Articles

# The Right of Access to a Lawyer in Europe: A Long Road Ahead?

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*This article explores the right of access to a lawyer in criminal proceedings as a fundamental right in the European area. After noting the divergence of national legal systems in respect to the scope and practical exercise of this right, it discusses the ECtHR's recent case-law on Article 6(3) c of the Convention and the EU-Directive, which was recently adopted. The lengthy debate over the Commission's ambitious Proposal has highlighted five major issues, which are critically addressed in the text: time and scope of the right of access to a lawyer, derogations, confidentiality of communications, remedies, European Arrest Warrant proceedings. The article concludes that the Directive, though less strong than desirable in some respects, is a step forward on the long road to achieving effective defence in Europe.*

## I. The fundamental right to legal assistance in criminal proceedings

The right to legal assistance in criminal proceedings is enshrined as a fundamental right and a basic feature of a fair trial in the most important European and international legal instruments.

Article 6(3) c of the ECHR entitles *'everyone charged with a criminal offence … to defend himself in person or through legal assistance of his own choosing …'*

The same wording is to be found in Article 14(3) d of the ICCPR, in which the right of the individual *'not to be compelled to testify against himself or to confess guilt'* (Article 14(3) g) is also expressly recognised.

Article 47 of the Charter of Fundamental Rights of the EU, which entered into force with the Lisbon Treaty, provides that *'everyone shall have the possibility of being advised, defended and represented'*, while Article 48 (2) guarantees the *'respect for the rights of the defence of anyone who has been charged'*.

The right of all persons *'to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings'* is mentioned among the Basic Principles on the Role of Lawyers adopted by the United Nations in Havana in 1990[1].

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[1] Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990, UN Doc A/CONF.144/28/Rev.1 at 118 (1990), § 1.

Indeed, it is the right to legal assistance that guarantees the effective exercise of all other procedural rights in criminal proceedings[2].

## II. Divergence of national legal systems regarding the details of the right to legal assistance

The right to legal assistance in criminal proceedings is firmly established in national legal systems. However, the details of this right, in other words *when and how* this right is to be exercised and what exactly it includes, are far from being regulated in a uniform way in different countries. Member states of the European Union are no exception to this finding.

For example, non-access of suspects to a lawyer during the first hours or during the first days of police detention and questioning, the (in)famous *garde à vue*, was for centuries something like a sacred cow in France[3].

The official belief was –and still is to a certain extent- that access to a lawyer at this initial stage of the proceedings and presence of the same during questioning would seriously hamper the efficiency of the investigation minimising the frequency of self-incrimination and confessions by suspects. The same (negative) stance towards allowing lawyers to enter the police station characterised the laws of a number of European jurisdictions, such as the Netherlands, Belgium, Ireland or Scotland.

This regime was left intact until 2010 when the ECtHR ruled in *Brusco* v France[4] that barring suspects from access to a lawyer during police detention is incompatible with fair trial requirements and the *Conseil Constitutionel*[5] found it discordant with the Constitution.

In the UK it was the ruling of the Supreme Court in *Cadder* v HM Advocate[6] which highlighted that the Scottish law does not meet in this respect the requirements of a fair trial as defined by the Grand Chamber of the ECtHR in its seminal judgment *Salduz* v Turkey[7].

By contrast, in other EU countries early access of suspects to a lawyer and prior to being questioned by police authorities has always been widely accepted as a fundamental safeguard against coercion, abuse of power and miscarriages of justice, ensuring fairness of the proceedings and admissibility of evidence collected at the pre-trial stage[8].

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[2] See the ECtHR judgment of 24.9.2009 in *Pischalnikov* v Russia, § 78: '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 rights…'.

[3] See, for example, *Chr. Lazerges*, Les désordres de la garde à vue, Revue de science criminelle et de droit pénal comparé (RSC) 2010, p. 275 et seq.

[4] Judgment of 14.10.2010, § 54.

[5] Decision of 30.7.2010.

[6] Judgment of 26.10.2010, § 32 et seq.

[7] Judgment of 27.11.2008; see *D. Giannoulopoulos*, 'North of the Border and Across the Channel': Custodial Legal Assistance and Reforms in Scotland and France, Criminal Law Review 2013, p. 369 et seq.

[8] See, for example, country reports for Germany by *Th. Weigend/Franz Salditt*, for Italy by *G. Illuminati/M. Caianiello*, for Greece by *Z. Dellidou*, in: Ed Cape/J. Hodgson/T. Prakken/T. Spronken (eds.), Suspects in Europe, Intersentia, Antwerp/Oxford 2005, p. 90, 140, 116, respectively.

Yet, even in this latter group of defence-friendlier member states, the role of the lawyer is not understood in the same way. In some states the lawyer has limited rights during the questioning of his client by police authorities or the investigating judge, i. e. he/she is not entitled to actively participate in the interview by asking questions, requesting clarifications, making statements or advising his client before answering specific questions etc., while in other states the active participation of the lawyer in the interview and the gathering of evidence is deemed necessary for efficiently exercising the right to legal assistance[9].

