

Right to legal assistance in EU Criminal Proceedings

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List of Abbreviations

AFSJ – Area of Freedom, Security and Justice

CPT – Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECBA – European Criminal Bar Association

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

EWA – European Arrest Warrant

ICCPR – International Convention of Civil and Political Rights

MS – Member States

Roadmap - Resolution of the Council 295/01 of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

EESC – European Economic and Social Committee

Introduction

In 2009 European Union adopted a Roadmap to strengthen protection of suspected and accused persons in criminal proceedings.¹ The Roadmap contains six new measures to be introduced in the next years. Until today Directive on the right to interpretation and translation in criminal proceedings was adopted. A proposal for a Directive on the right to information in criminal proceedings is to be adopted soon. Under Measure C, presented on 8 June 2011, the Commission considered the right to legal advice and the right to have someone informed of the detention. Eventually, a proposal concerning special safeguards for suspected or accused persons who are vulnerable is scheduled for this year. Nevertheless, this is not a *numerus clausus* list as the Council pointed out that measures listed in the Roadmap should be considered only indicative, addressing only an initial group of measures to be dealt with as a matter of priority.²

The rights envisaged in the roadmap are examples of new competences of European Union regarding procedural safeguards introduced in 2009 by Lisbon Treaty. All abovementioned measures aim to ensure common minimum standards so that citizens moving around Europe can do so with confidence about criminal justice systems in all Member States. The second important goal is to facilitate mutual recognition and to set a high standard of respect for fundamental rights within the EU.

The purpose of this paper is to analyze first four measures envisaged in the Roadmap. Emphasis has been placed on right to legal advice what is justified by its utmost importance. Moreover, as new EU legislation is strongly grounded on experiences of Council of Europe, the paper contains a considerable amount of reference to jurisprudence of European Court of Human Rights. This will allow to show the link between Directives and protection of fundamental rights and also to answer the question of whether Directives new EU legislation meet the requirements enshrined in European Convention on Human Rights.

Measures envisaged in the Roadmap:

Measure A: Translation and Interpretation

Measure B: Information on Rights and Information about the Charges

Measure C: Legal Advice and Legal Aid

Measure D: Communication with Relatives, Employers and Consular Authorities

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable

Measure F: Green Paper on Pre-Trial Detention

¹ Resolution of the Council 295/01 of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295.

² Ibid point 13.

I European Criminal Procedure. Setting a new policy.

1. European Criminal Procedure after Lisbon Policy.

Lisbon treaty has had a great impact on the Area of Freedom, Security and Justice. The huge change makes a fact that AFSJ falls within shared competence which means that any provision laid down by the Union may limit the competences of Member States and it is prohibited to adopt measures that are not in accordance with the Union's legislation. The previous three-pillar system has gone. One of the consequences is that the framework decisions are no longer in use and were replaced by full catalogue of institutional acts of European Union - regulations, directives and decisions.

Of great importance is new article 82 of Treaty on Functioning of the European Union.³ It is a new legal basis for European criminal procedure which allows to fill the existing gaps between the legislation of particular Member States. Art 82(2) TFEU stipulates that:

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.⁴

These measures shall concern, among others, the rights of individuals in criminal procedure and the rights of victims of crime. It follows that EU has now clearly set competence over criminal procedure. This competence is however carefully limited. The condition precedent for competence over criminal procedure is that it is necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters having a cross-border dimension. The linkage with mutual recognition thereby 'reaffirms the primary rationale for earlier EU involvement with criminal procedure'.⁵

The problem of the Union's competences in the field of law is vital for the topic of this paper. The important question is to what extent EU can lay down the law and what in practice means obligation to take into account differences between the legal traditions of Member States. One must remember that art. 82(2) TFEU concerns only minimum harmonization of several specifically indicated aspects of the law of criminal procedure, whereby 'such harmonization has to explicitly fulfill a support function'.⁶ For these reasons I will try to examine in following chapters whether new measures regarding "right to legal assistance" envisaged in the Roadmap fulfill the criteria set in art. 82(2) TFEU.

Since the European Council meeting in Tampere of 15 and 16 October 1999⁷, principle of mutual recognition is seen as a cornerstone of judicial cooperation.

³ Consolidated version of the treaty on the Functioning of the European Union [2010] OJ C 83 (further on: TFEU).

⁴ Ibid art. 82(2).

⁵ P. Craig and G. de Burca, *EU Law: Text, Cases, and Materials* (3rd edn, Oxford 2012) 942.

⁶ M.J Borgers, 'Functions and aims of harmonization after the Lisbon Treaty: a European perspective', in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Brill 2009).

⁷ Tampere European Council 15 and 16 October 1999, Presidency Conclusions
< http://www.europarl.europa.eu/summits/tam_en.htm> accessed 1.03.2012.

The aim of mutual recognition is that in an Area of Freedom, Security and Justice, judicial decisions ‘should circulate freely from one member State to another and be treated as equivalent.’⁸

Accordingly, The Stockholm Programme⁹ (2010-2014) reiterates the importance of criminal judicial cooperation. However, this time special emphasis is put on the strengthening of rights of suspected and accused persons in criminal proceedings: ‘The protection of the rights of suspected and accused persons in criminal proceedings 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.’¹⁰

To put it another way, ensuring of minimum of procedural rights is necessary to build mutual trust between member states, while mutual trust is needed to make the rule of mutual recognition effective. The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other’s criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

As it was rightly stated by S. Alegre ‘trust requires a degree of faith in the other, but particularly where the rights of individuals are concerned, states cannot afford to trust each other on the basis of blind faith. Mutual trust must be based on the knowledge that such trust is reasonable’.¹¹ It was confirmed in the commission staff working paper concerning impact assessment of directive on the rights of access to a lawyer.¹² The general problem identified in report is that there is insufficient mutual trust between judicial authorities of Member States and that there is insufficient level of protection of fundamental rights in criminal proceedings in the EU.

With regard to the above it must be stressed that the ensuring of minimum rights concerning legal advice is not only a goal in itself but also a measure which aims to build mutual trust between member states. Otherwise one could face a following problem: ‘how can a judicial authority be confident that a surrender of a person to a MS with systemic problem relating to legal aid, length, conditions and decisions on pre trial detention will not result in breach of that person’s human right?’¹³ Naturally the original foundation for legal assistance in European law is sake of justice but bearing in mind that since many of instruments adopted in AFSJ is to be based on mutual recognition,¹⁴ ensuring of existence of mutual trust between member states is as important.

At this point it is worth to mention about few another changes introduced by Lisbon Treaty. Firstly, shift from unanimity voting to co-decision. This means, on the one hand, that important decisions could be made faster and sampler and on the other the closer cooperation with European Parliament and between Member States.

⁸ C. Morgan, ‘The potential of mutual recognition as a leading policy principle’, in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Brill 2009) 231-239.

⁹ Council of the European Union, Notices from the European Union Institutions, Bodies, Offices and Agencies 2010/C ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’ [2010] OJ 115/1.

¹⁰ Ibid 10.

¹¹ S. Alegre, ‘Mutual trust – lifting the mask’, in G. de Kerchove and A. Weyembergh (eds), *Mutual Trust in European Criminal Area*, (Editions de l’Université de Bruxelles 2005) 43.

¹² Commission, ‘Impact Assesment accompanying the Proposal for a Directive of the European Parliament on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings’ COM (2011) 326 final.

¹³ Alegre, (n 11) 44.

¹⁴ It is already actual in the case of EWA, European Evidence Warrant or Freezing order.

Secondly, Commission gained new powers aiming to ensure the Member States implemented directives into their legislation properly.

Further, new Article 6(3) of the Treaty on European Union (TEU)¹⁵ provides for that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.¹⁶ Article 6(1) TEU stipulates that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. The Charter should be applied by Member States whilst implementing Union law, such as in the field of judicial cooperation in criminal matters. This creates a strong base for protection of human rights at the level of EU. Therefore, it also means that stake of human rights must always be taken into account whilst preparing new instruments especially in justice sphere.

2. Setting a new policy

Before an idea of Roadmap to strengthening procedural rights of suspected has been launched, the Commission came to the conclusion that there is no any regulation on procedural rights at the European level.¹⁷ It urged to put some efforts in this matter. It was reflected in Stockholm program which main goal is to 'make the benefit of the area of freedom, security and justice more tangible to the ordinary citizen'.¹⁸ In this way Roadmap became a key element of schedule for the years 2010-2014. The big part of the program was dedicated to accused and suspected persons under a title "a Europe of law and justice". It must be recognized that ambitions of EU with regard to procedural rights goes much further than that what stems from the Roadmap. Not forgetting about the enhanced protection of the rights of victims across EU and staying with accused persons, also such ideas were discussed as: presumption of innocence, prison rules or detention. European Council invited the Commission also to 'assess whether other issues would be necessary to promote better cooperation in this area'.¹⁹ The priority given to protection of fundamental rights denotes special significance of this subject matter. This view was also shared in European Parliament's resolution regarding Stockholm Programme.²⁰

It is clear that the Lisbon treaty gave European Policy makers a strong impulse to put a lot efforts in the area of Freedom, Security and Justice. It is a new stage for EU which primarily were so far after all focused on economic cooperation. However, it is not true that a debate about the protection of procedural rights never took place within EU. Proposition to harmonize some procedural rights was presented by the Commission on 28th April 2004. At this time appropriate measures were to be adopted in the form of framework decisions.²¹ However, neither proposal of Commission, nor (after amendments) proposition of European

¹⁵ Consolidated version of the treaty on the European Union [2010] OJ C 83.

¹⁶ However, problem of Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is increasingly complex, E. Myjer, 'Can the EU Join the ECHR - General Conditions and Practical Arrangements', in I. Pernice, A. Kokott and C. Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006) 297-308.

¹⁷ Commission, 'Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen', COM (2009) 262 final.

¹⁸ The Stockholm Programme (n 9) 9.

¹⁹ M. Jimeno-Bulnes, 'Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?' (Centre for European Policy Studies, February 2010) <<http://www.ceps.eu/ceps/download/3000>> accessed 23 February 2012.

²⁰ European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, (2009) P7_TA-PROV 0090.

²¹ Commission, 'Green Paper on Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union', COM (2003) 75 final.

Parliament was adopted. It was due to hard opposition of several Member States which claimed firstly, that EU doesn't have competence in this sphere and secondly that existing system of protection of procedural rights is sufficient. Drawing conclusions from these experiences, the Commission decided to adopt different approach. Notwithstanding the new legal basis harmonization of procedural rights remains sensitive area. According to the Commission only gradually one may achieve the stated objectives. Therefore, in the foreground there are more less controversial directives (right to interpretation and translation, right to information) and only then those who which required also some political consent (right to legal advice).

To end this section it might be advanced that this paper concerns mainly proposal for Directive on legal advice. The most attention was devoted to this issue. However, since remaining measures (A to D) are construed in such a way to create a uniform system, it is necessary also to look at the directives on right to translation and information. Basic knowledge about them seems important to grasp current developments with regard to right to legal assistance. One remark must be taken here – description of first two measures is not exhaustive. I tried to contained all necessary information seen primarily from the perspective of accused seeking a right to legal advice. Measures E and F of the roadmap are not entailed in this paper.

