For example *Imbriosica v. Switzerland* App. No 13972/88 (Judgment of 24 November 1993), paragraph 36.

¹³ 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 has 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.

¹⁴ *Pishchalnikov v. Russia*, cited above note 10, paragraph 71.

*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.*¹⁵

We will return to this principle below in Part I. At this point it is useful to bear in mind this summary of key points arising from the above in terms of the approach to Article 6 violations at the ECtHR:

- The ECtHR's own role under Article 6 is to assess the fairness of the proceedings as a whole.
- Article 6(3) requirements, and the right to silence, are relevant before the trial stage.
- However, in order to establish a violation of Article 6, it must be demonstrated that the defence rights issue arising at the pre-trial stage 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 obtained 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.¹⁶ Against this backdrop, it is clear why a Directive was needed to fix common minimum standards in this crucial area.

C. THE DIRECTIVE AND ITS IMPLEMENTATION

This Toolkit is published in Spring 2016, some months before the deadline for transposition of the Directive on 27 November 2016. Based on the experience to date with the other Roadmap Directives, legislative implementation could take some time in some places, and is likely to extend well into 2017 at least.

Accordingly, this Toolkit does not follow the model of the Toolkits on the Interpretation & Translation Directive and Right to Information Directive in proposing preparatory work to examine national transposition of the Directive. Part IV instead contains a check-list for implementation of the Directive and indications of the support available from LEAP to achieve this. Parts I-III below are aimed at practitioners using the Directive following its implementation deadline.

¹⁵ *Salduz v. Turkey*, cited above note 7, paragraph 55.

¹⁶ See, in this regard, D. Giannoulououlos [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, available at: <http://hrlr.oxfordjournals.org/content/early/2016/01/27/hrlr.ngv039>.

I – THE RIGHT OF ACCESS TO A LAWYER

A. THE CORE ISSUE

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 court, in assessing the merits of the case, took into account his earlier statement and found him guilty of the offence.

Little more need be said about this, but we think it useful to break it down into two stages:

- (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.

As will be seen below, the ECHR approach needs both: there can be a violation of the right to a lawyer, but this will not produce a violation of Article 6 ECHR overall if the statement is not used in evidence because a remedy is duly applied (eg. exclusion of evidence). This general approach seems to be retained for the purposes of the Directive, though with some possible subtleties as we will see.

B. THE ECHR BASELINE

1. The core *Salduz* principle

We saw above the core statement concerning violations of Article 6(3)(c) in so far as that provision concerns restrictions on the right of access to a lawyer in the early stage of criminal proceedings:¹⁷

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.

The statement establishes a rule with two parts: (i) access to a lawyer is required as from the first interrogation by police; and (ii) use of incriminating statements made without access to a lawyer for a conviction infringes Article 6 ECHR. 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.

¹⁷ We omit key language on exceptions which is discussed in part IV below.

2. The core principle, developed

a. 'Access to a lawyer': the content of the right

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*¹⁸ 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*,¹⁹ in which Fair Trials intervened. It 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].

As will be discussed later in this Toolkit, it remains to be seen to what extent limitations placed upon a lawyer's ability to intervene and participate in questioning may lead to violations of Article 6. Arguments about this before national courts will currently be better anchored in the Directive.

b. 'Incriminating statements'

The concept of an 'incriminating statement', the use of which for a conviction will infringe Article 6, 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 (eg. 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 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

¹⁸ *Dayanan v. Turkey* App. No 7377/03 (Judgment of 13 October 2009).

¹⁹ *A.T. v. Luxembourg*, cited above note 8.

*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.*²⁰

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* (eg. 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.

c. 'Used for a conviction'

As established above, the violation of Article 6 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.²¹ There may be other readings of the case-law, but the different approaches identified were the following:²²

- *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. RELEVANT PROVISIONS OF THE DIRECTIVE

For simplicity, we will not dwell upon the numerous recitals in the preamble to the Directive. For the purposes of our general approach, it is sufficient to consider part of the content of Article 3, which sets out a rule articulating the *Salduz* right to legal assistance as from initial questioning:

'2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(...)

²⁰ *Saunders v. United Kingdom* App. No 19187/91 (Judgment of 17 December 1996).

²¹ See Fair Trials' intervention in *A.T. v. Luxembourg*, March 2014, available at <https://www.fairtrials.org/wp-content/uploads/AT-v-LUX-Intervention.pdf>.

²² 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 (*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 *Dvorski v. Croatia* App. No 25703/11 (Judgment (Grand Chamber) of 20 October 2015).

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 (...)

(...)

There is more to say about each of these specific provisions and the content of the obligations they impose but it is clear that the Directive is imposing a requirement for access to a lawyer prior to and during police questioning – effectively, ‘access to a lawyer as from the first interrogation by police’ as required under the *Salduz* principle mentioned above. Accordingly, the failure to provide access to a lawyer at that stage will be a violation of Article 3. In that case, Article 12 applies:

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. It is incumbent upon EU Member States to ensure an effective remedy for infringement of rights protected by EU law, as reflected in Article 47 of the EU Charter of Fundamental Rights. However, the concept of remedies is a broad one, and might typically include compensatory remedies before the civil courts.

