JOINT STATEMENT

Joint Statement on the Directive on the Right of Access to a Lawyer and to Communicate Upon Arrest

For Trilogue Discussions on Articles 1 to 6

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This joint statement makes comprehensive recommendations for amendments to the European Union Council's General Approach to the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Measure C1) to ensure that the Directive upholds the minimum human rights standards for fair trials.

Introduction

On 31 May 2012, the Council of the European Union Presidency published its general approach to the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.[1] On the 12th July 2012 the European Parliament published its orientation vote on the Directive.[2] Trilogues between the Council, Parliament and Commission are now taking place to reach a compromise between the three positions. In this statement, our organisations make nine recommendations in relation to the first six articles which are currently under discussion in order to ensure the final Directive meets the minimum standards required to protect fundamental rights and in particular the right to a fair trial. We continue to have concerns about application to the European arrest warrant, derogations, and remedies but will address these in a supplementary briefing to coincide with progress on to the final articles of the Directives in the Trilogues.

Our organisations reaffirm our support for the European Union's work to develop common minimum safeguards for people who are suspected or accused of crimes. The Swedish Roadmap on Procedural Rights, of which the draft Directive is a component, has the stated intention *"to expand existing standards*" including those found in the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (CFR) and other relevant regional and global instruments and *"to make their application more uniform"*. Recital 39 to the draft Directive reiterates that *"the level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted by the European Court of Human Rights."*

It is clear that the three institutions are making genuine efforts to adopt an instrument which will contain concrete and genuine procedural safeguards and we welcome the progress already being made during the trilogue meetings.

[1] Council of the European Union, Presidency, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – General Approach*, 10467/12 (31st May 2012) [DROIPEN 67 COPEN 129 CODEC 1459]

[2] European Parliament, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Orientation Vote,* 908151 (12th July 2012)

However, although the Commission's original proposals[3] were solidly grounded in the jurisprudence of the European Court of Human Rights (ECtHR), subsequent amendments by the Council signal some significant departures from existing ECHR protections. Some of the amendments that continue to be proposed potentially undermine the purpose of the Directive and some appear to contravene the ECHR. If these amendments remain in the adopted text of the Directive, the level of protection provided by the Directive would fall significantly below the minimum standards required by the ECHR and by extension the EU Charter, the principles of which the Directive must be in accordance with in order to be adopted.

Considering that the Directive is intended to provide practical and effective protection of procedural safeguards in criminal proceedings and to contribute to the prevention of ill-treatment, we are particularly concerned about:

1. Article 2, removal of safeguards for people who are not formally designated as suspects or accused persons;
2. Article 2, removal of safeguards for people accused of minor offences during the pretrial period
3. Article 3, focus on 'interviews' rather than questioning;
4. Article 3, limiting access to a lawyer by omitting the requirement to assist with provision for voluntary attendees and allowing procedures to commence without waiting for a lawyer;
5. Article 3, limiting the participation of lawyers in interviews and hearings;
6. Article 4, inadequate safeguards for derogations from confidentiality;
7. Article 5, removal of communication with third person;
8. Article 5, no notification of appropriate adult for vulnerable suspects;
9. Article 6, ensuring the Vienna Convention on Consular Relations is fully complied with.

Article 2 - Scope

(1) Removal of safeguards for people who are not formally designated as suspects or accused persons

[Recital 14]

Article 10 of the Commission Proposal included explicit protection of the rights of people other than suspects and accused. The General Approach and continued position of the Council has deleted this from the body of the Directive and partially placed it into recital 14:

> *"Any person other than a suspect or accused person, such as a witness, who is interviewed by the police or other enforcement authority in the context of criminal proceedings, should be granted the rights for suspects and accused persons provided*

[3] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest,* COM(2011) 326 final (14 June 2011)

for under this Directive if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence".

This should be reinstated into the Directive. It is essential that all people who are *in fact* accused or suspected of a criminal offence be provided the rights in this Directive, regardless of their formal designation. From the standpoint of a person deprived of their liberty, questioning during custody is experienced as a continuum and it is crucial that any statements made by a person before he has been made aware that he is a suspect or an accused person may not be used against him.