3. Lack of adequate protection to suspects and accused persons under ECHR.

Member States are obliged to obey rules envisaged in the European Convention on Human Rights.²² The Convention creates a complete system of protection of fundamental rights. In fact it includes all rights envisaged in roadmap (including rights to legal advice and legal aid). J. Bulnes pointed out that 'prior to the adoption of the Lisbon Treaty, there have been enormous discussions inside the Council about the necessity and added value at times of providing a catalogue of procedural rights at EU level taking into account the framework of protection already provided in ECHR'.²³ The problem boils down to question on whether there is a need for harmonization at EU level if comprehensive system of procedural protections already exists? This argument was supported by some delegations which were reluctant to any harmonization in this sphere.²⁴

Firstly, one must look at the necessity of European regulation from the boarder perspective. The common rules in the area of protection of accused and suspected persons are necessary within the EU's AFSJ as a whole²⁵ and must be treated also as an important part needed for development of European judicial cooperation in criminal matters.²⁶ Secondly, common rules in aspect in question are crucial to ensure that approximation and enhancing of mutual recognition will go hand with hand.²⁷ The study of *EU Procedural Rights in Criminal Proceedings* found that there is substantial divergence between Member States in the way how they refer to jurisprudence of the European Court of Human Rights (ECtHR) and ECHR as such.²⁸

²² Council of Europe, The European Convention on Human Rights, Rome 14 November 1950 (further on ECHR).

²³ Jimeno-Bulnes, (n 19) 6.

²⁴ Among others, this argument explains the failure of proposals for FD in 2004. Argument is maintained also today...

²⁵ A. Klip, *European Criminal Law* (Intersentia 2009) 425.

²⁶ Jimeno-Bulnes, (n 19) 6.

²⁷ E. Guild, 'Crime and the EU's constitutional future in an area of freedom, security and justice' [2004] *European Law Journal* 218-234.

²⁸ G.Vermeulen and others, *EU Procedural Rights in Criminal Proceedings* (Maklu 2009).

Further, the Competence of the Union is justified by the fact of inefficiency of the system envisaged in ECHR.

Critical remarks concerns especially the redress procedure and are based primarily on an argument of its long duration. Statistics shows that Court of Human Rights is overloaded and the remedy may come years after the motion was lodged, not to mention about difficulties in mere bringing a case before the ECtHR. Besides, the system of protection given *ex-post* nowadays seems to be inadequate. All in all many people refrain from seeking a help and redress in Court. This is very often an incentive for States not to amend their legislation. In this regard use of directives seems to be much more better solution. It impose an obligation to achieve certain result and in the case of infringement gives the Commission an effective tool to force MS to obey the rules.

Despite all the mentioned drawbacks one must appreciate jurisprudence of ECHR. The EU whilst creating its own system of protection of procedural rights builds on experiences of the Council of Europe. It made this reference explicitly in the recitals of the Roadmap: 'Any new EU legislative acts in this field (procedural rights) should be coherent and consistent with the minimum standards set out by the Convention and its Protocols, as interpreted by the European Court of Human Rights.'²⁹ For these reasons I believe it is necessary to present the most significance jurisprudence of European Court of Human Rights with regard to right to legal assistance. I hope that it will allow me to make this paper more exhaustive and interesting.

II First steps under the roadmap. Right to interpretation and translation and right to information.

1. Directive on the right to interpretation and translation

First measure envisaged in the Roadmap is the right to interpretation and translation. The Directive on the right to interpretation and translation was adopted on 20 October 2010 and this is the first Directive regarding procedural rights of accused adopted after the entry into force of the Treaty of Lisbon.³⁰ The legal basis for this measure is as mentioned above article 82(2) of TFEU. The directive is based on an initiative taken by 13 Member States.

The right to translation is provided by European Convention on Human Rights. Pursuant to Article 6(e) of ECHR everyone charged with a criminal offence has the right to free assistance of an interpreter if he cannot understand or speak the language used in court. From the case law of European Court of Human Rights it follows that this requirement was not fully respected in all EU countries. For instance, a qualified interpreter was not always present during police questioning and at trial. Instead of taking into account reasons of the right to defense, interpreters were repeatedly supporting the judge or prosecutor, rather than accused.

Directive made a reference to the ECHR as well as EU fundamental charter of rights. The core goal of the directive is to lay grounds for fairness of the proceedings. The suspects who doesn't understand the language of proceeding is especially vulnerable and in a much worse situation in comparison to the people who doesn't face such problems.³¹ The directive aims to ensure that suspected or accused are fully aware of their rights and their legal situation. Therefore, suspected or accused persons should be able, inter alia, 'to explain their version of

²⁹ Roadmap for strengthening procedural rights (n 1) 2.

³⁰ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

³¹ P. Wiliński and others, *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* (Wolters Kluwer Polska 2009) 67.

the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.³²

The scope of directive is broad. It applies to criminal proceedings and proceedings for the execution of a European arrest warrant. The right to interpretation and translation applies for persons beginning from the moment that they are made aware that they are suspected or accused of having committed a criminal offence and it last until the conclusion of the proceedings.

With regard to right to interpretation Article 2(1) of the Directive impose on Member States duty to ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings will be provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities (including police questioning, all court hearings and any necessary interim hearings). The right to interpretation must be extended to the situations where there is a special need to communication between suspected and his lawyer. To these ends Member States must ensure that there is procedure or mechanism for determining whether interpretation is necessary or not.

The next element is right to translation. The right to written translation is not explicitly provided by ECHR, however, it might be inferred from its art. 6 (right to fair trial). The ECtHR held that at least the most important documents ought to be translated. It pointed out that:

[P]aragraph 3 (e) (Art. 6-3-e) signifies that a person "charged with a criminal offence" who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial.³³

ECtHR therefore, didn't find a need for translation of all documents but only those which accused needs to understand to have a right to fair trial.

Some variation of outcome of this judgment might be found in the Directive. Art. 3 provides that Member States shall ensure translation of all documents which are essential to ensure that accused or suspected are able to exercise their right of defence and to safeguard the fairness of the proceedings. Essential documents under the directive must be understood as these concerning decision depriving a person of his liberty, any charge or indictment, and any judgment. However, competent authorities may on case by case basis always decide whether there is a need to translate any other documents. What document shall be translated? In a criminal case precise and complete information about the charges and possible legal qualification must be seen as of greatest importance; thus, such evaluation should be carried out very carefully. It seems for instance that it would not be necessary to translate indication of evidences.³⁴ However, without any exceptions, accused should always receive translated information about any changes that have occurred in the proceedings, for example, about the possibility of different from that initial legal qualification of his conduct. The right to such an information is closely linked with the right to have adequate time and facilities for the preparation of defence enshrined in the art. 6(3) of ECHR.

To make those rights effective, interpretation and translation must be provided obviously in the native language of the suspected or accused persons or in any other language

³² Directive on right to interpretation (n 30) point 19 of recitals.

³³ *Luedicke, Belkacem and Koç v Germany* (1978) Series A no. 29, para 48.

³⁴ M.A Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (Lexis Nexis 2010) 167.

that they speak or understand. Only such a guarantee will allow them fully to exercise their right of defence.³⁵ The suspected or accused persons have the right to challenge a decision whereby interpretation or translation is refused. They also have the right to complain about the quality of the provided interpretation or translation, if they find it not sufficient to guarantee the fairness of the proceedings.

Directive contains also some more technical requirements, like duty that MS must undertake measure in order to ensure that the interpretation and translation meets high quality (art. 5) or duty to provide relevant training of judges, prosecutors and judicial staff. The provisions regarding quality of translation are more important than one could suppose. In fact the insufficient level of accuracy and qualified interpretation was in many cases one of the biggest problems amongst the MS.³⁶

Last but not least directive in its art. 4 reflects ECtHR in relation to the cost of translation. Court held that the accused is never obliged to cover the costs of translation, even in the event of a conviction.³⁷ Another interpretation would be contrary to the object and purpose of article 6 and obviously might lead to the waiver of the right to an interpreter by defendant only for fear of excessive financial burden. This is maintained in art 4 which stipulates that irrespective of outcome of the case Member States must cover cost of translation and interpretation.

In accordance with directive must be implemented by all Member States by 27 October 2013.

2. Right to information

1) Outline

The right of accused or suspected person to obtain information about charges and the right to information about fundamental rights is an integral part of a fair criminal proceedings (right to the fair trial). It is particularly important that this obligation would occur just right after the first steps in investigation phase were taken. This can help to avoid dangerous situation where accused is disorientated what affects the entire subsequent process.

It should be recognized that right to information is utter in the context of all other rights because in fact, from its realization depends the possibility of taking advantage of others rights including in particular the right to defense.

Suspects and accused persons cannot be presumed to have enough knowledge regarding their rights at the moment of arrest (or police interview).³⁸

Naturally, it is usually so that the person in question, have some knowledge about their rights. However, the scope of this knowledge and its detail raise a serious doubts. One can imagine a situation where accused has in fact more rights than he think he has or his specific legal situation provides a wider scope of protection than a standard one.

In this sense, the right to information, on the one hand aims to ensure awareness of the situation which accused or suspected person actually face, and on the other is the gateway for accessing all accessible rights.

³⁵ Directive on right to interpretation (n 30) point 22 of recitals.

³⁶ B. Vidal Fernández, 'The right to accurate interpretation and translation of a high standard: Articles 8 and 9 of the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' in C. Arangüena Fanego (ed), *Procedural safeguards in criminal proceedings throughout the European Union*, (Lex Nova 2007) 211-229.

³⁷ *Kamasinski v Austria* (1989) Series A, no 168, para 74.

³⁸ Commission, 'Commission staff working document: Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings', COM (2010) 392 final 9.

Of great importance is a detailed information about a crime, its constituent elements, the extent of threatening penalties. Accused should also be informed about evidences which were crucial for charging him. This information is needed at least to challenge pre-trial decisions.

Failure to give such information may lead to the recognition of process as unfair, and will always lead to reduced possibilities of accused to defend.

The Commission's impact assessment rightly observes that:

[S]uspect might not be aware that he can seek independent legal advice from a lawyer before police questioning and may thus be prone to make statements under the psychological pressure of detention which might be unduly incriminating and could be relied on at trial by the prosecution.³⁹

Testimony given in such circumstances do not guarantee that the quality of the collected evidence is sufficient. In consequence judgment may be subject to appeal what may lead to lengthy and costly process.

A similar argument must be addressed in the absence of details about evidence. Perhaps part of the decision would not be challenged if the accused knew o about evidence under which the court based its conviction.

2) Right to information in the light of European Convention of Human Rights

All the rights envisaged in article 6(3) of ECHR must be interpreted in the light of general concept of the right to fair trial contained in art 6(1) and laid down in the Charter of Fundamental Rights of the European Union (Article 47 - Right to an effective remedy and to a fair trial, Article 48 – Rights of the defence and presumption of innocence). It applies also to the right to prompt information without which fair construction of criminal proceedings wouldn't be possible. It makes aware that right to information must be seen as fundamental right of accused or suspected persons.

Right to information is applicable in preparatory proceedings (investigation stage) as well as in appeal proceedings.

From articles 5(3) and 6(3) of ECHR it follows that either arrested and not arrested persons are entitled to receive information. When one deal with arrest especially detailed reasons for arrest become subject to the right to information.

One can distinguish two dimensions of right to information. First is envisaged by article 5 and 6 ECHR - the right of anyone charged with a criminal offence to be informed on the nature and cause of the accusations against him and to have access to the evidence on which these accusations are based. Secondly, the right to information can be understood in the sense of being informed on all of fundamental procedural rights, which as such is not covered by the ECHR.⁴⁰

Sometimes in literature one might find a difference between words "charge" and "accusation",⁴¹ however, both of these notions were included by ECtHR in the case of *Lutz v. Germany*.⁴²

As it was already mentioned above, right to information can be regarded as fundamental to prepare a defence.