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 specific remedy in the criminal proceedings which ensures such evidence is the focus of the remedy. As we will 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.

D. USING THE DIRECTIVE IN PRACTICE

1. Assumption: direct effect of Article 3 and Article 12

It is possible that violation of the Directive will happen because national law prescribes this. 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 sanctions available under national law. So, in order to enforce your right, you need to rely directly on

the Directive, relying on its 'direct effect' as a measure of EU law. 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, likewise, should 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. See the Using EU Law Toolkit for more on direct effect of directives. 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 that.

- ➔ Take as your starting point that the relevant provision of Article 3 of the Directive (eg. entitlement 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 of Article 3 of the Directive.

2. The core device: Article 3 violation – Article 12 remedy

Below we will consider different possible kinds of violations of the right of access to a lawyer (eg. 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 (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 Article 3

There are manifold ways in which a violation of Article 3 might occur. National law may provide for access to a lawyer but this may not have been followed in the case. National law may not provide access to a lawyer in a certain context. 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. We will consider these below in their own sections but the point is that, 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.²³ We would suggest:

- ➔ Establish how you say the Directive has been infringed.
- Identify the issue in terms of the Directive (eg. refusal to provide access to a lawyer in a customs interview because the procedure there does not foresee it).
- If you are present at the time of the questioning (eg. you are not able to consult privately with the client before questioning), you should ensure this is identified as an issue in terms of the Directive at the point at which it arises. Take the

²³ The police, somewhat surprisingly, complained to the Madrid Bar Association about this, which dismissed the complaint without further action: see http://web.icam.es/bucket/ACUERDO%20I_P_%20277-14%281%29.pdf.

approach of the *Asociacion Libre de Abogados* and ensure the relevant authority records your protestation based on the Directive.

- If you are not present at the relevant time (eg. the person was denied the right to call you at all), ensure 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. 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.

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 by the breach. The most typical context to which this refers is the decision-making as to the merits of the accusation (though see the comments in the Using EU Law Toolkit about pre-trial remedies). 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 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. If remedies in national law (eg. exclusion of evidence or nullity) achieve this, they will be effective. If they do not (eg. merely declaratory remedies or where the court is able to factor the evidence into its decision, notwithstanding the breach) they may not be and the court will have to use the Directive and Charter as a basis for removing the evidence from consideration.

Again, these are all simply ideas emanating from the LEAP network, and you have to decide whether you agree. But we believe they are correct. On that basis only we suggest:

- ➔ Claim a remedy in respect of the violation of the Directive.
- ➔ Argue:
 - 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 be declared null, or the evidence obtained as a result of the breach excluded if these remedies are available under national law.
- If there is no such remedy (eg. in Sweden), Article 47 requires the court to take no account of evidence obtained in breach and avoid its decision being based 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. However it achieves it, the end result must be that the evidence is not taken into consideration for a conviction.

ii. *The fruit of the poisoned tree*

In order to ensure the full effect of the Directive, should national remedies also extend to the ‘fruit of the poisoned tree’? By that term we understand the doctrine according to which evidence obtained by virtue of a previous infringement (eg. physical evidence obtained after 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. This is one of the questions that will be examined by LEAP’s Judicial Remedies Working Group led by LEAP member Vania Costa Ramos, to begin its deliberations in 2016, which will be reported on in due course. For now, our assumption is that the fruit of the poisoned tree doctrine applies: the Directive would be deprived of effect without it. So:

→ Argue:

- 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 Article 3) 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. Some specific areas to explore

The above is an outline sketch of how the Directive can be used when the application of national law does not yield the desired result. From that starting point, you can use the Directive in different situations that may arise in your cases. There are many situations in which you might wish to invoke the Directive. We cannot cover them all here. However, to give you some ideas, we provide some examples below of particularly interesting areas where you could explore using the Directive.

a. Effective participation in questioning

Following *Salduz*, further cases were brought which enabled the ECtHR to establish what was meant by the requirement for access to a lawyer ‘as from the first interrogation by police’. One of those is a line of case-law including *Navone and Others v. Monaco*,²⁴ in which the ECtHR specified that this means assistance *during* questioning:

The Court underlines that it has several times specified that assistance by a lawyer during police custody should be understood, in the meaning of Article 6 of the Convention, as assistance “during questioning”, and this as from the first questioning [our translation].

²⁴ [Navone and Others v. Monaco](#) Apps. Nos 62880/11 and others (Judgment of 24 October 2013).

Implementation of this principle has not been straightforward. We noted in the Using EU Law Toolkit that the Dutch Supreme Court had, at the time of publication of that document, taken the view that the right of the lawyer to be present in questioning under Dutch law, despite the above case-law which appears fairly clear. In December 2015, it reversed its position, finding that there was a right for a suspect to have their lawyer present in questioning. It appears that one of the main reasons for this was the inevitability of that development happening anyway because of the Directive.²⁵

The next phase in this discussion seems likely to focus on the extent of the lawyer's participation in questioning. The ECtHR case-law has not, to our knowledge, covered this point in detail and the Directive may provide a useful basis for argument if restrictions are placed on lawyers' intervention in your Member State. Article 3(3)(b) of the Directive provides:

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

Recital 25 in the preamble to the Directive essentially repeats the content of the operative provision 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.