The Open Society Justice Initiative, JUSTICE and other organisations have been involved in extensive comparative research on this issue across Europe and have found that calling a suspect by another name, such as 'witness' or 'person of interest' is a common tactic used by police in many Member States to avoid providing suspects with their due fair trial rights.[4] It is common for police to use their power to either classify persons as non-suspects, or to delay officially charging them. This can have an enormous impact on the ability of the person to understand their situation and rights, as they are not provided with the same information, assistance and rights as formal suspects.

Furthermore, reinstating this recital into the Directive will ensure compliance with the ECHR. In *Shabelnik v Ukraine,* the ECtHR held that the right to legal assistance does not depend on the formal designation of the person.[5] Article 6 is applicable from the point that the person's position is significantly affected, even if they are not formally placed into custody as a suspect or accused person.[6] A person's position is significantly affected when they are charged, which for the purposes of Article 6(1) of the ECHR, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[7] The Court in *Zaichenko v Russia* held that the right to legal assistance arises once freedom of action has been curtailed.[8] The ECtHR similarly found violations in *Brusco v France,* in which a person who was interviewed as a witness but was clearly a suspect confessed to a crime without the presence of a lawyer.[9]

The removal of this important issue of application of the Directive to a recital signals it has little importance. Yet the case law and our research demonstrates this is not an academic issue but one occurring in practice. Suspects should have the full protection of the Directive to ensure that a status change is properly accompanied by procedural rights.

[4] Cape, Namoradze, Smith and Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010), pp. 615, 620, 623.
[5] *Shabelnik v Ukraine,* ECtHR, App. No. 16404/03, Judgment of 19 February 2009, at para.57
[6] *Shabelnik* at para. 57
[7] *Zaichenko v Russia,* ECtHR, App. No. 39660/02, Judgment of 28 June 2010, at para. 41
[8] *Zaichenko* at para. 41
[9] *Brusco v France,* ECtHR, App. No. 1466/07, Judgment of 14 October 2010 at para. 44-45

Recommendation: Recital 14 should be reinstated into the body of the Directive at article 2. In addition, the article should include the following requirement:

> *"Member States shall ensure that any statement made by such a person when he is in fact being treated as a suspect or an accused person, but before he is made aware of this, may not be used against him."*

(2) Removal of safeguards for people accused of minor offences during the pretrial period

[Article 2(4) / Recital 9-10a]

The General Approach at Article 2(4) restricts access to a lawyer for people accused of minor offences during the pretrial period, and in our view contravenes the ECHR and CFR:

> *"In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot or shall not be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters".*

Recitals 9 and 10 provide examples of what are minor offences, including:

> *"[T]raffic offences which are committed on a large scale and which might be established following a traffic control … minor offences which are committed in a prison context … minor offences committed in a military context and dealt with in first instance by a commanding officer … "*

These amendments extend the exception for minor offences that were agreed in Measures A and B. The exclusion of the right to a lawyer in Measures A and B is intended to apply in relation to minor offences imposed by an authority other than a criminal court, not only in the pretrial period but which never have a criminal process through the courts at all, unless the convicted person requests an appeal, and the same approach should be taken here. On-the-spot or through-the-post fines – which do not require attendance at the police station, interrogation or attendance at court at all – should be what is envisaged by this article. The justification for this exclusion, which we can accept, is that if someone is accused in these circumstances they would be able to seek legal advice themselves before accepting the conviction or fine because an administrative authority could not detain and/or interrogate them. If this is what is intended, there is no need to exclude other types of offence because the circumstances are outside the scope of this Directive, which determines when the State *shall ensure* access to a lawyer.

The Directive cannot exclude conduct from the protection of article 6 ECHR when the ECtHR has held that the concept of a criminal charge has an

autonomous meaning, independent of the categorisations employed by the national legal systems of the Member States.[10] One aspect of this definition is that a "charge" arises against a person suspected of a minor offence as soon as the situation of the suspect has been substantially affected.[11] This means the right to counsel arises at the very beginning of the investigation period, as this is the point at which the person is seriously investigated for the offence, the prosecution case is compiled and the person may be informed that they are suspected of having committed an offence.