## III. ECtHR case-law on the right to legal assistance

The ECtHR has issued a remarkable number of judgments in respect to the right to legal assistance in criminal proceedings.

In *Murray* v UK[10], the Court stated that where national laws attach consequences to the attitude of an accused at the initial stage of police interrogation, Article 6 ECHR *'will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation'*.

The Court has developed its jurisprudence in *Salduz* v Turkey of 27.11.2008. This landmark judgment of the Grand Chamber is the first in a series of more recent rulings which clarified various important aspects of the right to legal assistance in criminal proceedings.

In *Salduz* the Court highlighted the importance of early access to a lawyer particularly where serious charges are brought and stated[11] that *'in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of the suspect by the police'*.

The concurring opinion of Judge *Zagrebelsky*, joined by Judges *Cassadeval* and *Türmen*[12], stated *'that it is … at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer and not only while being questioned'* and that *'the fairness of proceedings against an accused person who is in custody also requires that he be able to obtain (and that defence counsel to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on'*.

The above significant section of Judge Zagrebelsky's concurring opinion found its way into the Court's judgment in *Dayanan* v Turkey[13] the following year thus entering the main body of the Court's jurisprudence. In *Dayanan,* the Court found

[9] See the comparative study by *Ed Cape / Z. Namoradze / R. Smith / T. Spronken*, Effective Criminal Defence in Europe, Intersentia, Antwerp/Oxford 2010, p. 38 et seq.

[10] 10 Judgment of 8.2.1996, § 63.

[11] At 55.

[12] See also in this respect the concurring opinion of the Court's President *Nicolas Bratza.*

[13] Judgment of 13.10.2009, § 32.

a violation of Article 6 (3) despite the fact that the respondent had exercised his right to silence and made no admissions during his police detention[14].

An impressive number of other important judgments have been issued in recent years following the *Salduz* doctrine and specifying the Court's position on vital elements of the right to defence.

For example, in *Panovits* v Cyprus[15] and *Pischalnikov* v Russia[16], the Court has set high standards regarding the validity of a waiver of the right to legal assistance, noting 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'*.

In *Pavlenko* v Russia[17], the Court emphasised that priority must be given to the lawyer chosen by the suspect over a lawyer assigned to him by state authorities.

## IV. The Proposal for an EU-Directive on the right of access to a lawyer in criminal proceedings

### 1. The European Commission's Proposal

On June 8, 2011, the European Commission presented its Proposal for a Directive on the rights of access to a lawyer in criminal proceedings and on the right to communicate upon arrest[18]. The proposed Directive, which was launched in accordance with the new legislation procedure introduced by the Lisbon Treaty (2009), seeks to partly implement Measure C on legal advice and legal aid (excluding legal aid which will be dealt with separately) and Measure D on communications with relatives, employers and consular authorities of the *Roadmap* for strengthening procedural rights of suspected or accused persons in criminal proceedings presented by the Swedish Presidency on July 1, 2009[19].

The Roadmap's intention was to restore the balance in the European area of freedom, security and justice between numerous and highly intrusive prosecutorial instruments such as the European Arrest Warrant, which were rapidly introduced after the Amsterdam Treaty, and procedural rights of suspects and accused persons, which in sharp contrast had been systematically neglected[20].

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[14] The approach of the Court was more restrictive in *Brennan* v UK (judgment of 16.10.2001), § 48.

[15] Judgment of 11.12.2008, § 68.

[16] Judgment of 24.9.2009, § 78.

[17] Judgment of 1.4.2010, § 98-99.

[18] COM(2011) 326 final.

[19] The Roadmap was adopted by the Council of the European Union on 30.11.2009, OJ 2009 C 295/1; see, for example, *M. Jimeno-Bulmes*, The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, eucrim 209, p. 157 et seq., *J. Blackstock*, Procedural Rights in the European Union: a Road well travelled? EuCLR 2012, p. 23 et seq., *C. Morgan*, Where Are We Now With EU Procedural Rights? European Human Rights Law Review 2012, p. 428 et seq.

[20] See *V. Redding*, Vers une politique de l' UE en matière penal: état des lieux et perspectives, L' Observateur des Bruxelles, No 86/Octobre 2011, p. 8.

In this respect, it is worth noting the saga of the European Commission's *Proposal for a Framework Decision on certain procedural rights* of 28.4.2004[21], which was finally abandoned three years later due to vehement opposition by some member states disputing the legal basis as well as the need for such an instrument[22].

The Roadmap on procedural rights aims not only to ensure full implementation and respect of the standards set out in the ECHR and to improve uniformity of their application but also to expand existing standards where necessary. The Roadmap, which was adopted by the European Council on 30.11 2009, forms part of the (five-year) Stockholm Programme for *'an open and secure Europe serving and protecting the citizens'*[23].

The Stockholm Programme stresses[24] that *'the protection of the rights of suspected and accused persons is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union'*.

