



15 April 2013

Joint briefing on the Directive on the right of access to a lawyer in criminal proceedings and the right to inform a third party upon deprivation of liberty

After eight months of intensive discussions, the two legislators, the European Parliament (EP) and the Council of the European Union appear willing to conclude the negotiation of a new Directive that will set common minimum standards on the right of access to a lawyer and the right to communicate with third parties when detained, for persons suspected or accused of a crime in the EU.

When the right of access to a lawyer is denied, even temporarily, other core rights of suspects and accused persons are endangered, important procedural safeguards are weakened in practice and the fairness of the entire criminal process is brought into question. In any event, no questioning should be allowed without access to a lawyer.

Our organisations – national and international NGOs working on justice and human rights, together with the European Criminal Bar Association (ECBA) - have advocated the need for a Directive to uphold and develop existing international human rights standards in this area and have actively engaged in the discussions with all the parties since the publication of the Commission proposal in June 2011.

Ahead of the next trilogue on 17 April 2013, we welcome the positive developments on a number of contentious points but wish to raise five remaining concerns that we believe deserve special attention from the co-legislators at this critical juncture in the negotiations, to ensure the Directive does not undermine human rights standards.

A primary aspect of the role of a lawyer is to protect the right against self-incrimination of the suspect and accused person. Whilst the Directive will place obligations upon the Member States to facilitate access to a lawyer, nothing in the Directive should allow law enforcement authorities to prevent a suspect or accused person from exercising his or her right of access to a lawyer. All provisions of the Directive must meet these prerequisites, which the latest drafts¹ do not yet achieve.

Our outstanding concerns relate primarily to minor offences, derogations, confidentiality, dual representation in EAW cases and remedies.² These issues are not new to the negotiators who have endeavoured to address them at different levels and at different stages of the negotiations.

These issues remain critical because the latest drafts retain wording that could compromise the right to access a lawyer in criminal proceedings and to communicate when detained, in a way that runs counter to the agreed objectives set by the EU's "Roadmap" on Procedural Rights³ which are: to reflect the minimum standards set down in the European Convention on Human Rights (ECHR) and clear jurisprudence from the European Court of Human Rights (ECtHR); as well as provide practical answers where research and human rights monitoring bodies have revealed that the right to a fair trial is being undermined.

We therefore urge the Council and the European Parliament to revisit the latest drafts to ensure that the final compromise is fully in line with these objectives. By failing to do so, the EU would lose a great opportunity to contribute to enhancing human rights protection in Europe and run the risk of setting a regressive agenda for defence rights in Europe and beyond.

1. Exclusion of minor criminal offences from the scope of the Directive

By deciding to apply the rights set out in the Directive "only to the proceedings before a court having jurisdiction in criminal matters" in the case of so-called "minor" criminal offences, the EU legislator opens the door to people suspected or accused of minor crimes being legally deprived of their basic right to have a lawyer at the pre-trial/ investigative stage, and when tried by an authority other than a criminal court. This contravenes existing ECtHR jurisprudence and international standards that do not make such a distinction. Ultimately, excluding minor offences from the scope of the Directive will create a conflict with the ECHR requirement for a remedy in cases where the right of access to a lawyer is violated.

The attempt to narrow the breadth of minor criminal offences by explicitly excluding offences for which imprisonment is an available penalty fails to bring the text in line with the applicable standards. Equally, specifying that the exclusion of minor offences will not apply in cases where the suspect or accused is deprived of liberty in the course of the criminal proceedings fails to provide an adequate level of protection.

¹ Text for 6th and 7th trilogues - 14 March 2013 & 9 April 2013

² Individual organisations may have additional concerns that go beyond those collectively stated here

³ Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Council of the EU, 1 July 2009 (11457/09) ; endorsed by the Stockholm Programme Council of the EU, 2 December 2009 (17024/09)

Together with the recitals, these provisions set out a subjective approach to classifying minor offences that conflicts with the well-established objective approach set out by the European Court of Human Rights.⁴ As currently drafted, the exclusion of minor offences could still mean that individuals facing other types of punishment that may have a serious impact on their lives, employment, family and financial situation could be questioned by the police without the presence of a lawyer.