³⁹ Ibid 10.

⁴⁰ G. Vermeulen (n 28) 32.

⁴¹ S. Trechsel, *Human rights in criminal proceedings* (Oxford University Press 2005) 195.

⁴² *Lutz v Germany* (1987) Series A No 123.

Provisions of ECHR concerning the right to information doesn't require any specific form of informing accused or suspected person. In principle, this should be done in writing, but it is not necessary, if the defendant received sufficient information orally or waived his right to a written information. However, written information will be always more preferable than oral information. The best way to inform person in question is by providing to him/her the so-called "letter of rights".⁴³

What is important is the fact that information factually reached accused. At the same time the legal presumption of deliverance must not be deemed as sufficient. The accused must receive the necessary information in a language he understands. This of course in the context of EU harmonization is guaranteed by the Directive 64/210. However, directive as it was already said doesn't impose an obligation to translate all documents. Such limitation also stems from the judgments of ECtHR.

Whether the content and promptness of the conveyed information was sufficient is to be assessed in each case according to surrounding circumstances.⁴⁴

Whilst this information must be conveyed "promptly" it doesn't have to be enclosed in entirety. Content of information is limited to the scope of factual information of the case, reasons for the arrest and the nature and cause of the accusation.⁴⁵ Accordingly, bearing in mind the interpretation carried by the ECtHR, the right to information should include not only facts but also legal qualifications.⁴⁶

Regrettably, there is no special provision in the ECHR which would stipulate that the suspect ought to be notified immediately of the other defence rights enlisted in the Convention (e.g. the right to consult a lawyer, to examine or have examined witnesses, the right to interpretation and translation).⁴⁷ However, recent case law of ECtHR requires from domestic authorities of being conscious of the all possible difficulties for the applicant, and ensure that he understood all his rights (including right of a lawyer free of charge if necessary).⁴⁸ Thus, in this intermediary way, Member States are obliged to inform accused persons about at least some part of their rights.

In completion to what was already said, in the case *Kamasiński v Austria* complainant alleged that as a foreigner he was accused in a criminal trial in Austria and has not received documents related to the case in a language he understands.⁴⁹ The Court has rejected that claim, insisting that *Kamasiński* had a defender who used the language of the court, as well as his native language. In this way Mr. *Kamasiński* could without too many troubles communicate with his counsel, and through him also with the court in all matters related to the trial. He could obtain any necessary information by intermediation of lawyer. Therefore, in this particular case Court held that there was no need for translation of documents and obligation of informing was satisfied. This case illustrates how the right of information might be interpreted and secondly, what most important, the relationship between right to information and the right to legal assistance.

3) Directive proposal

As already indicated right to information is a second measure (Measure B "Information on Rights and Information about the Charges") contained in the Roadmap to

⁴³ *Miroux v France* App No 73529/01 (EctHR 26 September 2006), para 31.

⁴⁴ *Murray v the United Kingdom* (1994) Series A no 300, para 72.

⁴⁵ *Ladent v Poland* App no 11036/03 (ECtHR 18 March 2008), para 66.

⁴⁶ *Pélissier v Sassi* App no. 25444/94 (ECtHR 25 March 1999).

⁴⁷ *G. Vermeulen* (n 28) 33.

⁴⁸ *Panovits v Cyprus* App no. 4268/04, (ECtHR 11 March 2009), para 72.

⁴⁹ *Kamasiński v Austria* (n 33).

strengthen protection of suspected and accused persons in criminal proceedings. In compliance with this mandate, Directive lays down minimum requirements at EU level for the information of suspected and accused persons about their procedural rights and the case against them.⁵⁰

The Commission came up with a proposal introducing a letter of rights, which would inform suspects being in detention in written form about their basic rights during criminal proceedings, and requiring enough information to be given to the suspect so that he knows what he is accused about.⁵¹

The proposal for a directive on the right to information in criminal proceedings refers to art 5 and 6 of ECHR and to articles 47 and 48 of the Charter of Fundamental Rights of the European Union but definitely goes further in the scope of fundamental protection. Directive provides about relevant procedural rights at the earliest possible moment in the criminal proceedings.⁵²

According to art. 2 of directive applies from the time a person is made aware (by the competent authorities of a Member State, by official notification or otherwise) that he is suspected or accused until the conclusion of the proceedings.

As it was mentioned ECHR requires that accused or suspected persons must be informed *promptly* about their rights. The mirror-image of this provision can be found in directive.

The directive provides for sufficient information about the charge to ensure the fairness of criminal proceeding. What should be understood as the ‘sufficient information’? Article 6 of Directive stipulates that information must include a description of the circumstances in which the offence was committed (detailed information on the accusation, including the nature and legal classification of the offence, as well as the nature of participation by the accused person). Moreover, Member States shall ensure that a suspected or accused person is informed promptly of changes in the information. The importance of enumeration of content of right to information was stressed many times in literature.⁵³

Next step is to guarantee an information about minimum rights of all suspected and accused persons. In accordance with article 3 the information in question shall include as a minimum:

- **the right of access to a lawyer, and any entitlement to free legal advice**
- the right to be informed of the accusation
- the right to interpretation and translation,
- the right to remain silent

These are therefore the most important rights safeguarding the fairness of criminal proceedings at their outset, which fully meets requirements provided by ECHR, Chart of Fundamental Rights or ICCPR.

The above mentioned provision doesn’t require that information on rights will be handed to interested person in written form. Proposal for directive only assumes that such information “should be given in simple and accessible language, orally or in writing”.

⁵⁰ Council of the European Union, Interinstitutional file 16342/11 ‘Proposal for a directive on the right to information in criminal proceedings - Approval of the final compromise text with a view to a first reading agreement with the European Parliament – 11 November 2011, 2010/0215 (COD).

⁵¹ European Commission, EU Justice - Rights of suspect and accused

< http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm> accessed 2 March 2012.

⁵² Ibid.

⁵³ E. Valentini, ‘The ‘other rights’ and the information about the charge’, in C. Arangüena Fanego (ed), *Procedural safeguards in criminal proceedings throughout the European Union*, (Lex Nova 2007) 157.

The situation is different only when it comes to people who are deprived of liberty. In such a situation in accordance with art. 4 of Directive Member States are required to inform these persons of their relevant rights *in writing* in the form of letter of rights. The letter of rights must contain also information about additional rights which are not envisaged in art 3, like the right of access to urgent medical assistance or information for how many hours/days he may be deprived of liberty before being brought before a judicial authority. Furthermore, information about possibility to challenge the lawfulness of detention must be guaranteed. The accused person is allowed to keep it in his possession throughout the time he is deprived of his liberty – art. 4(1).

According to The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘the period immediately following deprivation of liberty is when the arrested person is considered to be most vulnerable in relation to risks of intimidation and physical ill-treatment.’⁵⁴ That’s why it is so important that accused will be informed about his rights promptly in a simple language he understands. These conditions are also envisaged by proposal.

With deprivation of liberty also another right is related, namely the right to access to the case-file (right to access to the material of the case). As research showed in 4 Member States, this right is not provided at all. Moreover, in 6 of those Member States where such a right exists, there is no legal obligation to inform the suspect on his right of access.⁵⁵ Directive aims to change this situation substantially. It was stated in explanatory memorandum to Directive proposal that ‘the most effective way to provide a suspected or accused person with detailed information about the charge in order to allow him adequately to prepare his defence at trial is to give him or his lawyer access to the case-file’. The right in question was also recognized by ECtHR.⁵⁶ During the work on Directive, at one time this measure has been deleted. However, as it must be observed as ‘part as the most general right of defence’,⁵⁷ right to access to the case file is fortunately entailed again.

Directive stipulates that Member States must ensure that lawyer (or accused is himself) will be granted of an access to those documents contained in the case-file which are relevant for contest the lawfulness of the arrest or detention (art. 7). Access to case file must be also guaranteed in the situation once the investigation of criminal investigation is concluded. It must be provided in a good time to allow accused to prepare defence or challenge pre-trial decisions.

The right to have adequate time and the facilities for the preparation of defence was discussed by ECtHR. The answer to the question of whether the accused in a particular case had a "right time" to properly prepare the defense, depends on the circumstances such as the nature of allegations, the complexity of the case, attorney work-load or like the decision of the accused that he will defend himself. Therefore, each case must be considered individually. For example, the Court of Human Rights held that five days was enough to prepare a defense in the case of the prisoner accused of involvement in the revolt.⁵⁸ In another case, Court has found that 15 days is sufficient in disciplinary proceedings against doctor for issuing unjust certificates of incapacity for work.⁵⁹

Returning to the Directive, finally its significant “value added” is also the right to written information about rights regarding European Arrest Warrant proceedings (art.5). In

⁵⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘The CPT standards "Substantive" sections of the CPT's General Reports’ (Council of Europe 2006) 70.

⁵⁵ G. Vermeulen (n 28) 130.

⁵⁶ *Edwards v United Kingdom*, App no 13071/87 (ECtHR 16 December 1992) para 36.

⁵⁷ M. Chiavario, ‘Private parties: The right of the defendant and the victim’, in M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures*, (Cambridge University Press 2002) 558.

⁵⁸ *Jespers v Belgium* (1981) 27 DR 61.

⁵⁹ *Campbell and Fell v The United Kingdom*, (1982) Series A no 080.

short, any person subject to execution of EWA must be informed in the form of the letter about rights envisaged according to the national law implementing Framework Decision in the executing Member State. This information is needed to challenge pre-trial decisions (such as a decision refusing him bail) where necessary.

Above description aims only to shed light on the new shape of right to information across the EU. From the perspective of right to legal assistance it is extremely important step forward towards strengthening procedural situation of accused. Without relevant knowledge, which must be understood as both access to the information on merits of accusation and information about all fundamental rights, the whole system which creates right to legal assistance would be undermined.

Approximation of rights in this subject matter was really necessary. Existing protection in current shape is far from perfect. Admittedly, Member States are obliged to obey rules envisaged in ECHR. The protection of rights of accused or suspected persons with regard to the right to information envisaged in ECHR, however, turned out to be insufficient. This is mainly due to two factors: ECHR doesn't ensure the efficiency of protection whilst leaving to broad scope for its interpretation.

Understanding of the right to information of the accused or suspected varies considerably between Member States. The study of EU Procedural Rights in Criminal Proceedings found that there was substantial divergence between Member States in the way how suspects are informed about their rights and the case against them.⁶⁰

To give an example only in 10 Member States the suspect is informed about (one or more of) his rights by means of a Letter of rights (Austria, Czech Republic, England and Wales, Italy, Latvia, Luxemburg, Poland, Slovak Republic, Spain and Sweden). There are great differences between these EU Member States as to which rights are included.

It was found, that in four Member States there was no legal obligation to inform a suspect of the right to legal assistance.⁶¹

It may obviously influence on the level of mutual trust between Member States and hinder the functioning of mutual recognition instruments. For these reasons the directive is more than welcomed.

Having already an idea of directives on right to translation and information, Commission could finally started to think about more advanced safeguards as right to legal advice.

The Directive on right to information is to be adopted in this year.

⁶⁰ G. Vermeulen (n 28) 130.

⁶¹ Ibid.