Furthermore, the Directive's current explanation and examples of what are "minor offences" are also at odds with the ECtHR's definition of "criminal". The ECtHR has held that offences classified as minor, petty, regulatory, or administrative may still be considered to be criminal under the Convention[12] if they meet one of three criteria, namely (a) the classification of the offence in domestic law; (b) the nature of the offence; and (c) the severity of the potential penalty which the person concerned risks incurring.[13] Any one of these criteria may make the charge criminal, it does not need to satisfy all of them.[14]

Applying these three criteria in *Öztürk v. Germany*,[15] the ECtHR found that although a traffic offence was described by the state as being a mere "regulatory offence" and the penalty was a fine, the Court held that it was a criminal charge for the purposes of Article 6. The Court took note of the fact that this offence was still considered a crime in most Member States and that the penalty for the office had a punitive and deterrence effect, thus giving it a criminal character. In other cases, the ECtHR has found a range of road traffic offences to fall within the ambit of criminal matters, including those punishable by fines or restrictions concerning the driving license such as penalty points or disqualifications.[16] It has also held a minor offence of causing a nuisance to be a criminal matter.[17]

Therefore, whilst article 2(3) seeks to exclude the *requirements* upon the Member States contained in the Directive by identifying procedures where the state will not be obliged to provide access to a lawyer, the EU cannot suggest these minor offences are excluded from the ambit of article 6 ECHR protection entirely. Yet Article 2(4) currently makes this assertion by denying a person accused of a minor offence access to a lawyer until the matter is before a court, in contravention of the ECHR. It was made clear in *Imbrioscia v Switzerland*[18]

[10] *Adolf v. Austria*, ECtHR, App. No. 8269/78, Judgment of 26 March 1982 at para. 30.
[11] See, for example, *Deweer v. Belgium*, ECtHR, App. No. 6903/75, Judgment of 27 February 1980 at para. 42 and 46; and *Eckle v. Germany*, ECtHR, App. No. 8130/78, Judgment of 15 July 1982 at para. 73.
[12] *Öztürk v. Germany*, ECtHR, App. No. 8544/79, Judgment of 21 February 1984, at para. 49.
[13] *Engel and Others v. the Netherlands*, ECtHR, App. No. 5100/71, Judgment of 8 June 1976 at para. 82, 83. These principles were subsequently upheld by a number of Grand Chamber judgments, such as: *Ezeh and Connors v. the United Kingdom,* ECtHR, App. Nos. 39665/98 40086/98, Grand Chamber Judgment of 9 October 2003 at para. 82.
[14] *Jussila v. Finland*, ECtHR, App. No. 73053/01, Grand Chamber Judgment of 23 November 2006, at para. 31.
[15] *Öztürk* at para. 46-53.
[16] *Lutz v. Germany*, ECtHR, App. No. 9912/82 Judgment of 25 August 1987 at para. 182; *Schmautzer v. Austria*, ECtHR, App. No. 15523/89, Judgment of 23 October 1995; *Malige v. France*, ECtHR, App. No. 27812/95, Judgment of 23 September 1998.
[17] *Lauko v. Slovakia*, ECtHR, App. No. 26138/95, Judgment of 2 September 1998.
[18] *Imbrioscia v Switzerland,* ECtHR, App. No. 13972/88, Judgment of 24th November 1993

that the protections under article 6 ECHR extend to pre-trial proceedings and that the right to a lawyer applies in those pre-trial proceedings.[19]

It seems to our organisations that the attempt to exclude *types* of offences rather than focusing on what *procedures* are necessary to pursue a criminal case have caused unnecessary complexity and risk breaching the right to a fair trial. The right to a lawyer is enshrined in the jurisprudence of the ECHR to prevent violation of the privilege against self-incrimination. It is important to recall what the Directive is aiming to provide for. The General Approach agrees that the Directive will apply,

(i) Pursuant to article 2, once a suspicion that a person has committed a criminal offence has arisen; and

(ii) Pursuant to article 3, when a person is to be questioned (save for preliminary questioning as defined in the Recital);

(iii) When their presence is required at an evidence gathering procedure;

(iv) When they appear in court; and/or

(v) When they are deprived of their liberty.

If none of these activities takes place in the context of a minor offence, the Directive will not apply anyway. If a suspicion has arisen and any of these activities are necessary to pursue an investigation or prosecution, article 6 ECHR demands the right of access to a lawyer.