Two Directives of the European Parliament and the Council have already been adopted: The first Directive is on the right to translation and interpretation[25]; the second Directive is on the right to information in criminal proceedings[26]. Member states are currently adjusting their legislations to these Directives.

It is noteworthy that the Directive on the right to information includes a model Letter of Rights in its annex[27]. Its purpose is to inform suspects in a language they understand, especially those detained in police stations, in a timely and adequate manner about all basic procedural rights granted to them and thus facilitate the effective exercise of their defence.

The Draft Directive on the right of access to a lawyer presented by the European Commission was ambitious: Based on the case law of the ECtHR, it included a clear set of rules regulating essential aspects of this right, establishing common minimum standards for all member states.

The Draft Directive followed the *Salduz* doctrine by imposing a duty on state authorities to allow suspects to have access to a lawyer of their choosing as soon as possible and in any event prior to questioning by police or other competent authorities (Article 3). Lawyers would have the right according to Article 4 not only to be present but also to actively participate in the questioning of their clients as well as in other important investigative acts (identity parades, taking of fingerprints or DNA samples etc.).

Moreover, lawyers would be entitled to inspect the detention amenities of their clients in order to ensure that these do not prevent them from effectively exercising

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[21] COM(2004) 328 final.

[22] *T. Spronken*, EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach, EuCLR 2011, p. 217et seq.

[23] OJ 2010 C 115/1; *M. Plachta*, Stockholm Programme: Setting New Agenda for EU Justice and Home Affairs, International Enforcement Law Reporter 2010, p. 90 et seq.

[24] At 2.4. See *St. Manacorda*, Le droit pénal sous Lisbonne: vers un meilleur équilibre entre liberté, securité et justice? RSC 2010, p. 951 et seq.

[25] 2010/64/EU, OJ 2010 L 280/1.

[26] 2012/13/EU, OJ 2012 L 142/1.

[27] *T. Spronken*, EuCLR 2011, p. 223 et seq.

their defence rights (Article 4(4)). Limited derogations from the right of access to a lawyer would have to be authorised by a judicial authority (Article 8), while statements of suspects or other evidence acquired in breach of the right of access to a lawyer would be excluded as evidence on which a conviction can be based (Article 13(3)).

The Draft Directive also mandated that the right of access to a lawyer applies to European Arrest Warrant procedures including the assistance of a lawyer in the issuing member state (Article 11).

## 2. Reactions to the Proposal

The Commission's Proposal was hailed by lawyers' and human rights organisations as an important step towards the creation of a European area of liberty and justice[28].

The President of the Council of Bars and Law Societies of Europe (CCBE) *Georges Albert Dal* commented[29] on 8.6.2011 that the Proposal *'demonstrates the European Commission's commitment to ensuring that citizens have the same basic rights in their dealings with criminal justice systems, regardless of the country where the person is suspected or accused of having committed a criminal offence'*.

The Proposal also received positive comments in an *Opinion* of the Secretariat of the Council of Europe dated 9.11.2011.

However, it ran up against strong opposition by a number of influential states such as France, Belgium, the Netherlands, Ireland and the United Kingdom.

In a Joint Note to the Council of the European Union dated 21.9.2011[30], the opposing states expressed *'serious reservations about the Commission's approach'* claiming that the Draft Directive *'would hamper the effective conduct of criminal investigations and proceedings'* and complained that in a number of respects it *'goes beyond the current requirements of the ECHR'* and the Court's established case law while not taking properly into account '*the different ways in which Member State systems secure the right to a fair trial'*.

Much criticism was directed at the right of the lawyer to actively participate in investigative acts and to inspect the place of detention of his client and the exclusion of evidence acquired in violation of the rights established in the Directive.

Negotiations on the Commission's Proposal proved to be much more difficult than those on the previous two Directives as it is demonstrated by the fact that they lasted for an unusually long period.

The opposition of member states to the Commission's Draft Directive had a significant impact on the Council's approach. The Council favoured a 'slimmed-down' version of the Directive, in which safeguards for suspects in respect of scope

[28] See, for example, the *Law Society of England and Wales* Response of 13.7.2011 to the Ministry of Justice Discussion Paper on the EU Draft Directive on the right of access to a lawyer in criminal proceedings, available at www.lawsociety.org.uk .

[29] CCBE Press Release of 8.6.2011, available at www.ccbe.eu .

[30] Note by Belgium, France, Ireland, the Netherlands, the United Kingdom (14495/11).

and time of the right to access a lawyer, derogations from this right, confidentiality of communications between suspects and their lawyers and remedies for violations of their rights etc. were substantively watered down, falling clearly behind standards set by the ECtHR and thus contradicting the aims of the Roadmap on procedural rights.