III The right to legal assistance in the light of ECHR

1. Access to a lawyer

In accordance with art. 6 (3) ECHR everyone charged with a criminal offence has ‘the right to defend himself in person or through legal assistance of his own choosing (...)’. The ECHR entails also right to legal aid which is described in next part of this paper. Firstly, however attention should be paid to the fundamental problem of access to a lawyer.

Although this right is not absolute - it is nevertheless regarded as one of the fundamental characteristics of the fair trial. ECHR does not specify how right to legal advice could be exercised. The Court's task is merely to ascertain whether the chosen method is compatible with the requirements of the fair trial.

Firstly, the mere appointment of counsel does not guarantee the effectiveness of required assistance for the accused.⁶² Additionally, as it follows from *Salduz* case any exception to the exercise of the right in question must be clearly defined and strictly limited in time. These rules are required especially in cases of serious crimes, because in a democratic society - if the most severe penalties are considered - the right to a fair trial should be ensured at the highest pitch.⁶³

At the beginning, it must be highlighted that access to a lawyer, especially for a person in custody, is necessary starting from the first phase of the investigation. This is because in this time the presence of counsel is needed at the first interrogation of the suspect and during the conduct of evidence activities. Help is often necessary in drafting complaints against the decision of the arrest, and then, after some time, during applications for release from detention and possible appeals against negative Court decisions.⁶⁴ Accordingly, defence lawyer can be regarded also as an ‘observer’ who controls the compliance procedures with the law, both in the public interest, as well as in interest of his client.⁶⁵

At this point one can mention that the time from which accused is entitled to legal advice was one of the most controversial issues whilst preparing by UE proposal of directive. For this reason it is good to look closer at experiences of ECtHR in these matters.

First, the problem of admission of defender since the beginning of the investigation was the subject of the case *Imbrioscia v Switzerland*.⁶⁶

Following the resignation of a lawyer appointed by Mr. Imbrioscia, a public defender was designated. The district prosecutor did not inform the Imbrioscia's new lawyer when he was going to be interrogated (he didn't know about two previous interrogations). He attended only the third one. Nevertheless, it didn't change the fact that attorney had all the opportunity to defend the accused, both at first instance and during appeal proceeding. He attended in the one interrogation, he had access to the case file and he could without difficulties use all the possibilities of defence.

The court firstly stressed that there is nothing in Article 6 to prevent it from applying to pre-trial proceedings.⁶⁷ Then it explained that the right to representation pursuant to Article 6(3)(c) ECHR is one aspect of the concept of a fair trial and it must be examined whether in this particular case member State obeyed this rule.

The court observed that:

⁶² *Kremzow v Austria* (1993) Series A no 268, para 49-50.

⁶³ *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008), para 51.

⁶⁴ *Ibid*, para 54.

⁶⁵ *Nowicki* (n 34) 365.

⁶⁶ *Imbrioscia v Switzerland* (1993) Series A no 275.

⁶⁷ *Ibid*, para 36.

[T]he State cannot be held responsible for every inadequacy of an accused's counsel and, *in casu*, the brevity of the period prior to the assignment of an official representative to the accused, during which the latter's own counsel was inactive, was such that the relevant authorities could scarcely be expected to intervene. Before and after each subsequent interview the accused spoke to his official counsel who attended the last interview and, although aware of them, did not challenge the earlier interrogations. The domestic court hearings themselves were attended by adequate safeguards.⁶⁸

Therefore, here the fundamental rights weren't breach as possibilities of counsel to defence his client were fully respected.

To grasp the meaning of the right to defence enshrined in ECHR one should compare this judgment with the another.

Next huge step was taken by the Court in recent case *Salduz v Turkey*. Mr Salduz was arrested by police officers on suspicion (among others) of having participated in an illegal demonstration. Mr Salduz denied the content of his police statement, arguing that it had been extracted from him under duress. Investigation Court remanded Mr Salduz in custody and afterwards State Security Court convicted him and sentenced to two and a half years of imprisonment.

Mr Salduz complained under Article 6 § 1 and 3(c) ECHR, alleging among others, that he had been denied the assistance of a lawyer while in police custody.

In the groundbreaking paragraph ECtHR pointed out that 'Art 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.'⁶⁹

Since the *Salduz* case it is therefore clear that accused should have the possibility to exercise his right to legal advice from the very beginning of the proceeding. This right, which is not explicitly enshrined in the Convention, may be subject to restriction only for good cause.⁷⁰

This goes hand with hand with the statements of ECtHR where it stressed that the right to defense would be generally diminished if the suspect's statements made during his interrogation without access to lawyer will be later used by the court as a basis for a conviction.⁷¹ The court pointed out casually that such access to a lawyer is fundamental if arrested person is still a minor.

In another recent case *Sebalj v Croatia* court found a breach of Art 6(1) and (3)(c) 'on account of the applicant's questioning by the police without the presence of a defence lawyer'.⁷²

Important ruling was issued by the Court in *Brusco v France*.⁷³ The judgement has expanded application of the right to legal assistance to 'volunteers' or 'witnesses'. Court held that a 'person who is questioned without being arrested and/or who is treated as a witness may nevertheless be regarded as a person charged with a criminal offence'.⁷⁴

⁶⁸ Ibid.

⁶⁹ Ibid, para 55.

⁷⁰ *Salduz v Turkey* (n 63), para 52.

⁷¹ Ibid.

⁷² *Sebalj v Croatia* App no 4429/09 (ECtHR 28 June 2011) para 257.

⁷³ *Brusco v France* App no 1466/07 (ECtHR 14 October 2010).

⁷⁴ Ibid; EU Justice - Rights of suspect and accused (n 51).

Case of Mr Pishchalnikov⁷⁵ concerned accused who had asked for a lawyer to represent him before the Court. However, responsible authorities had not contacted a lawyer nor had they offered free legal assistance to Mr Pishchalnikov.⁷⁶ Instead they had interrogated him in the first few days after his arrest, 'in the absence of a lawyer, in an effort to generate the evidence aiding the prosecution's case'.⁷⁷ Subsequently, his confessions during the interrogations were crucial for his conviction.

In this case the Court held that if the suspect in a criminal case referred to his right to legal assistance during police interrogation, one cannot legitimately believe that he gave up this right only because he still answered questions from the police, even after he had been informed about the his right to remain silent.

Interrogation of a suspect, who agreed to participate in the investigation only in the presence of his lawyer, must be stopped before his arrival, unless the suspect himself on his own initiative, undertake further contact with the police or prosecutor.

Also in already mentioned case *Panovits v Cyprus* the Court found a breach of 'Article 3' (which prohibits inhuman or degrading treatment or punishment) where statements made by the suspect in the absence of his lawyer were used to secure a conviction, even if they were not the sole evidence available.⁷⁸

In case *Dayanan v. Turkey* the Court pointed out that the suspect's right to consult legal counsel from the moment of detention shall not be limited solely to his participation in the interrogations. Maintaining the just of the criminal proceeding requires that a suspect (and then accused) could rely on a number of diverse, necessary measures, such as discussing the case, arrange for his defense, preparing for interrogations, psychological support and control of the defendant's conditions of detention. A person accused of a crime that does not want to defend himself in person, must be allowed to benefit from right to legal counsel by choice.

Importance of the right to legal advice was pointed out also in *Gillow v United Kingdom* with regard to a little bit different aspect, namely appeal procedure. The Court stated that 'the requirement of a lawyer to lodge an appeal before a higher court is a common feature of the legal systems in several member States of the Council of Europe'.⁷⁹

2. Selected aspects of the right to legal advice

In the previous paragraphs I mainly tried to describe the issues regarding access to a lawyer. In this part I will very briefly focus on remaining important aspects of legal advice which has occurred before ECtHR and which in my view should be taken into account whilst building EU legislation.

First, in answer to the question on whether an accused who fails to appear before the court retains the right to defend himself in person or through legal counsel, the Court stressed that the right of every accused in a criminal case for an effective defense by a lawyer is one of the cornerstones of a fair trial. Accused doesn't lose the benefits of this right because of the absence at the hearing, even if he was properly called and did not provide any convincing explanation. Legislation should discourage unexcused absence in the Court but it cannot go too far and by no means prevent defense counsel to present his arguments before court.⁸⁰

⁷⁵ *Pishchalnikov v Russia*, App no 7025/04 (ECtHR 24 September 2009).

⁷⁶ *Ibid.*

⁷⁷ Netherlands Institute for Human Rights, 'Summary of the case Pishchalnikov v Russia'.

<<http://sim.law.uu.nl/sim/caselaw/>> accessed 15 March 2012.

⁷⁸ *Panovits v Cyprus* (n 44); EU justice (n 37).

⁷⁹ *Gillow v UK* (1986) Series A no 109, para 69.

⁸⁰ *Pullicino v Malta* z App no 45441/99 (ECtHR 15 June 2000).

Accordingly, exercise of the defendant's right to counsel doesn't mean that from that moment he has no longer the right to defend himself in person. The right to this kind of participation of accused in the trial was expressly confirmed by Court in *FCB v Italy*.⁸¹

Among other things, to give an example - effective participation of the accused in a criminal trial must also include the right to take notes in order to facilitate the conduct of the defense. According to Court such a possibility is irrespective of accused is represented by a lawyer or not.⁸²

3. The right to legal aid in ECHR

Generally speaking the right to legal aid envisages the help of a lawyer for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. It is guaranteed in art. 6 ECHR –‘everyone charged with a criminal offence has the right to defend himself in person or through legal assistance(...), and if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.’ Therefore there are two conditions: lack of sufficient means and interest of justice.

Court held that provisions of art. 6 constitute express guarantees and are not merely illustrations of fair trial considerations.⁸³ How it should be understood ?

Firstly, the meaning of insufficient means to pay is vague. ECtHR pointed out that the relevant authority must seriously consider the circumstances of the particular case⁸⁴ and that ‘in determining whether the accused does not have sufficient means to pay, the accused does not have to establish lack of ability to pay beyond all doubt’.⁸⁵

Article 6 paragraph. 3 point. c does not guarantee the accused the right to choose defense counsel, or even the right to require the court to consult with him before making a decision.⁸⁶ With regard to the choice of a counsel, generally preferences of the accused should be respected, however choice may be constrained ‘where there are relevant and sufficient grounds for holding that this is in the interests of justice’.⁸⁷

Accused may not request a change of the counsel after his appointment, unless there are some justified reasons for that.⁸⁸ There is also no right to require the public defender to pursue a certain line of defense, if he considers that the current is not justified.⁸⁹ On the other hand, right to legal aid doesn't mean that the court's obligation is limited only to ensure the appointment of defense counsel. Legal aid, which the accused is expected and which is required because of the interests of justice and an important role of the right to a fair trial must be practical and effective and not just theoretical and illusory.⁹⁰

In case *Atrico v Italy*⁹¹ Court held that mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes ‘may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties’.⁹² Therefore ‘If they are notified of the situation, the authorities must either replace him or cause him to fulfill his

⁸¹ *F.C.B. v Italy* (1991) Series A no 208 B.

⁸² *Moreira de Azevedo v Portugal* (1991) Series A no 208 C.

⁸³ *Al-Khawaja and Tahery v UK* App no 26766/05 and 22228/06 (ECtHR 20 January 2009).

⁸⁴ *Kreuz v Poland* App no 28249/95 (ECtHR 19 June 2001).

⁸⁵ *Pakelli v Germany* (1983) Series A no 064, para 17.

⁸⁶ *X v UK* (1977) 11 DR 55.

⁸⁷ *Croissant v Germany* (1992) Series A no 237.