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 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 as such at that stage, so as to rely on this later.

i. Identify and document the violation

What are you looking for? What constitutes a violation? The provision includes the standard reference to national law, so it is clear that the Directive 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 totally clear. But it should be borne in mind

²⁵ See G. Jansen [LEAP member] 'The legal struggle for the right to access a lawyer in the Netherlands', March 2016, available at: <https://www.fairtrials.org/press/guest-post-the-legal-struggle-for-the-right-to-access-to-a-lawyer-in-the-netherlands/>. An English version of the decision is available on request from Fair Trials.

what is already established about the role of the lawyer – including, but not limited to, securing the suspect’s right to silence and not to incriminate himself (see the ECtHR case-law discussed above).

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 not to incriminate himself would be inconsistent with the Directive. This would include, in particular, rules which mean a lawyer is 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 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 (eg. 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 clarificatory questions in respect of areas where the answers given by the suspect risk being considered incriminatory?

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 Using EU Law 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 the general case-law of the ECtHR 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 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 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. 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*²⁶ 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

²⁶ [Stojkovic v. France and Belgium](#) App. No 25303/08 (Judgment of 27 October 2011).

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), due to be implemented by April 2017, which provides for the execution of investigative steps by Member State B at the order of a judicial authority in Member State A. The Directive 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 'core device' introduced earlier, only relying on a violation in another country.

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

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 a person 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 or EIO issued specifies that the person should be heard in accordance with the requirements of Article 3 of the Directive. You may, equally, see fit to contact a colleague in the issuing country (contact Fair Trials if you need assistance in finding a lawyer in that jurisdiction). It is important to undertake these steps (assuming you are instructed) because, if the person is then for some reason 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 / requested 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. Member State A (where you act) is an addressee of the Directive and is bound by a result obligation under Article 12: it has to ensure that in the assessment of statements made by the suspect the fairness of the proceedings is respected. It cannot discharge that obligation if it takes into account incriminating statements which have been collected incompatibly with 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 is so bound.

- ➔ Seek a remedy (see earlier comments / the Using EU Law 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

We presented above the ‘core issue’ and the ‘core device’ for situations where a violation of the Directive can actually be established (ie. where access to a lawyer was denied). However, we focused on two more exploratory areas (participation of the lawyer in questioning, and cross-border issues) because it seems relatively unlikely that there will be that many straightforward violations of the Directive. By and large, national law in most Member States already does provide for access to a lawyer in questioning, and where violations arise there should be simple arguments available under the national procedural law so there will be little need to rely upon the Directive.

Much more common is the concern 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 the Toolkit on the Right to Information Directive.

B. THE ECHR BASELINE

The core principles were reviewed in the Toolkit on the Right to Information Directive but we reproduce them here. These are principles applicable generally under Article 6: other fair trial rights, eg. the right to be present at trial or the right to silence, can be waived too, and the principles below apply whatever specific right is waived. But, as the ECtHR itself notes (see below), they 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 (...).*²⁷

When procedural rights are not effectively conveyed to the suspect, 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 then means prejudice is caused 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 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.*²⁸
- *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);*²⁹
- *The 'stressful situation' and 'quick sequence of the events' leading to questioning of the suspect;*³⁰
- *A 'certain confusion' in the mind of the suspect at the point of questioning;*³¹
- *The young age of the suspect;*³²
- *The suspect's level of literacy;*³³
- *Familiarity with police encounters;*³⁴ and
- *Drug dependency of the suspect.*³⁵

In addition to the above there are some specific comments on the right to legal assistance specifically protected by Article 6(3)(c), which came in the recent 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.*³⁶

A further instalment in this line of case-law came in 2015 with a judgment in the case of *Zachar and Čierny v. Slovakia*,³⁷ in which Fair Trials intervened to underline the concerns raised by LEAP

²⁷ [Saman v. Turkey](#) App. no 35292/05 (Judgment of 5 April 2011).

²⁸ *Saman v. Turkey*, cited above note 25, paragraph 35.

²⁹ [Panovits v. Cyprus](#) App. No 4268/04 (Judgment of 11 December 2008), paragraph 74.

³⁰ [Zaichenko v. Russia](#) App. No 33720/05 (Judgment of 1 February 2007), paragraph 55.

³¹ [Stojkovic v. France and Belgium](#), cited above note 24, paragraph 53.

³² *Panovits v. Cyprus*, cited above note 29, paragraph 67.

³³ [Kaciu and Kotorri v. Albania](#), Apps. nos. 33192/07 and 33194/07 (Judgment of 25 June 2013), para. 120.

³⁴ *Pishchalnikov v. Russia*, cited above note 10, paragraph 80.

³⁵ [Plonka v. Poland](#), App. no. 20310/02 (Judgment of 31 March 2009), para. 38.

³⁶ *Pishchalnikov v. Russia*, cited above 10, paragraph 78.

³⁷ [Zachar and Čierny v. Slovakia](#) App. No 29376/12 (Judgment of 21 July 2015).

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.³⁸

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.