The Council's proposed version of the Draft Directive prompted sharp criticism from lawyers' and human rights organizations. CCBE noted in its Response dated 6.6.2012[31] that the Council's text of 31.5.2012[32] *'clearly falls below the standards set by the jurisprudence of the European Court of Human Rights … thus contradicting the very purpose of the Roadmap'* and that it *'has drifted away … from both the intention and wording of the Commission proposal'*. In a Joint Statement dated 21.6.2012[33] the Criminal Defence Lawyers Associations of Germany, Switzerland, Austria and the Netherlands complained that the Council's proposal *'fails to meet the legal standards in almost every country within the European Union …* [and] *undermines the standards as set by the ECtHR in Salduz vs. Turkey'* claiming that *'policies such as this one originate from the repertoire of police states and are unworthy of the European Union'*[34].

The Council's narrow approach to the right of access to a lawyer was not shared by the European Parliament, which opted for a more liberal approach. In the Explanatory Statement of the LIBE Committee Draft Report on the Commission's Proposal Rapporteur *E. O. Antonescu*[35] noted that *'the absence of measures at EU level to promote the rights of citizens as suspects or accused in criminal proceedings in another Member State has created a sense of imbalance in EU justice policies'* and that *'*[t]*he need for a suspect or accused person to have access to a lawyer … is a key element in placing suspected or accused persons in a position to defend themselves properly'*, stressing that *'*[w]*ithout proper access to a lawyer, the effective exercise of other defence rights may remain illusory'*. The European Parliament used its enhanced legislative powers under the Lisbon Treaty and insisted on a long list of amendments to the Council's version whose purpose was to restore the balance and effectively protect defence rights throughout the European Union[36].

The trilogue negotiations between the Council, the Parliament and the Commission on the Draft Directive were concluded under the Irish Presidency on 28 May, 2013[37], and the text provisionally agreed upon[38] was endorsed by the Permanent Representatives Committee (Coreper)[39]. The final compromise text of the Direc-

[31] Available at www.ccbe.eu .

[32] Council document 10467/12.

[33] Available at www.forum-strafverteidigung.ch .

[34] See also the *European Criminal Bar Association's* 'Cornerstones on access to a lawyer in criminal proceedings', available at www.ecba.org, and the Summary Report of *Fair Trials International* of August 2012 'Towards an EU guaranteeing the right to a lawyer and to communicate with consular staff and others on arrest', available at www.fairtrials.net .

[35] Draft Report dated 25.1.2012 of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Rapporteur: *Eleana Oana Antonescu*), p. 34-35.

[36] See the LIBE Orientation Vote of 12.7.2012.

[37] See the press release of the Irish Presidency of 28.5.2013, available at www.eu2013.ie .

[38] Council's Document 10190/13.

[39] See the Council's press release of June 4, 2013 (10495/13).

tive, which reinstates some of the guarantees included in the initial wording of the Commission's Proposal, was endorsed by the Parliament on September 10, 2013.

The Council of Bars and Law Societies of Europe (CCBE) has closely followed the various stages of the negotiations and submitted comprehensive position papers[40] voicing the views of European lawyers in respect of the fundamental right of legal assistance for all suspects and accused persons. The same holds true for a number of lawyers' and human rights organisations, which filed influential statements opposing the Council's restrictive approach and advocating a broad wording of the new Directive[41].

## V. Issues in dispute

The debate on the Draft Directive has highlighted five major issues, which have been and most probably will continue to be in dispute.

### 1. Time and scope of the right of access to a lawyer

The earliest possible access to a lawyer is of paramount importance to guarantee that defence rights will be 'practical and effective' and not 'theoretical and illusory'.

Lawyers are not an impediment to the smooth and efficient operation of criminal investigations. An active defence lawyer not only protects the suspect from coercion and other abusive practices but contributes his part to getting the truth on the table in accordance with the law.

Abusive practices during police investigations produce inadmissible or unreliable evidence while early participation of a lawyer in investigating procedures ensures the quality and admissibility of evidence in subsequent proceedings.

The final text of the Directive imposes an obligation on Member States to ensure that suspects exercise their right of access to a lawyer 'without undue delay' and in any event before they are questioned by the police or other law enforcement or judicial authorities (Article 3 (2), Recital 20). Though the wording of the compromise text is slightly 'softer' than that of the Commission's Proposal, which provided for the exercise of this right 'as soon as possible', it respects the standards set by the ECtHR in *Murray*, *Salduz* and *Dayanan*[42].

Article 3(3) b-c and Recitals 26-27 of the final text aim at ensuring that during the investigation the lawyer will not be restricted to a role of a passive spectator simply witnessing the acts carried out by the competent authorities but will be entitled to actively participate during the interrogation of the suspect or accused person as well as any other investigative or evidence gathering acts such as identity parades, confrontations, experimental reconstructions of the scene of the crime or other.

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[40] See CCBE position papers of 21.1.2011, 8.7.2011, 29.9.2011, 6.6.2012, 22.1.2013, 24.5.2013, available at www.ccbe.eu .