It also seems that the question of costs must be influencing the exclusion of offences because Member States are focusing on having to provide lawyers in a much greater set of circumstances than they currently do. This measure is about giving effect to the right to a lawyer and not the costs implications of doing so, which are to be considered at a later stage. Concern about the costs of representation should not influence the opportunity to create proper protection of suspects in the EU.

In any event, as drafted, in some Member States these exclusions will be unworkable since it may not be known whether the offence can be dealt with or a sanction imposed by a competent authority other than a court unless and until the suspect has been interviewed by the authority.

Recommendation: Article 2(4) should be removed as either its intended meaning is not communicated by the current draft and is not necessary at all, or its exclusion of pretrial advice is unlawful. Article 2(3) should make clear that

[19] With respect to pre-interrogation advice and during interrogation see *Salduz v Turkey,* ECtHR, App. No. 36391/02, Judgment of 27th November 2008 (GC); *Brusco, op cit.* and *Sebalj v Croatia,* ECtHR, App. No. 4429/09, Judgment of 28th June 2011; and with respect to preparation of the defence pre-trial *Dayanan v Turkey,* ECtHR, App. No. 7377/03, Judgment of 13 October 2009.

all people accused or suspected of any criminal matter – no matter how minor – can exercise their full and unrestricted fair trial rights, including the right to a lawyer during the pretrial stages of proceedings where the procedures in the Directive are envisaged.

Article 3 – The right of access to a lawyer in criminal proceedings

(3) Focus on 'interviews' rather than questioning

[Recital 15 / Articles 3(2)(a), 3(3)(a), 3(3)(b)]

The General Approach introduced the phrase "official interview" into the Directive, a development that is of great concern from a human rights perspective.

Recital 15 states:

> *"An official interview means the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the place where it is conducted or the stage of the proceedings when it takes place. This notion should not encompass preliminary questioning by the police or other law enforcement authorities […] such as when a person has been caught red-handed, and whose primary purpose is the identification of the person concerned or the verification of the possession of weapons or other similar safety issues."*

This is a hazardous use of wording, suggesting that it may be acceptable to conduct *unofficial* interviews, at which the suspect does not have access to the rights in the Directive. We understand that agreement may have been reached during the trilogues for the word 'official' to have been removed. We welcome this constructive approach. Nevertheless, concerns still remain about limiting the application of the Directive to 'interviews.'

Our research has revealed that it is a common practice for some police to question suspects informally in order to deprive them of their rights. Examples include conducting informal questioning of suspects under a national framework of "informational questioning", "short-term arrest", or "oral interviews", or informing the suspect that he has the opportunity to make a written "explanation" before formally taking him in to custody. We have found that police officers can try to have a "chat" before the lawyer arrives, trying to make the suspect trust them, or depending on the crime, intimidate or patronise them.[20]

[20] See the Executive Summary of Cape, Namoradze, Smith and Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010) at page 8: http://www.soros.org/initiatives/justice/articles_publications/publications/criminal-

Moreover, in jurisdictions where inferences from silence can be used at trial as evidence against a person, early questioning of suspects without affording them the right of access to a lawyer can have serious detrimental effects on their ability to mount a defence at a later stage.

We agree that during preliminary questioning for the purposes of identification or immediate safety issues – such as when a police officer asks a motorist his or her name or stops a person on the street who is carrying a gun – that it is impracticable to expect a lawyer to attend. However, the best way to ensure this Directive excludes those particular circumstances is to draft a clear and precise exception clause to cover them. It is disproportionate and potentially dangerous to instead introduce the idea of official interviews, making the provision of fair trial rights the exception, rather than the rule. The Orientation Vote has included this in its recital 8(a) and an encouraging compromise text has emerged from the trilogues. With this in place, we cannot see why there is a need to continue defining questioning as 'interview,' yet retaining it risks real harm to the protection of suspects.

Recommendation: Delete Recital 15. Replace all references to "official interviews" throughout the text of the Directive with the word "questioning" or "questioned". Include an exception clause into the body of the Directive that reads:

> *"Preliminary questioning by law enforcement authorities of people who have not been deprived of their liberty, which seeks only to identify the person or to deal with immediate safety issues, is not excluded from the scope of this Directive."*

(4) Limiting access to a lawyer by omitting the requirement to assist with provision for voluntary attendees and allowing procedures to commence without waiting for a lawyer

[Recitals 16, 17 and 20]

Recital 16 of the General Approach, together with article 3(4) provides that Member States are required to make the necessary arrangements to ensure that the person can effectively exercise their right of access to a lawyer. We welcome the inclusion of this obligation.