Consequently, the Directive must guarantee a minimum level of protection to all suspects of criminal offences compelled to answer questions by ensuring that they cannot be questioned in any circumstances without access to a lawyer.

These are precisely the type of situations which any ordinary EU citizens could be confronted with in his/her daily life, notably when travelling throughout Europe, e.g. at any European airport. The exclusion of the right of access to a lawyer in very common situations risks undermining people's trust in the EU's capacity to build a fair common area of justice.

Furthermore, such provisions could lead to abuse, for example:

A common problem across the EU is that the police question people for minor offences while in fact they are gathering evidence to substantiate serious crimes. For example, the police can question a person for having expired car insurance when in reality their goal is to gather evidence to support suspicions for drug trafficking.

2. **Derogations to the right of access to a lawyer and the right to communicate with a third party upon deprivation of liberty**

Given the crucial role access to a lawyer plays not only in ensuring a fair trial but as a fundamental safeguard against torture and other cruel, inhuman or degrading treatment or punishment while in police custody, our organisations consider that there should be no derogation clause.

It must be recalled that much damage can be done to someone in the first hours of police custody. Last week in Hungary, it was reported that a Romanian man was arrested for stealing a chainsaw, and denied access to a lawyer. He died after approximately three hours in police custody. Police officers are now being investigated for allegations that they beat him to death during their interrogations⁵

If temporary derogations to the right of a suspect or accused person to access a lawyer or the outside world upon deprivation of liberty are still to be included, they must be time-limited and crafted in a sufficiently precise and narrow way properly to reflect international legal standards. This means that as a minimum the time-limited provision in the transversal derogation clause should be "strictly

⁴ *Engel and Others v the Netherlands*, 8 June 1976, paras 82-3

⁵ See Hungarian news sources at:

http://atv.hu/belfold/20130410_peppe_volt_verve_halaleset_es_kenyszervallatas_miatt_nyomoznak_izsakon

http://atv.hu/cikk/20130410_az_utobbi_harom_evben_folerositettek_egy_az_eroszakot_preferalo_rendori_sz_ubkulturat; in English, <http://www.politics.hu/20130412/navracsics-pledges-resolute-action-after-theft-suspect-is-killed-in-police-custody/>

limited in time” without any qualification and that any derogation must be approved by a judicial or competent authority independent of the investigation.

Exceptional derogations to the right of access to a lawyer

We welcome recent amendments that further limit when a derogation to access to a lawyer can be made. However, we remain concerned that the latest drafts still leave open the possibility of Member States to deny *complete* access to *any* lawyer for an undefined period of time.

In cases where legitimate reasons for delaying access to a lawyer may exceptionally arise (e.g. if there is a need to preserve evidence or prevent further crime, and particularly regarding unlawfully compromising the investigation by alerting other parties to the arrest of the suspect, of course strictly limited to a few hours only), we insist that any concerns should be capable of being addressed through the derogation from access to a lawyer of one’s own choice.

*As stated clearly by the European Committee for the Prevention of Torture (CPT): “The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society”.*⁶

If in fact a person is deprived of all access to any lawyer for a limited period for any reason, no questioning should be permitted to take place during that period of delay. The Directive must not allow derogations for investigative purposes to provide an excuse to deliberately prevent legal representation during questioning.

In any event, it is not acceptable to allow questioning of a suspect or accused person without a lawyer because of “geographical remoteness.” Member States must ensure that access to a lawyer is available, at the very least to audio-visual communication, if they have remote areas within their territory.