[41] See, for example, the Joint Statements by Open Society Justice Initiative, Fait Trials International, Irish Council for Civil Liberties, ECBA and other organisations dated 7.5.2012, 6.11.2012, 15.4.2013, available at www.ecba.org, Position no. 02/2013, January 2013 of the Bundesrechtsanwaltskammer, available at www.brak.de .

[42] See above footnotes 10-13.

This provision is in line with the ECtHR case law. In *Pischalnikov*[43], the Court found a violation of Article 6 ECHR because the respondent had participated in an 'investigative experiment' without a lawyer, though he had requested the assistance of such.

However, reference to 'the procedures of national law' in accordance with which these rights shall be exercised entails a risk of them being watered down when implemented in member states where the role of the lawyer is rather passive during the investigation. This risk is counter-balanced to a certain extent by providing that such procedures should not 'prejudice the effective exercise and essence of the right concerned'.

The right of the lawyer 'to check the conditions in which the suspect or accused person is detained' and to 'have access to the place where the person is detained', which was provided for in Article 4(4) of the Commission's Proposal, though backed by the Parliament[44], was rejected by the Council. In the final compromise text it is only given a brief mention (Recital 30) that the lawyer 'should be able to raise a question to the competent authorities' regarding the detention conditions of his client. This is regrettable. In its Response of 29.9.2011[45] to the Five Member States Joint Note dated 21.9.2011[46], which criticised the Commission's Proposal to allow the lawyer to inspect detention amenities, the Council of Bars and Law Societies of Europe (CCBE) noted in this respect:

*'Presumably no signatory State would support inhumane conditions of detention, and all this measure provides is that there would be an immediate review by an independent person of any complaint in this regard…. In fact, signatory States might be expected to welcome such an efficient, timely and cost effective mechanism to monitor safe standards of detention. As such, this measure can be seen as a logical progression of steps taken to guarantee the Article 6 and Article 3 rights of the suspect".*

Indeed, inspection of the detention amenities of his/her client is fully in compliance with the lawyer's procedural role. The purpose of such a right would not be to substitute the competent authorities for the lawyers but to ensure that detained suspects are held in custody in circumstances allowing them to effectively exercise their rights in accordance with Article 6 ECHR[47].

In *Dayanan*[48] the ECtHR has stated in this respect that checking of the conditions of detention belongs (along with discussion of the case, organisation of the defence, collection of evidence, preparation for questioning, support of an accused in distress) to the *'fundamental aspects'* of a person's defence, which the defence lawyer *'has to be*

[43] See above footnote 16, § 62 et seq.

[44] See LIBE Orientation Vote of 12.7.2012, AM 50, p.31.

[45] At II(d), p. 4, available at www.ccbe.eu .

[46] At II, p.4; see above footnote 30.

[47] The Law Society of England and Wales noted in its Response to the Ministry of Justice of 13.7.2011, at 7, p. 13: ‚Granting lawyers routine access to the place where a person is detained is a starting point. In addition to the right to check detention conditions, the Society would at least add the right to check and to have maintained a custody record … a simple tool that focuses the minds of custodians and reduces inadvertent law breaking', available at www.lawsociety.org.uk .

[48] See above footnote 13, § 32.

*able to secure without restriction'*. Moreover, a right to inspect detention conditions would de-motivate police or other law enforcement authorities to engage in abusive practices rendering defence rights theoretical and illusory.

## 2. Derogations from the right of access to a lawyer

The Commission's Proposal (Article 8) provided for temporary derogations from the right of access to a lawyer when these would be justified exceptionally 'by compelling reasons pertaining to an urgent need to avert serious adverse consequences for the life or physical integrity of a person' and required 'a duly reasoned decision taken by a judicial authority on a case-by-case basis'. The Council supported a much broader wording of the derogations provision including the need to prevent 'substantial jeopardy to on-going criminal proceedings' as grounds to derogate from the right of access to a lawyer.

The final compromise text (Article 3(6), Recitals 32-33) adopted in principle the Council's position but includes some additional safeguards such as the obligation to remind the suspect of his right to remain silent, respect of defence rights and the privilege against self incrimination as well as a soft abuse clause ('abuse of this derogation would in principle irretrievably prejudice the rights of the defence'). Moreover, in Article 8(1) and Recital 39, a general proportionality clause regarding all derogation decisions is established.

The scope of the derogations is thus overly broad and open to abuse. Most questionable appears to be the derogation from the right of access to a lawyer in order to 'prevent a substantial jeopardy to on-going criminal proceedings' such as 'destruction or alteration of evidence or interference with witnesses'. It is not clear why access to a lawyer in general should jeopardise the investigation, as the Directive assumes. As *CCBE* rightly pointed out in its Position of 22.1.2013[49]:

*'Lawyers are not "enemies" of an efficient investigation. On the contrary, their timely and full involvement in investigative proceedings not only prevents abuses and miscarriages of justice but also contributes to establishing the true facts following fair procedures'*.