However, Recital 17 provides that where a person is not deprived of their liberty, whilst Member States should not prevent suspects from exercising their right of access to a lawyer, they would not need to 'actively pursue' that the suspect will be assisted by a lawyer. This does not accord with the fact that the

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defence-europe-20100623/criminal-defence-europe-summary.pdf . See also the Germany Country Report at page 17, the Hungary Country report at pages 11 and 51, the Poland Country Report at page 12, and the Turkey Country Report at pages 29-30. All Country Reports available here: http://www.unimaas.nl/default.asp?template=werkveld.htm&id=4T1475L07W4211EF1376&taal=en

person should have access to a lawyer irrespective of whether he is deprived of liberty or not, as called for by the European Parliament in its Orientation Vote. Furthermore it could lead to circumstances where a suspect who has attended the police station or court voluntarily to be interviewed by the police or stand trial is in a worse position than a suspect who has been detained. Suspects may not know which lawyer to contact, or how. If they are in an interview with the police and decide that they need the assistance of a lawyer, the police should facilitate this. Were the police to not 'actively pursue' this request, could they simply ignore it? It is not clear what this wording means, nor whether it complies with article 3 of the Directive on the Right to Information in Criminal Proceedings,[21] which requires all suspects to be notified of their right to a lawyer. All suspects should be given the same assistance with how to contact a lawyer, irrespective of whether they are detained, in order to ensure that their right is effective.

Recommendation: Delete the phrase 'but it would not need to actively pursue that the suspect or accused person who is not deprived of his liberty will be assisted by a lawyer.'

Recital 20 of the General Approach allows Member States to determine whether, and if so, how long the authorities should wait for a lawyer to arrive before starting an interview or an investigative or other evidence-gathering act. Recital 20 states:

> *"The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting an interview or an investigative or other evidence-gathering act."*

This article potentially undermines the right to access a lawyer to such a degree that it could render it null and void. It creates a loophole for authorities to deny the basic rights of fair trial; police can inform a person of their right to a lawyer but then proceed with questioning them without a lawyer present. In order for the right to a lawyer to be fully meaningful in practice, it is essential that authorities must wait for that lawyer to arrive before commencing questioning or an investigative or evidence-gathering act.

The ECtHR has also emphasized the importance of respecting a person's right to counsel and waiting for the lawyer to arrive. In *Pishchalnikov v Russia,* the ECtHR stated that an accused who has requested legal assistance should not be subject to any further interrogation by the authorities until he receives legal assistance, unless the accused himself initiates further communication or conversations with the police or prosecution.[22]

[21] 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 L 142/1 (1st June 2012)
[22] *Pishchalnikov v. Russia,* ECtHR, App. No. 7025/04, Judgment of 24 September 2009, at para. 79.

Recital 20 should be deleted in its entirety. Any extraordinary situation in which Member States are concerned that they will be required to wait for an unreasonable amount of time, can be adequately dealt with under the separate derogations clause (Article 7) which strictly circumscribes the general conditions under which derogations are permissible.

Recommendation: Delete Recital 20.

(5) Limiting the participation of lawyers in interviews and hearings

[Article 3(3)(b) / Recitals 20 and 21]

Article 3(3)(b) of the General Approach contains a significant new restriction on the ability of people to access practical and effective legal assistance, by allowing the Member States to regulate how the lawyer can and cannot participate during the interview:

> *"Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when he is officially interviewed."*

Recital 20 provides further that:

> *"The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States."*

Recital 21 contains guidance about what participation should be permitted by a lawyer in an interrogation, but it is undermined by the fact that this is explicitly limited to regulations determined by the Member States. Recital 21 states that the lawyer should be able to:

> *"[I]n accordance with procedures in national law, ask questions, request clarification and make statements".*

These provisions open the door for Member States to limit the activities a lawyer can undertake. The Commission Proposal recognised in article 4(2) that in order for the right to a lawyer to be practical and effective, it is essential that lawyers are not limited or hampered in their provision of legal assistance. They must be able to ask questions, request clarification, make statements, and provide advice to their client during the interview. The mere *presence* of a lawyer during an interrogation is of limited value to a suspect or accused person and may actually disadvantage them. Indeed, some Member States have experimented with systems in which the lawyer is permitted to attend the interrogation, but must sit in the back of the room and cannot communicate with

their client. This is wholly unsatisfactory, and can place the suspect in an even worse position than they would have been in with no lawyer.