⁸⁸ *Ostergren and Others v. Sweden* App no 13572/88 (Commission Decision, 1 March 1991).

⁸⁹ *Croissant v Germany* (n 87).

⁹⁰ Nowicki (n 34) 216.

⁹¹ *Artico v. Italy* (1980) Series A no 037.

⁹² A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd OUP 2007).

obligations'.⁹³ In this case the lawyer stated from the very outset that he was unable to act. The authorities had two options - either substitute attorney with another one or to force him to render an actual defense. They chose a third solution - passivity, where respect for the Convention required an action on their part. For this reason, the Court stated that there was an infringement. It stressed that State cannot be held responsible for every shortcoming of a lawyer, however, under such a circumstances authorities should have taken appropriate actions. Otherwise the right to legal aid would be completely meaningless.⁹⁴

A similar problem arose in case *Kamasiński v Austria*. Here, the Court expressly noted that the state cannot be held responsible for every defect in the work of defense counsel. Due to the independence of the Bar the conduct of the defense (line of defense) falls within the sphere covered by the relationship only between the accused and the lawyer. Pursuant to Art. 6. authorities have a duty to intervene only in an event of obvious neglect of duty by an attorney, provided that the situation is sufficiently recognized.

Despite that Art 6. Refers to 'free legal assistance when accused has not sufficient means to pay', this wording does not preclude the temporary release of the accused from the cost of defense, for the period in which accused temporarily does not have sufficient funds to cover such costs.⁹⁵

As a side note it might be added that effective legal aid can be provided only by counsel properly prepared to represent the defendant in a particular stage of the proceedings. This condition is not met for instance in the situation where in complex criminal trials are appointed defense counsels who have no experience in such cases or are experts only in civil or family law.⁹⁶

The last think which should be mentioned here is a possibility to waive the right to legal aid. From *Pishchalnikov v Russia* follows that it is possible, however, waiver 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right... it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.'⁹⁷

4. Interest of justice

At this point it is worth to look at the set of a case law which concerns interpretation of the notion "interests of justice" used by ECHR in article 6. As it was already mentioned this is a second condition (after lack of sufficient means) to qualify for legal aid.

Determining whether "interests of justice" comes into play is largely dependent on the practice in respective country and the circumstances of each case. In assessing the "interests of the justice" adequate authority must take into account in particular: specificity of the case, the degree of its complexity in the sphere of facts as well as legal issues at stake.⁹⁸ The concrete example of the consequences for the justice system which stem from abovementioned rule might be found in the case *Quaranta v Switzerland*.

The case concerned drug trafficking which was subject to imprisonment for up to three years. The Court held that free legal assistance should have been afforded by reason of the mere fact that so much was at stake.⁹⁹

⁹³ *Artico v Italy* (n 91) para 33.

⁹⁴ *Ibid* para 36.

⁹⁵ *Biondo v Italy* App no 51030/99 (ECtHR 28 February 2002).

⁹⁶ *Mowbray* (n 92).

⁹⁷ *Pishchalnikov v Russia* (n 75) para 78.

⁹⁸ *Nowicki* (n 34).

⁹⁹ Netherlands Institute for Human Rights, 'Summary of the case *Quaranta v Switzerland*' <<http://sim.law.uu.nl/sim/caselaw/>> accessed 15 March 2012.

The case was relatively simple, but with possible far-reaching, negative consequences for the accused, due (among the other things), suspension of imprisonment held in another case. Since everything happened in probation period the participation of a lawyer would have created the best conditions for the accused's defence.¹⁰⁰ Also the personal situation of the applicant argued for professional help. Accused in time of proceeding was a young adult of foreign origin and from underprivileged background, with no real occupational training and a long criminal record. Moreover, he was a drug addict and living on social security benefit. From these reasons the Court acknowledged that accused could not defend in himself.

The Court should consider necessity of participation of the defender not only when preparing a case for consideration, but also later, at any stage of the proceedings. It is reasonable because it may turn out that there are new circumstances, causing the participation of an attorney will be necessary due to the "interests of justice".

The need to appoint counsel at the right time was highlighted by the Court. It held that the fact that attorney was appointed in the appeal proceeding cannot fix his absence in the first instance 'because of the limits on the scope of the review which may be carried out by those two courts'.¹⁰¹ In assessing whether the interests of justice requires a grant of legal aid in order to prepare and file the cassation, one should considered, among others, the complexity of the cassation procedure. Preparation of the appeal requires legal skills and experience, particularly knowledge of its all possible grounds.

In landmark case *Croissant v Germany* the Court has held that when appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, 'they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.'¹⁰²

One may ask therefore how to realize the right in question. The accused in fact has - to some extent - the right to choose a counsel. As it was pointed out above it does not mean complete freedom in this regard. Provisions of individual countries set out in detail who may be counsel in criminal matters and which formal conditions must met.¹⁰³ In *Goddi v Italy* the Court noted that in most cases, the defender of choice is better prepared for defense.¹⁰⁴ Therefore, if possible - though in practice it is quite difficult - an indication of the accused on the defense attorney should be taken into consideration.

¹⁰⁰ Ibid.

¹⁰¹ *Quaranta v Switzeland* (1991) Series A no 205, para 38.

¹⁰² *Croissant v Germany* (n 87) para 29.

¹⁰³ *Ensslin, Baader and Raspe v Germany* (1978) 14 DR 64.

¹⁰⁴ *Goddi v. Italy* (1980) Series A no 076.

IV The right to legal assistance and to communicate upon arrest

1. Measures C and D of a roadmap to strengthen protection of suspected and accused persons in criminal proceedings

Initially the Roadmap devised that under Measure C legal advice and right to legal aid will be prepared as unified solution. As the time passed, however, it turned out that although these concepts are closely linked together, it will be difficult to contain them both in one directive proposal. With the development of work under the Roadmap it became clear that measure C should be divided into two parts. This solution is supported by at least couple of arguments. Firstly, recent case law of European Court Of Human Rights changed the perception of right to legal counsel and right to legal aid. In case *Salduz v Tukey* (which was described in previous chapter) Court shed some light on the scope of application of the right to access to a lawyer. Moreover, as Caroline Morgan explained during the Legal Aid conference which took place in Warsaw in December 2011, the idea of DG Justice was not to confuse principles of "right to a lawyer" with "interests of justice for State to fund legal advice".¹⁰⁵ Besides, for separation of Measure C stands the fact that discussion on right to a lawyer is purely legal nature while right to legal aid is also technical/administrative (one can imagine the possible consequences for the States' budgets). On the other hand during the legislative preparations it turned out that right to access to a lawyer should go hand with hand with rights envisaged in roadmap's measure D, i.e. 'the right for a detained person to communicate with family members, employers and consular authorities'.¹⁰⁶ These measures are again strongly dependent on each other. It would not be possible to exercise fully the right to legal assistance when accused wouldn't have ensured the right to communicate with a third person, such as a relative, employer or consular authority. For these reasons it was decided to prepare firstly the directive proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest whilst the issue of legal aid, which was conflated with that of access to a lawyer in the Roadmap, warrants a separate proposal owing to the specificity and complexity of the subject.¹⁰⁷

2. Directive and its objectives

According to the Roadmap to strengthen protection of suspected and accused persons in criminal proceedings UE by step by step approach should adopt measures to harmonize procedural safeguards of accused or suspected persons. The big step was taken by introducing proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest which combines first part of measure C (right to legal advice) and measure C (right to communicate upon arrest).¹⁰⁸

Similarly to the two previous measures, directive proposal in question seeks to improve the rights of suspects and accused persons in aim to build mutual trust between

¹⁰⁵ Caroline Morgan, 'Right to legal aid' (Conference on legal aid in criminal proceedings in the European Union, Warsaw, December 2011).

¹⁰⁶ Roadmap for strengthening procedural rights (n 1).

¹⁰⁷ Ibid, explanatory memorandum 1.

¹⁰⁸ Council of the European Union, '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 - Revised text (recent version 9 March 2012)' 2011/0154 (COD).

member states and to ensure certain degree of compatibility between the legislation of Member States which is deemed pivotal to improve judicial cooperation in the EU.

As it was shown right of defence is laid down in the Charter of Fundamental Rights in EU and in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The idea is to build new directive on the legal output of ECtHR in such a way as it to be coherent and consistent with the minimum standards set out by the Convention and its protocols.

I tried to present comprehensively the jurisprudence of ECHR in a previous Chapter. The ECHR gave precise instructions how the right to legal assistance should be understood. In this regard cornerstone judgments were *Salduz v Turkey* and *Panovits vs. Cyprus* which dealt (among others) with the time necessary to ensure rights in question and their efficiency.¹⁰⁹ In following paragraphs I will try to determine whether the directive meets these requirements.

Necessity for a new directive – according to European Commission – stems primarily from the fact that protection of suspect and accused persons with regard to access to lawyer varies considerably between Member States. The basic problem is a fact that there is insufficient access to a lawyer and notification of custody in many Member States.¹¹⁰ Differences exist when it comes to access to lawyer before and during the first police questioning.¹¹¹ There are also discrepancies between Member States about the possibility of waiver of right to a lawyer. Moreover, evidence obtained without a lawyer being present has a different impact on proceedings in Member States. Finally there is a lack of EU rules in the case of in European Arrest Warrant proceedings.¹¹² It is self-evident that purpose of the Directive can not be sufficiently achieved by member states themselves. The project is therefore consistent with the principle of subsidiarity. However, there is another issue which needs to be discussed. One should also determine whether proposal in its shape still falls within the competence of European Union. Legal basis for directive constitutes art. 82(2) of TFEU. Directive imposing on Member States an obligation concerning legal assistance at first glance seems to be very far reaching when it comes to national sovereignty. It is true that Lisbon Treaty introduces new competences in criminal regards. The question is to what extent EU may require from Member States to obey of harmonization measures.

This aspect was pointed out in the opinion of the European Economic and Social Committee – it stated that ‘such rules as contained in directive can only be applied and fully implemented if they take account of the differences between the Member States’ traditions and legal systems (accusatorial or inquisitorial systems) in accordance with Article 82(2) of the Treaty on the Functioning of the European Union.’¹¹³ EESC believed that this aspect wasn’t examined in detail.

Accordingly, the ministers for justice of several member states have already reported some critical observations with regard to directive in question. Delegations underlined that, in their opinion, ‘the Commission proposal would entail the risk of prejudicing criminal proceedings by complicating them and slowing them down, as well as by imposing substantial resource

¹⁰⁹ Court has held that accused/suspected person should be entitled to contact a lawyer as from the first questioning and that lawyer is entitled to play an active role during the questioning (see above *Salduz v Turkey*, *Brusco v France*).

¹¹⁰ Impact assessment (n 12) 1.

¹¹¹ G. Vermeulen (n 28) 20.

¹¹² Ibid 2.

¹¹³ Opinion of the European Economic and Social Committee (EESC) 2012/C 43/11 on the ‘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’ [2011] OJ C 43/51.

burdens on criminal justice systems'.¹¹⁴ They also explained that the Commission proposal went substantially beyond the European Convention on Human Rights (ECHR) and its Protocols.

In addition UK and Ireland, during the European council meeting indicated that at this stage they will not use their rights to "opt-in".

Keeping these remarks in mind, and in order to determine real effects of the directive one should close look in details on propositions contained in the Directive.