C. RELEVANT PROVISIONS OF THE DIRECTIVE

The key provision of the Directive is Article 9, which appears largely based on the above case-law:

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

³⁸ Paragraph 70.

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:³⁹

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.

We make the following observations about these provisions:

- Information has to be provided about the right ‘orally or in writing’. The Right to Information Directive governs the provision of information about right 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 has to 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 has to 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.
- 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.

D. USING THE DIRECTIVE IN PRACTICE

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 ineffective. The basic argument is that the absence of the lawyer is in fact a violation of Article 3, because the purported waiver was not compatible with Article 9; accordingly, remedies should be applied under Article 12.

³⁹ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings ([OJ 2013 C 387, p. 8](#)).

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 to, for instance, confirm that the person was given a Letter of Rights and an opportunity to consider it; to address how account was taken of specific vulnerabilities of the accused (eg. 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.

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.

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 (failure to provide full information, 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 waiver 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 (eg. 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 this may be a disputed fact. Procedural rules which prevent the calling of rebuttal evidence – even if the suspect gives a detailed and credible account – would appear problematic. 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*:⁴⁰

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

⁴⁰ Case C-187/10 *Unal* [ECLI:EU:C:2011:623](https://eur-lex.europa.eu/eli/cj/oj/2011/623).

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:

→ Argue: A rule of national law which, in effect, renders the police protocol / minutes conclusive and prevents the leading 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

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 ECHR BASELINE

1. The core principle and debate

There is, at present, very little case-law upon which to rely for this purpose. 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*

There has only been one case to date in which the ECtHR has found 'compelling reasons' for restricting the right to exist, 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.

At the time of writing, *Ibrahim and Others v. United Kingdom* is before the Grand Chamber of the ECtHR. 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 provide greater protection than the ECHR.

C. RELEVANT PROVISIONS OF THE DIRECTIVE

Similar open issues arise under the Directive: it is clear that the latter permits questioning to proceed in the absence of a lawyer, but leaves open the question whether evidence obtained in such circumstances may be used for a conviction. Article 3(5) and 3(6) provides:

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.

You should though also remind yourself of the text of 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)).

D. USING THE DIRECTIVE IN PRACTICE

1. The geographical remoteness derogation

a. Geographical remoteness: a high threshold

Recital 30 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 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.⁴¹ 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, ie. 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, eg. 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.

⁴¹ See the ECtHR Q&A on this: http://www.echr.coe.int/Documents/Press_Q_A_Ali_Samatar_Hassan_FRA.pdf

a. Identify the permissible ambit of the derogation

Derogations on this basis must, in accordance with Article 8, be subject to limitations. In particular, they should be limited in time and must not go beyond what is necessary and proportionate. As a starting point, it is worth establishing, based on the available records, whether a derogation exceeded reasonable limits. For instance, in the *Ibrahim and Others* case, it was argued that 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. The argument is that statements obtained in this context are not covered by the derogation in any event and thus should be regarded as having been obtained in breach of Article 3, and 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 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. This underlines that the *purpose* of the derogation is not investigative: it is preventive. 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.

Of course, these are our arguments and the Grand Chamber of the ECtHR may take a more relaxed approach when it gives judgment in *Ibrahim and Others v. United Kingdom*. However, 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.

IV – IMPLEMENTATION CHECK-LIST

A. ABOUT THIS PART

1. The implementation check-list

Below is a questionnaire with a series of questions which, in LEAP's view, should be borne in mind when implementing the Directive (references are in the endnotes). The reader is invited to review the relevant national law and answer the questions posed in the left hand column. The aim is to identify areas where the current or proposed law does or would fail to meet the requirements of the Directive (read with other key international standards) so that these can be addressed in the legislative phase, leaving fewer problems for the courts to deal with subsequently.

If no specific legislative proposals to implement the Directive have been brought forward, consider the current law. If legislative proposals are pending, we invite you to base your answers on the law as it would stand based on the current proposals. Contact us first if you wish to discuss this further.

2. Who should do what with this check-list

The Check-Lists provide a framework for analysis and discussion of national law in light of the Directive. From the responses to this questionnaire, we may identify issues for more detailed. The questionnaire is designed to be used by different groups of people, as follows.

a. LEAP Members

LEAP members will be invited to complete this questionnaire. For each country, answers will be reviewed by Fair Trials staff and key issues identified. Based upon this analysis, Fair Trials and LEAP members from selected countries will work together to initiate discussions with the relevant national authorities (ministries of justice, parliamentary committees etc.).

b. National authorities

Fair Trials will also send this questionnaire to relevant national authorities directly, to put them on notice as to the issues currently being discussed within LEAP. Answers received will be discussed with LEAP members from the relevant Member States to obtain their further comments.

c. Bar associations and other users

The present document will be publicly available as a PDF but the word version will be available on request from Fair Trials via gianluca.cesaro@fairtrials.net. We will welcome questionnaires from all interested stakeholders, including in particular academics and national / regional bar associations.

3. What LEAP can offer

In line with its paper, *Towards an EU Defence Rights Movement* (see [here](#)), LEAP will aim to provide useful assistance to implementing authorities. In particular, we can offer expert knowledge of the relevant standards and a wealth of comparative law examples.