If there are exceptional situations where access to the lawyer of the suspect's choice could result in jeopardising the investigation, these should be addressed by denying access to this specific lawyer while allowing such access to another independent lawyer. This is the position of the *Council of Europe Secretariat* in its Opinion dated 9.11.2011, where it is stated in respect to Article 8 derogations in the Commission's Proposal that in derogation cases *'it would be desirable if Article 8(c) would mention explicitly the possibility to appoint an alternative lawyer'*. This would also be *'in line with the view of the Committee for the Prevention of Torture of the Council of Europe'*[50].

[49] At p.3, available at www.ccbe.eu .

[50] CPT Standards (CPT/Inf/E(2002) – Rev. 2011, p.11 at 41, available at www.cpt.coe.int .See also comments in the Joint Briefing of ECBA, Amnesty International an other organisations on the Draft Directive dated 15.4.2013, The Law Society of England and Wales, Response to the Ministry of Justice of 13.7.2011, at 8, p. 14-16, available at www.lawsociety.org.uk .

Indeed, denying access to any lawyer does not seem to serve a legitimate purpose in an investigation. On the contrary, it would motivate law enforcement authorities to take advantage of the absence of a lawyer in order to ill-treat suspects and extract (possibly false) confessions.

Most regrettable is the provision in the final compromise text (Article 8(2)) that a derogation decision may be taken not only by a judicial authority[51] but also by another competent authority thus allowing Police to exclude legal assistance at the most crucial part of pre-trial investigations. The fact that such decision shall be subjected to judicial review (Article 8(2)) does not sufficiently guarantee fair use of the vague derogation provision.

## 3. Confidentiality of communications

Confidentiality of all communications of a suspect or accused persons with his/her lawyer guarantees the effective exercise of defence rights and is a key element of a fair trial. This was reflected in the Commission's Proposal (Article 7, Recital 14), which imposed a duty on Member States to ensure confidentiality of such communications subject to no exception. This position was shared by the LIBE Committee of the Parliament, which insisted on 'absolute' confidentiality 'in all circumstances' that 'shall not be subject to any exception'[52].

This approach is in line with the case law of the ECtHR. In its judgment *Castravet* v Moldova[53] the Court stated:

*'One key element in a lawyer's effective representation of a client's interests is the principle that confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers … confidential communication with one's lawyer is protected by the Convention as an important safeguard of one's right to defence … Indeed, if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness …'*[54].

In *Brennan* v UK[55] the Court held that the presence of a police officer within hearing during the applicant's first consultation with his solicitor *'would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him'* and therefore infringed his right to an effective exercise of his defence rights (Article 6 (3)c ECHR).

Full confidentiality of communications between suspects or accused persons and their lawyer is proclaimed in a series of international and European legal instruments. In the *UN Havana Principles on the Role of Lawyers*[56] it is stated that *'all arrested,*

[51] The LIBE Committee requested that such a decision should be taken by an independent judicial authority issuing a well reasoned decision in writing; see LIBE Orientation Vote of 12.7.2012, AM 60, p. 36.

[52] LIBE Orientation Vote of 12.7.2012, AM 55, p.34.

[53] Judgment of 13.6.2007, § 49-50.

[54] See also *Sakhnovskiy* v Russia, judgment of 2.11.2010, § 102, 104.

[55] Judgment of 16.10.2001, § 58-63.

[56] See above footnote 1, § 8, 22.

*detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing of law enforcement officials'*. It is also stated that *'Governments shall recognize and respect all communications and consultations between lawyers and their clients within their professional relationship are confidential'*.

Article 93 of the *Council of Europe Standard Minimum Rules for the Treatment of Prisoners* provides: *'An untried prisoner shall be entitled … to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose … Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.'*[57].

Contrary to these internationally established standards the Council of the European Union presented a version of the Draft Directive which would enable derogations from confidentiality 'to prevent a serious crime' or where there would be 'sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the accused person'[58].

The attempt of the Council to restrict confidentiality of communications was harshly criticised by lawyers' and human rights organisations[59] as an attack on the very fundaments of the defence.

In the final compromise text, derogations from confidentiality, which have been heavily disputed during the trilogue negotiations, have been removed.

However, Recital 34 includes the following reservation: 'This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence. Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of this Directive'.

Furthermore, in Recital 35 it is stated: 'This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work carried out, for example by national intelligence services, to safeguard national security in accordance with Article 4(2) of the Treaty on European Union or that falls within the scope of Article 72 of the Treaty on the Functioning of the European Union, according to which Title V on an area of Freedom, Security and Justice shall not affect the exercise of the responsibilities incumbent upon Member

[57] See also Article 8 of the American Convention on Human Rights: '2. Every person accused of a criminal offence … is entitled, with full equality, to the following minimum guarantees: …(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.'

[58] See the Council's General Approach of 8.6.2012, Article 4(2) a-b.