Furthermore, the wording of Article 3(3)(b) and Recitals 20 and 21 appear to overlook the fact that clear standards have been set down by the ECtHR on the role of lawyers. In *Dayanan v Turkey,* the ECtHR clarified the reasons behind early access to legal assistance and the scope of activities that must be permitted during the pre-trial stage:

> *"Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, 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".*[23]

The ECtHR also recognized in *Ocalan v Turkey* that early access to legal assistance, and the ability to meet with and give instructions to a lawyer, are necessary to allow detainees to challenge the lawfulness and length of their detention.[24] The range and objectives of legal assistance which the ECtHR recognised in these cases essentially reflects the duties set out in the UN Basic Principles on the Role of Lawyers, which include:

> *"Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients" and "Assisting clients in every appropriate way, and taking legal action to protect their interests".*[25]

Furthermore, the General Approach has removed from article 3(3)(b) the role of a lawyer during hearings, which was expressly stated in article 4(2) of the Commission Proposal. Article 6 ECHR expressly provides for a person to defend himself through legal assistance. It would be remarkable if the EU did not extend this right to representation at hearings before the courts and did not allow the lawyer to effectively defend the accused person.

Recommendation: Delete Recital 20. Delete the phrase "in accordance with procedures in national law" in Article 21. Amend Article 3(3)(b) to incorporate the wording of Recital 21 and extend to hearings to read:

> *"Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and participate fully to protect the rights of the accused person,*

[23] *Dayanan op cit.* para. 32
[24] *Ocalan v Turkey,* ECtHR, App. No. 46221/99, Judgment of 12 May 2005, paras. 66, 70.
[25] *Basic Principles on the Role of Lawyers*, Principle 13.

for example by asking questions, requesting clarification, providing advice and making statements, when he is interviewed and during hearings."

Article 4 - Confidentiality

(6) Inadequate safeguards for derogations from confidentiality

[Article 4(2) / Recitals 23-24]

Article 4(2) represents a striking departure from the fundamental rule that communications between suspects and lawyers should be confidential. It states:

> *"In exceptional circumstances only Member States may derogate from paragraph 1, when, in the light of the particular circumstances, this is justified by one of the following compelling reasons:*
>
> *(a) there is an urgent need to prevent a serious crime; or*
>
> *(b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person".*

This exception disregards the strong legal standards of confidentiality, which have been emphasized by the ECtHR and other international standard-setting bodies for many years. The ECtHR has stated that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial".[26] In the case of *Brennan v UK,* the ECtHR held that the presence of a police officer within hearing during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defense rights. The ECtHR explained that "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".[27]

The principles of confidentiality and adequate time have been verified by various organs of the United Nations. In rule 93 of the *Standard Minimum Rules for the Treatment of Prisoners*, the UN stressed that a person accused of a crime should have access to counsel and that their communications should be held out of hearing range from the authorities:

> *"For the purposes of his defense, an untried prisoner shall be allowed to … receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and*

[26] *Brennan v. the United Kingdom*, ECtHR, App. No. 39846/98, Judgment of 16 October 2001, at para. 58; *S v. Switzerland,* ECtHR, App. No. 12629/87, Judgment of 28 November 1991 at para. 48
[27] *Brennan v. the United Kingdom*, *op cit*, at para. 58

his legal adviser may be within sight but not within the hearing of a police or institution official".[28]

The *UN Basic Principles on the Role of Lawyers* also reiterate the right to adequate time with a lawyer and confidential communications. Principles 8 and 22 state:

> *"All arrested, 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".*

Whilst it may be justifiable in exceptional circumstances for a derogation to confidentiality to be sought, the conditions for approval of such a derogation must be far stricter than currently provided in the General Approach to ensure that the right of access to a lawyer is effective in practice.