B. IMPLEMENTATION CHECKLIST (1): CRIMINAL PROCEEDINGS

Provision(s)	Recital(s)	<ul style="list-style-type: none"> Observations / linked ECHR, EU or international standards / comparative good and bad practice examples
<ul style="list-style-type: none"> Questions in each area 		<ul style="list-style-type: none"> - <i>Enter your answers or comments about your system in the box below</i> - <i>Please ensure your answers specify the relevant legal provisions etc.</i>
Subject matter / scope		
Article 1, 2(1)	12, 13	<ul style="list-style-type: none"> The concept of 'criminal proceedings' has not yet been defined by the CJEU. See the ECtHR case-law in <i>Engel v. Netherlands</i>ⁱ for the criteria as to when Article 6 ECHR applies. See examples of atypical proceedings regarded as criminal in nature, eg. <i>Hammerton v. United Kingdom</i>ⁱⁱ. Recital 13 indicates minor military discipline matters and prison offending are outside of the scope. You may wish to consider: customs; contempt of court; military discipline; prison adjudications; proceedings relating to sentencing which may extend custodial sentences; special contexts eg. arrests at sea, overseas military operations; ad-hoc tribunals established for major sporting events etc.
<ul style="list-style-type: none"> Review national procedures – what should be regarded as 'criminal proceedings'? 		<ul style="list-style-type: none"> - <i>Your answers here</i>
Article 2(1) Article 2(3)	21	<ul style="list-style-type: none"> The Directive applies to 'suspected or accused persons', which is clearly intended to be a broad definition catching all persons. It applies 'irrespective of whether they are deprived of liberty'. See the ECtHR case-law concerning the concept of being 'charged', whereby Article 6 ECHR will apply; the person is charged as from the point when there is evidence that they have committed an offence. The Directive applies from the time that suspects or accused persons are 'made aware' that they are suspected of having committed an offence. It also applies to persons who become suspects or accused persons. It is assumed that a person against whom there is evidence will have the benefit of the Directive. The Directive then applies until the conclusion of the substantive proceedings, including any appeals before the higher courts. It is clear that it includes the resolution of sentencing issues.

<ul style="list-style-type: none"> • Do all suspects and accused persons have a right of access to a lawyer (detained or not) in all of the contexts above? • Are there procedures in your national law whereby a person may be questioned when there is evidence against them yet they have no right to a lawyer? • Is access to a lawyer ensured throughout the process, up until the resolution of all appeals? 	<ul style="list-style-type: none"> - <i>Your answers here</i> - <i>Identify specific areas where assistance is lacking</i> 	
<p>Article 2(4)</p>	<p>16, 17, 18</p>	<ul style="list-style-type: none"> • If minor offences (not involving custodial sanctions) are dealt with out of court subject to challenge before a court, the Directive applies to the proceedings before the court only. • See Case C-216/14 <i>Covaci</i>ⁱⁱⁱ (indicating that guarantees under the Right to Information Directive should apply for the purpose of bringing the challenge; by analogy, access to a lawyer should be ensured so as to enable the bringing of the challenge in the first place, and not only before the court once the challenge is brought). • See the Opinion of Advocate-General Sharpston in Case C-60/12 <i>Baláz</i>,^{iv} indicating that any court possessing a criminal jurisdiction (because it is the forum for such appeals) should observe the standards imposed by the Roadmap Directive in its proceedings.
<ul style="list-style-type: none"> • Is your jurisdiction one in which minor offences may be handled by way of penalties etc. challengeable before a court? • Is there a functioning system providing for access to a lawyer to enable the person to bring the challenge before the court? 	<ul style="list-style-type: none"> - <i>Your answers here</i> - <i>Identify specific types of proceedings and identify the courts to which appeals are brought</i> 	

Access to a lawyer		
Article 3(1)	19	<ul style="list-style-type: none"> This provision creates a general right of access to a lawyer in criminal proceedings (within the Article 2 scope)
<ul style="list-style-type: none"> Is there an enforceable right of access to a lawyer in all of the proceedings which you consider to be criminal proceedings? 		<ul style="list-style-type: none"> <i>Your answers here</i> <i>Please cite the relevant legal provisions</i>
Article 3(2)		<ul style="list-style-type: none"> The Directive requires that suspects or accused persons have access to a lawyer without undue delay In any event, access to a lawyer must be available from the following points in time, whichever is earliest: (a) before questioning; (b) upon the carrying out of investigative acts; (c) without undue delay on deprivation of liberty; and (d) in due time before they appear before a court before which they have been summoned.
<ul style="list-style-type: none"> Look at the different stages: are you satisfied that, whenever one of these happens first, the suspect has a right of access to a lawyer? Do legal aid systems work in such a way as to facilitate access to a lawyer at each point? 		<ul style="list-style-type: none"> <i>Your answers here</i>
Article 3(3)(a) Article 4	22, 23, 33	<ul style="list-style-type: none"> The Directive requires that the suspect has an opportunity to meet in private and communicate with the lawyer representing them, including before questioning See the ECtHR case <i>A.T. v. Luxembourg</i>^v making it clear that there should be an opportunity for such a meeting prior to questioning by an investigative judge, following an initial police questioning. The emphasis on ‘privacy’ should be read in light of Article 4 of the Directive, which imposes an unqualified confidentiality obligation. Recital 33 includes wide-ranging comment about the Member States’ ability to take certain measures to protect safety and security; however, Article 4 is an absolute standard and ought to prevail.
<ul style="list-style-type: none"> Is there an opportunity for the client to meet in private with his 		<ul style="list-style-type: none"> <i>Your answers here</i> <i>Please include references to the relevant national law, identifying any gaps if necessary</i>