3. Scope of the Directive

Before going into details of directive I would like to draw attention to the fact that work on the directive is ongoing constantly. The legislative process has not yet been completed. The shape of the Directive is changing and The Member States are constantly discussing possible changes. This paper is based on the revised text of proposal for directive dated on 9 march 2012.¹¹⁵ It differs from the original version of the Directive and includes all recent amendments.

Firstly, observations should be made with regard to the fact that Directive sets common minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the all European Union. It doesn't limit its scope only to international issues. What follows from Article 1, Directive will be applicable to rules regarding suspects and accused persons in criminal proceedings as such and of persons subject to European Arrest Warrant proceedings.

The directive is to be applicable from the time when has been officially informed that she or he is suspected or accused of having committed a criminal offence - art. 2(1).

The scope of directive is therefore broad. However, as follows specifically from recitals (point 6), Directive excludes administrative proceedings leading to sanctions. This is scope more limited than in for instance in a Directive on European Investigation Order (EIO).¹¹⁶ Moreover, also the scope of directive on the right to interpretation and translation is extended in certain cases to the administrative acts.¹¹⁷ It seems that right to legal advice should apply always when one deal with the possibility of criminal consequence. It is especially important in case of vulnerable or minor persons who are not aware of all consequences of abovementioned sanctions.

Another very important limitation of scope of directive is provided with in art 1(3). It regards minor offences, namely of this type when only fine can be imposed as the main sanction. From the draft it follows that Directive will apply only once the case is before a court having jurisdiction in criminal matters. The idea was to exclude from the directive pre-trial stage concerning primarily the minor traffic offences that are committed on a large scale and which are considered to be criminal offences only in some Member States. Such a limitation is an effect of comments of delegations and must be assessed as rational. Too broad scope of the directive could lead to the effect of throwing the baby out with the bath water. One must remember that the more procedural safeguards are given the more complex and time-consuming trial we need to deal with.

¹¹⁴ Council of the European Union, Press Release 14464/11 '3111th Council meeting Justice and Home Affairs' PR CO 53.

¹¹⁵ Council of the European Union, Interinstitutional file 12897/11 'Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Orientation debate' 2011/0154 (COD).

¹¹⁶ Council of the European Union, Interinstitutional file 9288/10 'Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters' 2010/0817 (COD)

¹¹⁷ In accordance with art 1(3) if imposition of administrative sanction may be appealed, this Directive shall apply to the proceedings following such an appeal.

Another important fact which must be stressed is that as long as a person is not, or not yet, suspected or accused of a criminal offence, directive does not apply. It is a change introduced by recent amendment. Previous versions of proposal provided protection and remedies for people such as witnesses who, during questioning or a hearing, become suspects or accused persons. It was based on case law of European Court, which held that ‘formal qualification of the person is immaterial’ and that to ensure fair trial proceeding access to a lawyer should be granted also to a persons who do not hold the status of accused or suspected. Member States recognized that such a wording went too far and necessitated amendments. Delegations have their own ideas to solve a problem in question. Finally need to ensure protection for persons other than suspected was expressed merely in proposal’s recitals and the final shape of law has been left to MS discretion. This is a step backwards and not necessary limitation which can reduce the effectiveness of protection of fundamental rights.

4. Promptness of legal advice and its content

Most crucial article 3 of Directive stipulates that Member States must ensure that suspects and accused persons are granted access to a lawyer in such a time and manner as to allow the person concerned to exercise rights of defence practically and effectively and in any event:

- (a) before the start of any questioning by the police or other law enforcement authorities;
- (b) upon carrying out any procedural or evidence-gathering act at which the person’s presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;
- (c) as soon as practicably possible from the outset of deprivation of liberty, including detention;

The content of right to legal advice consists primarily of:

- The right to communicate with one’s lawyer.
- The right of the lawyer to be present at questioning and hearings in accordance with procedures in national law,
- The right of the lawyer to be present at investigative or evidence-gathering act. The precise scope of this right is to be determined by each Member State. However, discretion here is not unlimited. The member states must ensure that accused person at least have the right for his lawyer to attend identity parades, confrontations, experimental reconstructions of the scene of crime.¹¹⁸

Directive takes into account jurisprudence of the ECtHR. It aims to ensure that suspected or accused person will benefit from the legal advice from the first interrogation without an undue delay. The goal is to achieve high level of minimum rights in order to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment.

The provisions in question are direct aftermath of *Salduz* case and have far-reaching consequences. Firstly, not in all Member States right to legal assistance is available in the early stages of investigation. As research show although in all Member States - except the Netherlands - the right to contact a lawyer (or legal representative) after arrest is guaranteed, in some countries (7) this is possible only at a certain stage of investigation or the proceedings.¹¹⁹ Furthermore, ‘there may be limitations to the right to contact a lawyer.’¹²⁰

¹¹⁸ Proposal on right to legal advice (n 108) Art 3(3).

¹¹⁹ G. Vermeulen (n 27) 50.

Example of Belgian shows that the right to contact a lawyer can be effected within a certain lapse of time after arrest.¹²¹

The natural consequence of entering of directive into the force will be an obligation to adjust national legislations by national authorities. In the Netherlands, the only Country where right to legal assistance after arrest is not guaranteed a draft bill has been already prepared to implement the forthcoming directive.¹²² This is also a fine example of how human rights standards developed in the case law of the ECtHR are being incorporated and interpreted by the EU.¹²³ On the other hand this measure means definite and sudden end of heated discussion concerning a doubt whether the *Salduz* case entails the right of an accused person to have a lawyer present during the first police interrogation or only the right to consult a lawyer.¹²⁴ The UE adopted a different interpretation of case in question than the Supreme Court and government of the Netherlands which presented much more restrictive approach. There are also other contradictions in the ways in which recent developments in ECHR case law are currently interpreted. To give an example, from the point of view of the European Economic and Social Committee, 'access to a lawyer must be understood to apply from the time when a person is deprived of their liberty.'¹²⁵ It is contrary to proposal directive which seeks to ensure access to lawyer upon questioning irrespective of the deprivation of liberty.

Such a differences in interpretation ECHR judgments even among the EU institution, leave a question on whether proposal scope of application is duly outlined. Personally I believe that art 3. of directive rightly aims to ensure that questioning will not take place until access to a lawyer is granted.

It is worth to note – as was highlighted in JUSTICE briefing - that questioning may take place outside of a detention setting. In such a case access to a lawyer should be guaranteed distinctly in this setting.¹²⁶ This opinion is not, however, supported by ECtHR. In case *Zaichenko v Russia*¹²⁷ the Court held that the absence of legal representation at the roadside check did not violate his right to legal assistance under article 6(3)(c) as it was initial stage of investigation and MR Zaichenko wasn't deprived of liberty.¹²⁸

Limitation of access to lawyer only to the situations where suspect is deprived of liberty doesn't seem to be justified and one cannot say that it entirely reflects ECHR jurisprudence. The main principle is that right to fair trial cannot be illusory. In fact initial stage of investigation might be crucial for the outcome of the case and consequently fate of the accused. Furthermore, the preliminary stage of investigation – according to CPT – is the period when the risk of infringement of human rights is the greatest.¹²⁹

¹²⁰ Ibid.

¹²¹ G. Vermeulen (n 27) 52.

¹²² *Conceptwetsvoorstel rechtsbijstand en politieverhoor* [Draft Bill on Legal assistance and police interrogation], 22 March 2011. <<http://www.internetconsultatie.nl>>.

¹²³ F. Kristen, 'Special Issue on Changing Approaches to Authority and Power in Criminal Justice' 3 [2011] *Utrecht law Review* 1.

¹²⁴ Special Issue on Changing Approaches, for instance: M.J. Borgers, 'Een nieuwe dageraad voor de raadsman bij het politieverhoor?' 2 [2009] *Nederlands Juristenblad*.

¹²⁵ Opinion of the European Economic and Social Committee (EESC) 2012/C 43/11 on the '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' [2011] OJ C 43/51.

¹²⁶ JUSTICE, 'Briefing on the Commission proposal for the purposes of the UK opt in decision'

(Justice 2011) < <http://www.justice.org.uk/data/files/resources/290/JUSTICE-briefing-on-the-right-of-access-to-a-lawyer.pdf>> accessed 5.04.2012.

¹²⁷ *Zaichenko v Russia* App no 39660/02 (EctHR 18-02-2010).

¹²⁸ Nevertheless, the Court held that the police has breached the right against self incrimination.

¹²⁹ CPT report (n 54) 72.

On the other hand, some concerns are raised by wording of article 3(5) which stipulates that Member States may temporarily **postpone** the application of the rights foreseen in this article when this is justified by compelling reasons. The derogations from the right in question in current shape of directive are not envisaged which means definitely broad scope of application of right to legal advice. Moreover, mentioned postponement is limited only to pre-trial stage. Although in comparison to derogation it is not very far reaching measure it still may cast some doubts. The notion of “compelling reasons” is vague and it leaves too big leeway to member States. Moreover, directive does not offer a clue how exercise of postponed right could differ from that in the normal course. For these reason it is crucial to ensure that postponement is limited only to exceptional circumstances and that in such case the same level of protection will be still achievable.

Coming back to the issue of granting a legal advice one general remark must be given. Keeping in mind above considerations it have to be noted, that the Directive makes clear that in spite of all, there still do exists a distinction between situations in which accused is deprived of liberty and situations concerning the pre-trial phase when he is still at large.¹³⁰ In the first situation as follows from the recitals of proposal (15) the right to legal advice is to be granted unconditionally and irrespective of the fact deprivation of liberty. In the latter State should provide a lawyer’s assistance only if this is necessary to ensure the ‘fairness of the proceedings’. It follows that the scope of right to legal advice is broad but not unlimited. The dividing line is drawn between phases of the proceedings and the fact of deprivation of liberty.

It is a kind of a “happy medium” between goals set by EU (and also its competences keeping in mind limitations of 82(2) TFEU) and what Member States are willing to accept.

5. Missed opportunities ?

Unfortunately not all the measures concerning the content of right to legal advice provided for in the directive can be deemed as satisfactory.

Firstly, the wording of article 3(3) creates some uncertainty as to its interpretation. It stipulates that suspected or accused person shall have a right to “access to a lawyer”. It only follows from art. 3(3) that accused person has the right for his lawyer to be present and participate when he is interviewed.

Theoretically mere access to lawyer could be provided by telephone advice, video conference etc. Such a way of granting legal advice would be in breach of “Saludz doctrine” as it doesn’t provide sufficient protection for suspected and accused. As it was rightly observed:

[I]t is very difficult for a lawyer to offer advice in anything but the most minor cases without receiving information about the case, and seeing their client face to face to ensure they fully comprehend their circumstances. For these reasons the measure could be stronger by referring in art. 3 to “access to lawyer in person”.¹³¹

In present shape directive does not even fully give accused persons the possibility to comprehensively discuss the case with lawyer and to come up with a line of defence. Therefore, there is a need to stipulate precisely when and in under what circumstances accused would vest the right to meet with his lawyer.¹³² Such an amendments would also

¹³⁰ Proposal for a Directive on legal advice (n 108).

¹³¹ JUSTICE (n 125) 7.

¹³² International Commission of Jurists, ‘Proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest - Briefing Paper’ (ICJ 2011).
<http://www.icj.org/dwn/database/ICJDir_Access_lawyer121011.pdf> accessed 10.04.2012.

fulfill the requirements of UN Body of Principles which refers to the right of a detained or imprisoned person to be visited by and to consult and communicate with a lawyer.¹³³

Second thing which in my opinion is worth to point out whilst assessing content of legal advice is the lack of a right of lawyer to check detention conditions and to have access to the place of detention. The former version of directive included such a guarantees.¹³⁴ However, as regards the issue of investigative and other evidence-gathering acts, 'a majority of Member States indicated that they prefer the solution with the self-determination by Member States.'¹³⁵ The result is complete abandonment of protection in this regard on the level of directive.