Recommendation: Amend article 4(2) to provide the following:

(i) Serious crime must be defined to include only those offences which occur during a public emergency threatening the life of the nation and demonstrate an urgent need to prevent injury to life or physical integrity of persons;

(ii) There must be established facts that the lawyer is actively engaged in criminal conduct with the suspect;

(iii) The decision to derogate must be taken by a judicial or competent authority *independent* of the proceedings;

(iv) The evidence obtained through the surveillance must not be admissible in the current proceedings against the suspect;

(v) Where the lawyer-client communication does not provide information to support a continuing derogation, the surveillance must cease and the evidence obtained must be destroyed.

[28] See http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf. The Rules were Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Pursuant to rule 95, these rules apply not only to prisoners but also to those on remand and other untried detainees.

Article 5 – the right to have a third person informed upon deprivation of liberty

(7) Removal of communication with third person

[Article 5(1), Recital 25]

The Commission Proposal at article 5(1) provide that a person has the right to communicate with at least one person named by him as soon as possible upon deprivation of liberty. The General Approach has however limited this right to only allow a suspect to have at least one person "informed" of their arrest. This inexplicably renders the right ineffective. The purpose of the right is to ensure that the suspect is able to notify a relative or employer of their detention and to be able to speak with them themselves. Detention can be a frightening experience and the possibility to speak with a relative can provide a safeguard where there are welfare or ill treatment concerns and assist with obtaining a lawyer. Where there are concerns that to allow communication could risk interference with the investigation of the case, this would have to be justified in accordance with article 7. There should not be a refusal of the right in all cases.

Recommendation: Amend article 5(1) to allow the right to communicate with a third person.

(8) No notification of appropriate adult for vulnerable suspects

[Article 5(2), Recital 41]

The General Approach ensures that the legal guardian (or appropriate adult with parental responsibility) is informed where a child is detained. Article 41 specifically provides:

> *"The Directive ensure that suspects and accused persons, including minors, should be provided with adequate information to understand the consequences of waiving a right under this Directive and that the waiver should be given voluntarily and unequivocally…The legal guardian of a suspect or accused minor should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto."*

The Directive must also ensure that vulnerable adults are provided with the same protections as children. In *Stanford v UK,*[29] judgment delivered 23rd February 1994, the Court held that the right of an accused to effective participation in his or her trial includes not only the right to be present, but also to hear and follow the proceedings. The UN Convention on the Rights of Persons with Disabilities has been ratified by the EU and provides a definition of disability:

[29] *Stanford v UK,* ECtHR, App. No. 16757/90, Judgment of 23rd February 1994

> *"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

The Convention requires State Parties to ensure that persons with disabilities enjoy legal capacity on an equal basis with others[30] and effective access to justice.[31] Article 26 CFR also requires that the Union "respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community." Where a person clearly has a mental or physical impairment and someone could assist them with communication, this person should be notified of their deprivation of liberty in the same way as a person with parental responsibility for a child must be.

Article 1 of the UN Convention on the Rights of The Child 1989 defines a child as any person under the age of 18 years. As a party to the convention, the Union should not leave the definition of a child to national law but specify that the article applies to all children under the age of 18 years.

Article 6 – the right to communicate with consular or diplomatic authorities

(9) Ensuring the Vienna Convention on Consular Relation is fully complied with.

[Article 6, Recital 26]

The General Approach provides that a suspect or accused person who is a non-national has the right to have consular authorities informed of their deprivation of liberty and to communicate with them if he so wishes. The article, together with Recital 26 purports to give effect to article 36 of the Vienna Convention on Consular Relations 1963. However, it does not go far enough. The Convention provides the right to have the consular official *visit* the suspect or accused person and in particular:

> *"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."*

[30] Article 12.
[31] Article 13.

Recommendation: Amend Article 6 to include the right to a consular visit, to correspond with their consulate, and for the consular authorities to arrange legal representation and to observe court proceedings.

Conclusion

Our organisations consider that the enactment of a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings represents an important step towards full mutual recognition within the common European justice space. The case law of the ECtHR and other relevant regional and global instruments provide a starting point from which the co-legislators can develop the highest possible standards in this area; they should be seen as a floor on which to build, not a ceiling beyond which we cannot pass. We believe our recommendations offer solutions that will ensure the Directive provides practical and effective procedural safeguards for suspects and accused persons without impeding the investigation and prosecution of crime.

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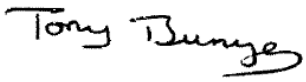

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