<p>lawyer prior to all questioning, before all relevant authorities?</p> <ul style="list-style-type: none"> Is the confidentiality of these meetings and communications protected? 		
<p>Article 3(3)(b)</p>	<p>20</p>	<ul style="list-style-type: none"> The Directive requires that suspects or accused persons have the right for their lawyer to be present during questioning, as is well-established under ECtHR case-law (eg. <i>Navone and Others v. Monaco</i>^{vi}). Recital 20 indicates that questioning does not include preliminary questioning for the purposes of verifying a person's identity etc., mentioning road-side checks as an example. But see the ECtHR case <i>Zaichenko v. Russia</i>:^{vii} Article 6 ECHR will be breached if such questioning (in that case, at a road-side check) is carried out when there is already evidence against a person (if their statements are used). The Directive specifies that there is a right to effective participation of the lawyer in questioning. Though this is to be in accordance with procedures in national law, these must respect the essence of the right concerned.
<ul style="list-style-type: none"> Do suspects have a right for their lawyer to be present and participate in questioning? What limitations are foreseen on the role of the lawyer? How do these impact upon the lawyer's ability to assist the suspect in asserting his rights? 	<ul style="list-style-type: none"> - <i>Your answers here</i> - <i>Please include references to the relevant national law or policy, identifying any specific issues</i> 	
<p>Article 3(3)(c)</p>	<p>26</p>	<ul style="list-style-type: none"> The Directive requires that the suspect has a right for the lawyer to be present at investigative acts, specified in Article 3(3)(c) as including identity parades; confrontations; and reconstructions of the crime scene, if one of these is the earliest. The above list is expressed as being a 'minimum'. Other situations might call for access to a lawyer where they could substantially impact upon the defence, eg. instruction of experts to analyse large volume of data.
<ul style="list-style-type: none"> Do suspects have a right of access to a lawyer at each of the 	<ul style="list-style-type: none"> - <i>Your answers here</i> 	

acts specified above? <ul style="list-style-type: none"> Do legal aid arrangements cover these sorts of interventions by the lawyer? 		
Article 3(4)	27	<ul style="list-style-type: none"> Member States should make general information available to facilitate the exercise of the right to access a lawyer. Article 3(4) and recital 27 call for particular effort to be made to assist those deprived of liberty. This requirement should be read together with the requirement for a Letter of Rights under the Right to Information Directive. See the work of the ‘Initiative Group’ (a group of Polish lawyers led by Polish LEAP members) which has sought to ensure better information about the right of access to a lawyer in Polish police stations.^{viii}
<ul style="list-style-type: none"> Is there sufficient information made available at police stations and other detention sites to facilitate exercise of the right? How does this information interact with the Letter of Rights provided to suspects? 		<ul style="list-style-type: none"> - Your answers here
Waiver		
Article 9	14, 39, 40	<ul style="list-style-type: none"> The rights under the Directive can be waived. See the case-law of the ECtHR such as <i>Pishchalnikov v. Russia</i>^{ix} and <i>Zachar and Cierny v. Slovakia</i>^x and examples of relevant factors concerning the validity of waivers, as discussed earlier in this Toolkit. The provision of ‘clear and sufficient’ information about the content of the right and the consequences of waiving it is a precondition to the waiver being regarded as valid. This requirement should be read together with the Letter of Rights requirement in the Right to Information Directive. In that regard, see also the LEAP Toolkit on the Right to Information Directive. Particular attention should be paid to the situation of those with vulnerabilities. See paragraph 11 of the

		<p>Commission recommendation on vulnerable suspects and the forthcoming Directive on safeguards for children suspected or accused in criminal proceedings,^{xi} which also includes requirements as to the provision of information for children.</p> <ul style="list-style-type: none"> • Recording procedures must ensure that the circumstances of the waiver are recorded. • Rules of evidence should not make it practically impossible to raise an issue as to the validity of the waiver (see the comments earlier in this Toolkit).
<ul style="list-style-type: none"> • Is clear and sufficient information currently provided in the Letter of Rights so as to enable a suspect to take a knowing and intelligent decision as to waiver? • How are particular vulnerabilities (eg. disability, intoxication, language issues) identified and addressed? • What recording procedures are in place, and do they reflect the particular circumstances of the waiver given? • Are there effective opportunities to challenge the validity of the waiver recorded later on in the courts? 		<ul style="list-style-type: none"> - <i>Your answers here</i> - <i>Please identify the relevant national legal provisions</i>
Derogations		
<p>Article 3(5) Article 8</p>	<p>30</p>	<ul style="list-style-type: none"> • In cases of geographical remoteness, a derogation is possible only from the timing of access to a lawyer. • See, by analogy, the ECtHR cases concerning delayed production of persons arrested at sea before a judicial authority: the circumstances can only serve to justify delays, not actual limitations on the rights.^{xii}