The right to check the welfare of detainee was deemed as crucial. In explanatory memorandum of initial version of proposal it was stated that this right is among those which lawyer have to be entitled to carry out, in aim to ensure effective exercise of defence rights. Right in question was also welcomed by some human rights organizations that took the floor with regard to right to legal advice.¹³⁶ It encountered, however, an argument of very sensitive nature. Delegations claimed that such a sophisticated protection of accused in fact goes much further than requirements of ECtHR. Accordingly, some MS argued that this is not of a lawyer to check the conditions of detention. This argument was developed in more details by The Council of Bars and Law Societies of Europe (CCBE) which stated that suspects or defendants can rely on their lawyer, and if there are legitimate complaints about the premises, he should be in a position to intervene.¹³⁷

Partially agreeing with this insight it must be noted that by introducing additional powers for lawyer, it would be possible to increase a control over the conditions under which persons deprived of liberty are present. It is a waste that MS didn't manage to find a compromise on this issue.

As a side note, another drawback related to pre-trial phase can be recognized. Namely, Directive does not give any answer to the question on whether one should wait until the lawyer arrives before starting questioning or an investigative or evidence-gathering act. In accordance with the directive 'this should be entirely left to the discretion of the Member States'.¹³⁸

Third concern, certainly not of the utmost importance, may be summarized as the lack of directly link between the right to legal advice and the right to information. Obviously these measures are conceived to create coherent system. Unfortunately, in proposal of directive reference was not made to the Directive on information. Only the comprehensive and transparent information about the rights make them fully valuable. It is therefore regrettable that such shortcoming occurs.

Eventually, there is a question about the limits of legal advice. At this point I would like only to flag this problem. One may argue that obligation to provide legal assistance in each case does not make sense. Indeed, it must be accepted that some limit must be placed in this regard. Some observations, which expressed the core of the problem, was presented by EESC. It pointed out that because of the risk of excessive formality in criminal proceedings that might jeopardize the effectiveness of the investigation, it could be necessary to leave each MS 'the option of implementing rules derogating from certain established principles during

¹³³ United Nations, Body of Principles for the Protection of Under Any Form of Detention or Imprisonment (76th plenary meeting 1988) Principle 18.3.

¹³⁴ Art. 4 of first draft stipulated that 'the lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.'

¹³⁵ Proposal for a Directive on legal advice (n 108) 2.

¹³⁶ Idea was supported among others by Fair Trials International and JUSTICE.

¹³⁷ CCBE, 'Briefing paper on the proposed directive on access to a lawyer' (CCBE 2011)

< <http://www.ccbe.eu> > accessed 15.04.2012.

¹³⁸ Ibid 3.

both the investigation and the proceedings, particularly when relatively minor acts, relating to commonly-committed offences, are neither questioned nor questionable.’¹³⁹

I have already written about the possibility of postponement of right to legal advice in exceptional circumstances in a pre-trial stage. Possibilities of other derogations and postponements are envisaged in art. 8 of the Directive. It leaves some margin of discretion to Member States, however, the right to legal advice in its current form retain the absolute character. Is this reasonable ? This issue will be examined separately later in this paper after other important aspects of directive will be discussed.

6. Free choice of lawyer ?

The directive makes no reference to the right of free choice of the lawyer. In accordance with art. 6 (3) of ECHR ‘everyone charged with criminal offence has a right to defend himself in person or through legal assistance of his own choosing’.

As research shows such a right exists in the legislation of all Member States – however, ‘this is often not a case when help is provided free of charge.’¹⁴⁰ As already mentioned the present directive doesn’t deal with legal aid leaving this issue to the discretion of MS. Still, should this prevent the directive from imposing on MS a requirement of ensuring free choice of lawyer ? Right to legal aid and free choice of a lawyer although strongly linked together could be due to circumstances (and maybe as an interim measure only) regulated separately. With laying down the free choice of lawyer one wouldn’t have to deal with problems specific to legal aid.

The right of choice was recognized by ECtHR in *Goddi v Italy*.¹⁴¹ The Court stressed that it is crucial when the lack of free choice would affect the effectiveness of the defence. ECtHR stated that this right could be constrained only ‘if sufficient ground for that exists and when it is justified by interest of justice’.¹⁴² Necessity of ensuring a free choice with regard to defender was acknowledged by CPT. It also allows exceptions but only in the form of necessary delay ‘in order to protect the legitimate interests of the police investigation’.¹⁴³ According to another position derogation might be provided for at the request of the judicial authority in cases such as terrorism or organized crime. The lawyer could only then be appointed by the relevant professional body.¹⁴⁴

As can be seen in all above-mentioned approaches appointment of a lawyer by public authority in exercising of the right to legal assistance was treated as an exception. Directive could build on these experience. Such a right would facilitate the achievement of the main directive objective, i.e. adequate and effective access to a lawyer and also mitigate the lack of common provision with regard to legal aid.

7. Qualifications of the lawyers ?

The Directive lacks any provision concerning qualifications of lawyers providing legal assistance. The ECtHR was more precise in this aspect.

¹³⁹ Opinion of EECS (n 113).

¹⁴⁰ G. Vermeulen (n 28) 52.

¹⁴¹ *Goddi v. Italy* (n 104) 46.

¹⁴² Ibid.

¹⁴³ CPT report (n 54) 41.

¹⁴⁴ Opinion of EECS (n 113) 9.

Unlike the directive on the right to interpretation the proposal does not envisage any instrument aiming at services (legal assistance) meet the adequate quality.¹⁴⁵ There is also no obligation to create a register of appropriately qualified lawyers or different control system.

Legal advice might be effective only when it is provided by independent and qualified lawyer with relevant experience. The UN Basic Principles on the Role of Lawyers stipulates that accused or suspected persons in detention should 'be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance...'.¹⁴⁶ Legal advice provided by an inexperienced or not an independent lawyer could turn out to be only an illusion when we take into account the complexity of criminal trials. So far in 9 Member States any special requirements are not required to render legal services and in most of them 'special requirements' are understood merely as general requirements applying to all lawyers¹⁴⁷ which certainly does not guarantee accurate level of knowledge and experience in criminal matters.

Bearing in mind these rules, it would be desirable if directive contained provision which would impose on Member States obligation to ensure that only accredited lawyers are entitled to provide representation. Similar observations has been raised among others by International Commission of Jurist and by UK JUSTICE.¹⁴⁸ It would surely contribute to the effectiveness of legal advice.

8. Right to communication upon arrest

Initially right to communicate upon arrest was to be subject to different directive. However, it was decided that as it is an essential component of access to justice and because of its closely link to right to legal advice, it should be incorporated into the directive proposal under measure C. Such a decision was legitimate. The separation of these two rights would be artificial. The right to legal advice should go hand with hand with right to communicate upon arrest.

With regard to the details, art. 5 of the directive stipulates that suspect or accused person who is deprived of his liberty 'has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay, if he so wishes.'

It is hard not to approve that deprived of liberty should have the possibility to contact with chosen by him person. One may wonder, however, whether this protection goes far enough. Directive says only about the right to communicate and not about attendance at police station. Such a right would be especially justified when it comes to young persons. Although Art. 5(2) identifies minor as separate category it doesn't impose on Member States obligation other than only to ensure that the minor's legal guardian is informed as soon as possible of the deprivation of liberty. It doesn't say anything about possibility to meet with parents or the right to have them present during questioning etc. This is a different type of assistance than that of legal representation. It 'prioritises the needs of the child rather than the legal issues.'¹⁴⁹ It is of great importance that a minor is in environment where he or she can take the conscious decision. Moreover, because of their age, children should be protected against

¹⁴⁵ In accordance with art 5 of directive on translation and interpretation Member States are obliged to take concrete measures to ensure that the interpretation and translation provided meets the quality required under the directive.

¹⁴⁶ United Nations, Basic Principles on the Role of Lawyers [1990]

<<http://www.unhcr.org/refworld/docid/3ddb9f034.html> accessed 8.04. 2012> accessed 15.04.2012, 7.

¹⁴⁷ G. Vermeulen (n 28) 102.

¹⁴⁸ ICJ Briefing paper (n 132) 3; Justice 'Briefing on the Commission proposal' (n 125).

¹⁴⁹ Justice 'Briefing on the Commission proposal' (n 125).

additional negative consequences resulting from being in detention. In this regard directive does not guarantee sufficient protection.

Another issue concerns the problem of treatment of children as criminals. The question is whether they should be regarded as ordinary suspects and be subject to common procedure rules.¹⁵⁰

There are two another concerns. Firstly, directive sees only a minor as a group requiring special protection. It is not difficult to imagine that there are other vulnerable categories of persons who will need similar assistance with communicating, for instance physically or mentally disabled persons, or people who cannot speak the language.

Secondly, directive (again) leaves the door open for derogation from this right. Para 3 of discussing article stipulates that Member States may postpone the right in question (also when it comes to minors) when this is justified by compelling reasons in the light of the particular circumstances of the case. This should be justified only exceptional and under limited circumstances.¹⁵¹

In addition to the right to inform selected person, Directive envisages the right to communicate with consular or diplomatic authorities (art. 6). This right is also enshrined by Article 36 of the 1963 Vienna Convention on Consular Relations.¹⁵² Convention entails the right to “visit”, such a possibility is unfortunately not provided for in the directive. Proposal merely states that this right should be exercised in conformity with the national law of the Member States, and must meet requirement that it enable to give full effect with regard to purposes for which this right is intended. Thus, *de facto* member state must ensure only the possibility of the notification to the consular authorities.

9. The issue of confidentiality

From the right to legal advice follows the right to unhampered contact with lawyer. In fact it is one of the pillars of the right to a fair trial. It is based on a personal relationship when a defence lawyer acquire an actual knowledge about offender’s conduct and the circumstances of the act. This knowledge is necessary to develop the strategy of defence, to declare motion as to the evidence or to undertake other actions in a trial. This right should means the right to secrecy. It is crucial that exchange of information between accused or suspect and lawyer is undisclosed. This is beyond discussion, the only question might be whether some exceptions should be allowed. It all boils down to striking the right balance between fundamental rights and public security.

The right of client-lawyer confidentiality was acknowledged by European Court of human rights. It stressed its importance in case *Castravet v Moldova*:

The Court considers that an interference with the lawyer-client privilege and, thus, with a detainee's right to defence, does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient, in the Court's view, to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably inhibit a free discussion between lawyer and client and

¹⁵⁰ Police Foundation, ‘Independent Commission on Youth Crime and Anti-social Behaviour: Time for a New Hearing’ (The Police Foundation 2010) 30.

¹⁵¹ Such a indication of interpretation contains recital of directive.