Right to communicate with a third party upon deprivation of liberty

We welcome the fact that the legislators have now all agreed to acknowledge this right in the Directive, in addition to the right to have a third person informed of the deprivation of liberty.

However, we remain concerned that the scope for derogation to this right permitted by the draft Directive is very vague and broad. It should at minimum be made subject to the transversal provision that establishes the conditions on which certain rights can be temporarily derogated from in the Directive.

We also regret that the essential right to receive visits in detention is still lacking in the latest drafts. The right to receive visits in detention is one aspect of the right to family and private life (pursuant to

⁶ CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2011, p 11, para 41.

article 8 ECHR). It is already recognised in a range of existing international standards, and is a crucial safeguard for the detainee's well-being *throughout* the criminal proceedings.⁷

As clearly stated in Principle 19 of the UN Body of Principles for the Protection of all persons under any form of detention or imprisonment, to which all EU member states have agreed,: "A detained or imprisoned person, shall have the right to be visited by and correspond with, in particular members of his family and shall be given adequate opportunity to communicate with the outside world subject to reasonable conditions and restrictions as specified by law or lawful regulations."

3. **Absolute confidentiality of communication between the suspect or accused and his/her lawyer**

Our organisations are adamant that any communication between the suspect or accused person and his or her lawyer has to be absolutely confidential and must not be monitored. The ECtHR and other key international standard-setting bodies have emphasised for many years that the right for a suspect or accused person to communicate with his/her lawyer out of hearing of a third person is part of the most basic requirements of a fair trial. **No exception to this right should be allowed.**

*Lawyers from EU countries have reported that they are reluctant to talk to their clients freely in police stations or prisons because it is common knowledge that confidentiality is routinely breached. Sometimes this results from the physical structure of the facility; for example, lack of private consultation rooms in police stations. Sometimes it is because of deliberate interference by state officials, for example, by listening into conversations, intercepting prisoner correspondence, or interfering with lawyers' files.*⁸

Further, the German Constitutional Court has held that secret supervision of defence communication and/or the use of such evidence against the suspect or accused person violates the principle of human dignity, that is also enshrined in article 1 of the Charter on Fundamental Rights of the European Union.⁹

If the legislators insist that there should be an "exception" to cover the case of collusion of lawyers in crime, this is a separate matter concerned with the regulation of the legal privilege of lawyers in their professional capacity. Apart from the possibility of substituting a lawyer through a judicial decision to deal with situations of collusion, the right of the suspect or accused to absolute confidentiality of communication with his or her lawyer must not be affected by any legal measure taken against his or her (initial) lawyer. Furthermore, if some legislators are concerned that providing for absolute confidentiality under the Directive could hamper lawful surveillance by national intelligence services,

⁷ See for instance the UN Body Principles for the Protection of All Persons under any form of detention and imprisonment (principles 19 and 36 (2)), UN Standard Minimum Rules for Treatment of Prisoners (Rule 92), General Comment no. 20 (1992) of the Human Rights Committee and UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guidelines 3(c), 3(e) and 10(b).

⁸ Z. Namoradze and E. Cape, *Effective Criminal Defence in Eastern Europe*, 2012, Soros Foundation–Moldova, page 422-433

⁹ See German Constitutional Court (Bundesverfassungsgericht), decision of 03 March 2004, 1 BvR 2378/98 and 1 BvR 1084/99, NJW 2004, 999, 1004 = BVerfGE 109, 279.

we refer them to the Recitals which specifically state that this Directive does not impact on these activities. In any event, the rights of the suspect or accused person under this Directive must not be affected in any way.