<ul style="list-style-type: none"> Does your Member State have overseas territories or a need for geographical derogations, (eg. EU anti-piracy / smuggling operations?) Are delays in access to a lawyer permitted? Are any other restrictions permitted? 	<p>- <i>Your answers here</i></p>
<p>Article 3(6) Article 8</p> <p>31, 32</p>	<ul style="list-style-type: none"> The Directive permits derogation from the substantive aspect of Article 3 (access to a private meeting before questioning, presence of the lawyer in questioning etc.) in urgent cases where (a) there is an urgent need to avert serious adverse consequences for other persons and (b) immediate action is needed to prevent substantial jeopardy to criminal proceedings. In accordance with Article 8, these derogations should be strictly limited in time, should not go beyond what is necessary, and should not unduly prejudice the rights of the defence. The issue is currently under consideration in the case of <i>Ibrahim and Others v. United Kingdom</i>, which is before the Grand Chamber of the ECtHR. See Fair Trials' intervention in that case, referred to in Part III of this Toolkit. The Recitals state that questioning during the derogation may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to one of the two above justifications. In Fair Trials' opinion, any information obtained should not be used in the substantive criminal proceedings (see further on remedies below).
<ul style="list-style-type: none"> Are derogations available from the rights specified in Article 3 of the Directive? On what grounds? What questioning is permissible during the absence of the lawyer? 	<p>- <i>Your answers here</i></p> <p>- <i>Please identify the relevant national legal provisions</i></p>

Confidentiality		
Article 4	33, 34	<ul style="list-style-type: none"> • An absolute right to confidentiality applies in respect of lawyer-client communications in the exercise of the rights conferred by the Directive. • See <i>Michaud v. France</i> and the exceptions in the relevant EU legislation on money laundering etc.: advice in the context of criminal proceedings is clearly exempted. • Meeting places in police stations etc. should therefore be free of any supervision. • It follows from the absolute nature of this protection that any information, however obtained, that should be protected by this confidentiality should not be admissible as evidence.
<ul style="list-style-type: none"> • Is client-lawyer confidentiality in all contexts covered by the Directive (in particular the private meetings before questioning) protected – (a) in law? (b) in practice? 		- Your answers here
Remedies		
Article 12	49, 50	<ul style="list-style-type: none"> • Article 12(1) reiterates the general obligation on Member States to protect EU law rights effectively. • Article 12(2) (as confirmed by recital 50) refers to the principle in <i>Salduz v. Turkey</i>, according to which the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made in the absence of a lawyer are used for a conviction. See further the ECtHR case-law discussed in Part I of this Toolkit. • Statements obtained as a result of a breach of Article 3 / where no valid waiver is given / where a derogation is applied under Article 3 should not be used for a conviction in any way, directly or indirectly. • The fruit of the poisoned tree should be treated in the same way.
<ul style="list-style-type: none"> • What system of remedies applies in your Member State? • In law or in practice, are incriminating statements obtained in the absence of a lawyer capable of being used for 		<ul style="list-style-type: none"> - Your answers here - Please identify the relevant provisions of national law and describe the courts' approach

<p>a conviction or to found subsequent procedural acts?</p> <ul style="list-style-type: none"> Do national remedies extend to the fruit of the poisoned tree as defined in Part I of this Toolkit? 		
Miscellaneous		
<p>Article 5 Article 6</p>	<p>35 36</p>	<ul style="list-style-type: none"> Article 5 establishes a right to have a third person informed of deprivation of liberty without undue delay. Regard should be had to the specific needs of children / vulnerable suspects (see the texts mentioned earlier). Derogations are available under Article 5(3) on similar grounds to those applicable under Article 3(6). Article 6 establishes a right to communicate with a third person while deprived of liberty. The limitations in Article 6(2) appear to follow similar logic as Article 5(2) (see recital 36).
<ul style="list-style-type: none"> Is incommunicado detention permitted in your jurisdiction? In what circumstances and subject to what safeguards? 	<p><i>Your answers here</i></p>	
<p>Article 7</p>	<p>37</p>	<ul style="list-style-type: none"> The right to consular assistance while deprived of liberty is protected by Article 7. See also the Vienna Convention on Consular Relations of 1963 (see recital 37). This does not impact upon third states' obligations to provide consular access to EU nationals arrested abroad. Persons with more than one nationality may choose which consular assistance they wish to receive.
<ul style="list-style-type: none"> Are non-nationals able to receive consular assistance promptly in all locations? 	<p><i>Your answers here</i></p>	