[59] See, for example, the Joint Statement of Open Society Justice Initiative, Fair Trials International, ECBA and other organisations of 7.5.2012, p.8-9, available at www.ecba.eu, CCBE position papers of 22.1.2013, p. 2-3 and 24.5.2013, p. 4., available at www.ccbe.eu, Position no. 02/2013 January 2013 of the Bundesrechtsanwaltskammer, p. 4, available at www.brak.de .

States with regard to the maintenance of law and order and the safeguarding of internal security.'

Both the above reservations are misplaced.

Article 4 of the Directive deals with confidentiality of the lawyer/suspect communications and not with alleged participation of the lawyer and his/her client in criminal activity. Such criminal activity is not a matter of confidentiality and therefore its inclusion in the recitals regarding the latter is systematically misplaced. If there is sufficient evidence that the lawyer is engaged in criminal activity with the suspect, this would be grounds to exclude the lawyer under existing rules of national legislations. To allow the suspect lawyer to consult with his/her client and intercept their communications on the basis of 'objective and factual circumstances' indicating joint criminal activity would open the door to state authorities to breach confidentiality on vague allegations of criminal activities at a lower level of suspicions than that required to open criminal investigation proceedings against the lawyer and/or his/her client.

Systematically misplaced also, are the 'lawful surveillance', 'intelligence work', or 'internal security' reservations in Recital 35 of the final compromise text, which originate from the Council's General Approach version of the Draft Directive of June 8, 2012. As has already been noted, Article 4 of the Directive deals with the fundamental procedural right of access to a lawyer and to consult with him in full confidentiality. Lawfulness of police operations or intelligence work is not part of this *sedes materiae* and their inclusion in the Recitals addressing confidentiality is confusing and creates a significant risk of breaching a fundamental principle of the lawyer's profession and eroding a key element of a fair trial.

## 4. Remedies

The Commission's Proposal provided for in Article 13(2) that remedies for breaches of the right of access to a lawyer 'shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred. Article 13(3) established an inadmissibility rule of statements made by suspects or accused persons as well as of other evidence obtained in breach of the right of access to a lawyer or during an authorised derogation to this right. Such statements or other evidence could not be used against them 'unless the use of such evidence would not prejudice the rights of the defence'. In Recital 17 it was stated that statements made by the accused in the absence of his lawyer should not be used 'to secure his conviction'.

The Commission's Proposal relied on *Salduz*[60], in which the ECtHR ruled that 'even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction … must not unduly prejudice the rights of the accused under Article 6 … The rights of the defence will be in principle irretrievably

[60] See above footnote 11, § 72, 55.

prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'[61].

The Council of Europe Secretariat confirmed in its Opinion of 9.1.2011[62] that this provision, notwithstanding its 'somewhat circular' wording regarding the 'unless…' exception to the inadmissibility rule and a certain inconsistency between Article 13(3) and Recital 17, reflected in principle the Court's jurisprudence in *Salduz* and other cases.

However, in the Council's General Approach version of the Draft Directive (Article 11) the inadmissibility of evidence rule was deleted.

The LIBE Committee backed the inadmissibility rule of the Commission's Proposal in Article 13(3) albeit requesting the inclusion of a 'without prejudice to the national rules on admissibility of evidence' clause[63].

The exclusion of evidence acquired in breach of the right of access to a lawyer or during derogations to this right was one of the most debated issues during the trilogue negotiations, with some member states arguing that the inclusion of an exclusionary rule in the Directive would contradict their long established traditions of free evaluation of all evidence by the courts having the exclusive responsibility to rule on admissibility of evidence and the possible impact of tainted evidence on the overall fairness of proceedings.

The final compromise text of the Directive states (Article 11(2)) that '[w]ithout 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 a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.'

The wording of Recital 51 appears to be stronger stating that 'in this context, regard should be had at the case-law of the European Court of Human Rights, which has established that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. However, at the end of this Recital it is further stated: this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge:'

The final compromise text is regrettably weak and offers no sufficient protection against the use of evidence acquired in breach of the right of access to a lawyer or while the suspect was denied such access on the basis of the (vague) derogation provisions of Article 3(6) of the Directive. Effective remedies against breaches of the right of access to a lawyer are of the utmost importance to ensure fairness of

[61] See the Proposal's explanatory memorandum, § 30.
[62] § 21, p. 8-9.
[63] See LIBE Orientation Vote of 12.7.2012, AM 80, p. 44.

proceedings. No evidence acquired in violation of this right should be admitted and relied upon in subsequent proceedings to convict an accused person. Admitting such tainted evidence undermines the fair character of criminal proceedings and opens the door for miscarriages of justice. Moreover, it does not dissuade police and prosecuting authorities from applying abusive practices and systematically violating suspects' rights.

The ECtHR has stressed in numerous judgments that a conviction based on such evidence impairs the right to a fair hearing notwithstanding the fact that the accused person and his defence counsel have had the opportunity to challenge this evidence in subsequent trial hearings. In *Panovits* v Cyprus, for instance, the Court found a violation of Article 6(3) c in conjunction with Article 6(1) of the Convention despite the fact that the respondent had a chance to challenge the voluntariness and admissibility of his initial statement taken shortly after his arrest by the police authorities in the absence of a lawyer in a separate trial within the main trial and although it was not the sole evidence on which his conviction was based[64].