4. Dual representation in European Arrest Warrant (EAW) cases

The benefit of having the assistance of expert legal advice in both the issuing and executing state to enable the EAW to function fairly and properly has been well documented and to some extent prompted the need to have an EU directive on the right of access to a lawyer in the first place. Dual representation enables genuine reasons for refusal to be properly argued and spurious ones to be discontinued. This right to dual representation in EAW cases must be clearly set out in the Directive and facilitated by the Member States. The content of the right must be no less than in domestic cases. We welcome the latest draft which recognises this. However, the Directive must not limit the role of the lawyer in the issuing state to providing the lawyer in the executing state with information and advice alone. The lawyer in the issuing state must also be able to provide representation in the issuing state during the proceedings, where appropriate:

A person is arrested under an EAW issued by Poland in relation to breaching a suspended sentence imposed for minor drugs offences some years earlier. She has established a stable family life in the UK and is the sole-carer for her young son. The British courts have no grounds on which to refuse her surrender to serve a sentence in Poland and her appeal against the EAW fails. However, when she obtains assistance from a Polish lawyer it becomes apparent that the Polish authorities are willing to remove the warrant on condition that she pays a fine. Had she had the right to a lawyer in the issuing state as soon as she was arrested the proceedings would have been resolved more quickly, saving resources and the stress of extradition proceedings.¹⁰

5. Remedies in case of a breach of the rights protected by the Directive

Remedies for breach of the Directive or application of derogations provide a crucial safeguard against routine violations of the rights set out within it. Remedies serve to remind law enforcement authorities that the right to legal assistance as well as to communicate in confidence with a lawyer and the right to contact with the outside world are fundamental safeguards which are vital to the process of obtaining a fair trial and must be maintained at all stages of criminal proceedings.

The Directive must therefore uphold the minimum ECtHR standard set down in *Salduz v. Turkey*, i.e: “Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a 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”.¹¹ Any provision that attempts to dilute this principle or allow States to decide that these statements have value or weight is unacceptable and undermines and contradicts the jurisprudence of the ECtHR.

¹⁰ See (R) on the application of *Gorcowska v District Court in Torun Poland* [2012] EWHC 378 (Admin); see also <http://www.fairtrials.net/cases/natalia-gorcowska/>

¹¹ *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, paras 54-55

However, we understand that some States have objected to express inclusion of the *Salduz* principle in the Directive text on the basis that their established criminal procedures provide for free production of evidence in the case-file and free evaluation by the judge of the weight to be given to each piece of evidence at trial. We argue that the *Salduz* rule should be compatible with these systems as it does not explicitly exclude the incriminating statements made without access to a lawyer from the case-file but holds that, ultimately, they can never be *used for a conviction*. This is a rule no member state objects in principle to its judges respecting. Furthermore, insofar as the objection is that no EU Directive could ever address the issue of admissibility of evidence, in the context of the UN Convention Against Torture, all EU countries are obliged by international human rights law to ensure that evidence obtained by torture is inadmissible and excluded from proceedings.¹² There is therefore no principled reason to prevent a rule on admissibility of evidence at EU level.

The Directive must set out as a clear binding standard in the body of the text that any incriminating statement made in violation of the right of access to a lawyer cannot be used for a conviction. By failing to do so, the Directive would fail to reflect the already-existing obligations of all EU Member States and the EU under the ECHR. This would create potential gaps in protection in practice in some Member States, undermining the stated objectives of the Directive, and eroding respect for ECHR case-law.¹³

*Notwithstanding that there is a system of free admissibility of evidence in Finland, in May 2012, the Finnish Supreme Court ruled that statements obtained where the defendant's right to a lawyer had been breached could not be used at trial. The Supreme Court held that if the defendant's right not to incriminate oneself has been breached, this right cannot be corrected simply by allowing the evidence to be presented to the court and the court later on deciding not to give credibility to the statement. The Supreme Court noted that the only way to avoid a violation of the rights of the defendant in these cases is for the incriminating evidence to not be brought to trial at all.*¹⁴

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¹² Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the European Court has applied the same rules under Article 3 of the European Convention of Human Rights)

¹³ According to Article 26, 1969 Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

¹⁴ KKO 2012 :45, 9 May 2012, paragraphs 45 and 46