C. IMPLEMENTATION CHECKLIST (2): EAW PROCEEDINGS

Provision(s)	Recital(s)	<ul style="list-style-type: none"> Observations / linked ECHR, EU or international standards / comparative good and bad practice examples
<ul style="list-style-type: none"> Questions in each area 		- <i>Enter your answers or comments about your system in the box below</i>
Subject matter / scope		
Article 1, 2(2)	12	<ul style="list-style-type: none"> The Directive applies the right of access to a lawyer to EAW proceedings. See Framework Decision 2002/584/JHA on the EAW (in particular Article 11(2)). Article 6 ECHR, by contrast, does not apply to extradition and immigration proceedings, there being no determination of civil rights or obligations or of any criminal charge (eg. <i>Maaouia v. France</i>^{xiii} et seq). Interferences with Article 8 ECHR (private life) rights do generate a right to an effective remedy under Article 13 ECHR, with some procedural safeguards inferred therefrom. However, the Directive is much more prescriptive.
<ul style="list-style-type: none"> Specify what rules or parts of the procedural code govern access to a lawyer in the context of EAW proceedings 		- <i>Your answers here</i>
Article 10(1)-(3)	42-45	<ul style="list-style-type: none"> The Directive establishes a right of access to a lawyer in the executing state. The right should enable the requested person to exercise their rights effectively; includes a right to meet and communicate with the lawyer representing them; and the right for the lawyer to be present and to participate in hearings relating to the execution of the EAW. Other provisions above (confidentiality, communication and consular rights, waiver etc.) apply <i>mutatis mutandis</i> to the EAW procedure in the executing Member State.
<ul style="list-style-type: none"> Is there a right to a lawyer in your Member State when it is the executing Member State? Does that right include the 		<ul style="list-style-type: none"> - <i>Your answers here</i> - <i>Please specify the legal provisions in question</i>

points mentioned in Article 10(2)? Is legal aid available?		
Article 10(4)-(6)	46	<ul style="list-style-type: none"> • The Directive also creates an obligation upon the issuing Member State to provide access to a lawyer there. • The role of the lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing information and advice to enable the exercise of the rights of the defence there. • This function is crucial in the defence of EAWs.
<ul style="list-style-type: none"> • Is there a right to a lawyer in your Member State when it is the issuing Member State? • Is this a distinct right vis a vis the right of access to a lawyer in the substantive criminal proceedings which underlie the EAW? • Can the right of access to a lawyer in the substantive criminal proceedings be invoked by the suspect or accused person prior to their surrender? 		- <i>Your comments here</i>

CONCLUSION

Salduz v. Turkey was a big moment. It caused significant reforms in Europe, including in older Member States such as France and the United Kingdom; revealed disparity in understanding of the right to a fair trial; and provided the impetus for the Roadmap. It may not be a coincidence that the Directive's implementation deadline is 27 November 2016, exactly eight years after the judgment. The EU appears to want to make it clear that it has now got its house in order. Yet, as noted in this Toolkit, there are key areas (eg. waiver) where the spirit of *Salduz* is still at peril in the EU.

It is hoped that implementation of the Directive will iron out and finally address any outstanding issues in compliance with the *Salduz* case-law. LEAP intends to provide as much assistance as possible to the authorities responsible for implementing the Directive, and the Implementation Checklist in this Toolkit is essentially LEAP's first step to beginning key discussions with law-makers.

After legislative implementation, the time will come for practitioners to use the Directive in practice, relying upon its direct effect where necessary, with a view to addressing outstanding issues of compliance. Again, practitioners in need of assistance are welcome to contact LEAP with a view to obtaining expertise, support and comparative best practice to assist them in their work.

This Toolkit will be circulated to thousands of lawyers across Europe, all of whom are invited to:

- [Contact us](#), let us know how you are getting on with 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 2014 paper on strategic approaches to the CJEU⁴² and our online training video on the preliminary ruling procedure in criminal practice.⁴³
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings.
- 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*⁴⁴ for concrete ideas on articles, litigation, conferences etc.

LEAP
Fair Trials Europe
Spring 2016

⁴² Fair Trials, *Strategic approaches to litigation before the CJEU on the Roadmap Directives and EAW*, 2014, available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

⁴³ Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

⁴⁴ Fair Trials, *Strategies for implementation of the Roadmap Directives: Towards an EU Defence Rights Movement*, February 2015, available at: <https://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

Check-List References:

-
- ⁱ *Engel v. Netherlands* App. No 5100/71 (Judgment of 8 June 1976).
- ⁱⁱ *Hammerton v. United Kingdom* App. No 6287/10 (Judgment of 17 March 2016).
- ⁱⁱⁱ Case C-216/14 *Covaci* [ECLI:EU:C:2015:686](#).
- ^{iv} Opinion of Advocate General Sharpston in Case C-60/12 *Baláz* [ECLI:EU:C:2013:485](#).
- ^v *A.T. v. Luxembourg*, cited above footnote 8.
- ^{vi} *Navone v. Monaco*, cited above footnote 24.
- ^{vii} *Zaichenko v. Russia*, cited above footnote 30.
- ^{viii} See <https://www.fairtrials.org/tag/initiative-project/>.
- ^{ix} *Pishchalnikov v. Russia*, cited above footnote 10.
- ^x *Zachar and Cierny v. Slovakia*, cited above footnote 37.
- ^{xi} At the time of writing, this has not been formally adopted, though its final text has been agreed by the European Parliament and Council, see [here](#).
- ^{xii} See the ECtHR Q&A on this: http://www.echr.coe.int/Documents/Press_Q_A_Ali_Samatar_Hassan_FRA.pdf.
- ^{xiii} *Maaouia v. France* App. No 39652/98 (Judgment of 5 October 2000).