It should be noted that an exclusionary rule as provided for in Article 13(3) of the Commission's Proposal would not be contrary to national rules allowing the unrestricted submission of all evidence to the courts to be evaluated, since it would only prevent, as a rule, the use of evidence acquired in the absence of legal assistance as the basis for a conviction of the accused person.

## 5. European Arrest Warrant procedures

Individuals involved in European Arrest Warrant (EAW) or judicial assistance procedures are often in need of legal advice in both the requested and the requesting state.

The traditional position of the ECtHR has been that extradition proceedings in the requested state do not fall, as a rule, under Article 6 of the Convention, because they are limited to the surrender of a person to the requesting state where he will face criminal charges[65].

On the other hand, EAW or judicial cooperation proceedings applying EU legal instruments fall under the Charter and therefore defence rights must be observed in accordance with Articles 47 and 48 of the EU-Charter.

Furthermore, judicial cooperation procedures may very well have an impact on the 'main' criminal proceedings and therefore care must be taken to ensure that the evidence gathered in the course of such proceedings does not violate defence rights.

In *Stojkovic* v France[66] the ECtHR ruled that a suspect's statement taken in Belgium in the absence of a lawyer – despite his request to be assisted by a lawyer- following a request by a French investigating judge, which subsequently formed the basis for his conviction by a court in France, violated his right to legal assistance in

[64] Judgment of 11.12.2008, § 76. See also in this context *Pischalnikov* v Russia, judgment of 24.9.2009, § 90, *Pavlenko* v Russia, judgment of 1.4.2010 § 117, *Šebalj* v Croatia, judgment of 28.6.11, § 261 et seq.

[65] See, for example, the Court's decision in *Stapleton* v Ireland of 4.5.2010, § 27 et seq.

[66] Judgment of 27.10.2011, § 50 et seq.

France, notwithstanding the fact that the Belgian legislation applicable at that time did not provide for legal assistance in such circumstances.

The Commission's Proposal on the right of access to a lawyer established such a right in EAW procedures (Article 11, Recitals 20-23), which applied not only to the procedures in the executing but also in the issuing member state, where the person to be surrendered should have a right to appoint a lawyer whose task would be 'limited to what is needed to assist the lawyer in the executing member state'. The Council proposed a narrower wording of the provision regarding the scope of this right in the executing member state while wholly rejecting the application of this right in the issuing member state[67]. The Parliament backed the Commission's Proposal suggesting a broader wording regarding the role of the lawyer in the issuing member state[68].

Though the final compromise text (Article 10, Recitals 43-48) is overall a weaker version of the initial provisions in the Commission's Proposal, it does include the right to legal assistance also in the issuing member state, which is a welcome progress over the Council's version of the Draft Directive in that respect.

Experience shows that dual representation of requested persons in both the executing and the issuing member state ensures more effective protection of their rights[69] and facilitates smooth functioning of the EAW mechanism with obvious savings in court time and costs[70].

## VI. Conclusion

The lengthy and cumbersome negotiations over the new Directive on the right of access to a lawyer have clearly demonstrated the added value of establishing new EU-wide legal instruments on procedural rights in criminal proceedings with a view to harmonising minimum standards and turn the area of liberty and justice proclaimed in the EU treaties from a legal vision to an everyday life reality[71]. The final compromise text of the new Directive may not reflect a number of liberal proposals, which would enhance justice and liberty in the common European area. Still, it is a step in the right direction on the long road ahead to achieving effective defence all over Europe. Protecting individual rights in criminal proceedings will continue to be an on-going project for liberty for years to come. Liberal minded Europeans are called upon to join forces and promote the core values of our democratic societies.

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[67] Article 9 of the General Approach version of the Directive.

[68] AM 73-77, p. 41 et seq., of the LIBE Orientation Vote of 12.7.2012.

[69] As *Malcom Hay*, a London based antiques dealer arrested by UK authorities in 2007 to execute a Greek EAW on charges of illicit handling in antiquities, who successfully opposed his surrender to Greece before the Horseferry Magistrates Court, because he had not been duly summoned by the Greek Prosecutor, put it: 'In the position such as I was in, at my arrest, you need good lawyers and money, and both quickly. Otherwise you do not stand a chance', Antiquities Trade Gazette 18.2.2008, available at www.antiquesgazette.com .

[70] See *JUSTICE*, European Arrest Warrants – Ensuring an effective defence, London 2012, p. 13 et seq., 42 et seq.

[71] House of Lords (European Union Committee) Report on the European Union's Policy on Criminal Procedure, 26.4.2012, p. 23 et seq., *J. Vogel / H. Matt*, Gemeinsame Standards für Strafverfahren in der Europäischen Union, Strafverteidiger 2007, p. 206 et seq.