¹⁵² United Nations, Vienna Convention on Consular Relations [1963] Treaty Series, vol. 596 261.

hamper the detained person's right effectively to challenge the lawfulness of his detention.¹⁵³

From this judgment it stems that confidentiality must be understood very broadly. Directive in article 4 impose on Member States obligation to guarantee confidentiality of communication between suspect and his lawyer. Provision includes but is not limited to meetings, correspondence, telephone conversations and any other forms of communication. Possible exceptions from confidentiality are envisaged in the situation when 'there is an urgent need to prevent a serious crime' or 'there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.' Derogations from the right of confidentiality were introduced only in recent versions of draft. Initially they were not envisaged and as such confidentiality was to be absolute. This fact was welcomed by many independent institutions. In the view of the ICJ, abovementioned derogation clause 'would not comply with international human rights law standards on the right of confidential communication with a lawyer'.¹⁵⁴ It stressed that derogations allowed by ECHR are narrow and exceptional and that it held the right to efficient legal assistance must be respected in all circumstances'. Accordingly, no exceptions should be allowed in the directive in aim to guarantee the best protection of confidentiality right.

In part I agree that exceptions undermine right of confidentiality which - we would all agree - is of greatest importance. On the other hand, one should use a common sense in shaping a directive. Existing exceptions cannot be deems as broad. They don't permit very wide restrictions on the confidentiality of correspondence with a lawyer. Moreover, in accordance with recital of the proposal, provision concerning exceptions should be interpreted in very strict manner. It should be possible to make derogations to the principle of confidentiality, only when there are no other, less restrictive means to achieve the same result. Such an interpretation of existing (exceptional) derogations will allow to "kill to birds with one stone" meaning that both interest of accused and public security will be possible to achieve.

10. Postponements and derogations

Postponements and derogations from the right to legal advice are criticized by many who think that only "absolute" right may contribute to strengthen the right of accused. Sufficient it to say that under international human rights law, the overall right to a fair trial is absolute and effectively non-derogable.¹⁵⁵

On the other hand, derogations are answer to the concerns that "directive will hamper the effective conduct of investigations". This is supported by the arguments presented among others by the UK and Ireland that 'the presence of a lawyer at every investigative act and even in "minor" cases fails to "strike the right balance" between the right to legal advice and the effectiveness of justice systems.'¹⁵⁶

As it was mentioned derogations (art.8) concerns issue of confidentiality whereas postponements - right to access to a lawyer and right to communicate upon arrest. The latter exist only in the new version of proposal. Previous versions instead of "postponement" envisaged "derogations" from the right to access to a lawyer. This change was welcomed by most of delegations and independent institutions.

¹⁵³ *Castravet v Moldova*, App no 23393/05 (ECtHR 13th March 2007), para 51.

¹⁵⁴ ICJ Briefing paper (n 132) 5.

¹⁵⁵ Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11, 31 (2011) para 11.

¹⁵⁶ C. Heard, R. Shaeffer, 'Making defence rights practical and effective: towards an EU Directive on the right to legal advice' (Fair Trials International 2011) <<http://www.fairtrials.net/publications>> accessed on 14.04.2012.

In order to ensure that rights in questions won't be breached directive contains several general clauses which aim to perform a guidance whilst interpretation of these provisions. Accordingly, directive stipulates that postponements or derogations shall not go beyond what is necessary, be limited in time as much as possible, and don't prejudice the overall fairness of the proceedings.

Personally I think that the biggest drawback of this regulation is the fact that decision regarding postponements and derogations might be authorized by authorities other than judicial. Directives in art. 8(2) stipulates that decisions can be taken on a case-by-case basis by 'another (from judicial) competent authority on condition that the decision may be subject to judicial review.' Judicial review in this case has therefore only *ex-post* character. Given the importance of promptness of legal advice exclusively decision of judge might be acceptable. Only judicial decision gives a guarantee that proportionality requirements will be met. Entrusting such a powers to administrative or police authorities pose a risk that it may lead to unnecessary or disproportionate decisions. *Ex-facto* review of decision by the Court can be insufficient to reverse its negative effects suffered by the accused or suspected persons.

11. Waiver

The right to waive the legal advice is of the very sensitive nature. Such a right was recognized by ECtHR exceptionally under the condition that the waiver is '*voluntary*, and might be regarded as *intelligent relinquishment*'.¹⁵⁷ Firstly, note that the lack of carefully outlined criteria in which such a right can be exercised may undermine the whole right to legal assistance.

Legislation in many Member States envisage the mandatory legal advice. In such a situations waiver of the right to legal advice is impossible. These situations are outside of the issue being described. Application of directive in accordance with the proposal is to be 'without prejudice to national law that requires the mandatory presence or assistance of a lawyer'.¹⁵⁸

The crucial here are the situations in which directive allows for the waiver. The first thing worth to point out are differences between current version of proposal (after the amendments requested by the delegations) and first draft. Initially directive provided for that waiver will be possible after receiving legal advice on the consequences of the waiver or after otherwise obtaining full knowledge of these consequences. However, in recitals it was pointed out that a waiver should be allowed 'notably because accused or suspected have met with a lawyer before making this decision'.¹⁵⁹ The aspect of prior contact with lawyer should be recognized as crucial. It is understandable because only the lawyer is competent to decide on whether his help is necessary in a particular case.

Unfortunately, a duty to prior legal advice doesn't exist under the recent proposal. Directive merely stipulates that the suspect or accused should be provided 'with sufficient information so as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it' (art. 9). It lacks any reference to the contact with lawyer. Then it reiterates the ruling of ECtHR in the part that the waiver must be given voluntarily and unequivocally. Such amendments can hardly be assessed as positive. On the one hand, directive reflects the ECtHR but on the other, it missed the opportunity to specify conditions under which one can be sure that accused is without any doubt aware of the consequences of the waiver. As observed in ECBA report this should be a general concern of those somehow involved in law enforcement, since uninformed waivers may lead to unsafe

¹⁵⁷ *Pishchalnikov v Russia* (n 75).

¹⁵⁸ Directive on legal advice (n 108) point 2 of recitals.

¹⁵⁹ Initial version of directive proposal on right to legal advice and to communicate upon arrest 8 June 2011 [2011] COM(2011) 326 final 3.

judicial decisions, and in consequence to insecure convictions.¹⁶⁰ This is particularly important in cases involving vulnerable persons or serious offences.

The lack of provision in Directive concerning the problem of who and in under what circumstances is responsible for providing an information to accused, must be assessed in the light of the right to a fair trial. Directive in this aspect doesn't strike a right balance between efficiency of criminal procedure and protection of fundamental rights.

On the contrary, positive aspect of directive is that it requires that the waiver and the circumstances in which it was given, must be noted by using recording procedure in accordance with national law. Furthermore, art. 9 (3) impose on MS an obligation to ensure that a waiver can be subsequently revoked at any point of procedure.

From the past experience of national investigations it stems how important is to have an opportunity of examining the circumstances under which the waiver took place. This represents an efficient preventive measure as well as an instrument of ex-post review.

I believe that it will contribute to fair treatment of accused during the police interrogation and also will allow to avoid situations where accused was misled as to corollaries of the waiver.

The right to revocation of the waiver reflects the assumption that the waiver should be allowed only when it is really voluntarily.

12. The right of access to a lawyer in European Arrest Warrant proceedings

The right of legal advice in EAW proceeding is a complex problem. The framework of this paper doesn't allow me to present this issue comprehensively. Nevertheless, in following paragraphs I will try to demonstrate at least the most crucial aspects.

Much part of the discussions around EAW concerned establishing of the right to dual representation (both in the executing and in the issuing state). Such a rules existed in the first draft of proposal. This rule despite the criticism by the most of Member States was welcomed by many NGOs which expressed that 'in fact, it is not possible to grant effective legal representation in European Arrest Warrant cases without granting the possibility of access to the so-called double defence.'¹⁶¹ However, delegations during discussions in the Working Party noted that 'the right of access to a lawyer is provided anyway during criminal proceedings in the issuing State and that thus no specific rules on European arrest warrant proceedings would be needed.'¹⁶² Such a view was accepted by the Presidency, and it was decided to delete paragraphs related to the right to legal advice in issuing State. This is not convincing solution. It seems that directive should precisely refer to double defence. It is justified not least because of research showing importance of legal advice for requested person also in issuing state, and the great savings that can be made when effective representation is provided early.¹⁶³

Still, current proposal contains rules only for the exercising State. Pursuant to art 11. directive contains following rights:

- the right of access to a lawyer as soon as practically possible from the outset of deprivation of liberty
- the right to communicate with the lawyer representing requested person, if he so wishes

¹⁶⁰ European Criminal Bar Association, 'Statement on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceeding and on the right to communicate upon arrest' (ECBA 8 June 2011).

<http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf> accessed 20 April 2012 4

¹⁶¹ Ibid 6.

¹⁶² Council of the European Council, Interinstitutional File 14495/11 'Note by Belgium / France / Ireland / the Netherlands / the United Kingdom' (2011) 2011/0154 (COD).

¹⁶³ Heard (n 156) 'Case Study: Alan Hickey'.

- the right for his lawyer to be present and participate during a hearing of the requested person by the executing judicial authority

In accordance with Art 11 (3) the rights provided in the directive like confidentiality, the right to have a third person informed upon deprivation of liberty, waiver, and remedies will apply *mutatis mutandis* to EAW.

One may expect that current version of this provision will be amended. It has been already expressed that EU will be seeking opinions of EAW experts in this regard. Moreover, shortly after appearance of current version of draft, Belgian delegation reported questions concerning art 11(3).¹⁶⁴ Among others, given the specialties of EAW-proceedings, concerns were expressed with regard to the application of the waiver to EAW. It stated that consideration must be given solution different than a "waiver". It argued that it would be more appropriate to EAW proceedings.

Nevertheless, using the common sense in assessing draft, in my opinion directive even in current shape is a huge "value added". Undoubtedly it will improve the observance of human rights during the EAW proceedings. One can hope that after consultations with EAW experts, expected changes will go in the desirable direction.

13. Remedies

Last but not least, in order to make directive efficient it impose on MS obligation to ensure that a suspected or accused person has an effective remedy where his right of access to a lawyer has been breached. Directive leaves to MS a lot of discretion in this regard.

Delegations didn't accept the previous wording of provision in the light of which it would be prohibited to make use of statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer. Such commitment was regarded as too far reaching. It turned out that unacceptable is also provision that stipulates concrete remedy in cases of infringement, namely – remedy that 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'.¹⁶⁵

Introduced changes enhance the competence of MS. Currently, Directive does not impose any particular solution. This may naturally affect the efficiency of the directive. On the other hand, regard must be taken to different legal traditions in MS. It must be assumed that in different countries different remedies can be the most effective. These are therefore the member States that are responsible for the final success of the directive. One may argued that it is cliché, but without remedies there are no effective rights.¹⁶⁶ Is agreed solution sufficient? It seems that the scope of discretion left to MS is too broad. Certain minimums in this respect would be more than desirable.

14. Criticism of the directive

Proposal of directive on the right to legal advice caused a much greater emotions in comparison to directives on right to information or translation. Unsurprisingly, MS expressed concerns about the scope of the directive, cost of its implementation, and traditionally – their

¹⁶⁴ Council of European Union, Interinstitutional File: 2011/0154 (COD) - 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 - Questions on Article 11 on the right of access to a lawyer in European Arrest Warrant proceedings [2012] 7794/12.

¹⁶⁵ Initial version of proposal (n 159) art.13.

¹⁶⁶ ECBA (n 160) 8.

sovereignty. Concerns of Member States according to many independent organizations were exaggerated and unjustified. In fear of the final shape of directive, and bearing in mind its importance for protection of fundamental rights in Europe, they decided to send a letter in defense of proposal to representatives of the delegations that were most opposed to it.¹⁶⁷ As with the letter have been discussed all the key arguments and controversies regarding new directive it is worth to briefly look through its content and see if the situation has changed since the time it was written.

1. The directive would hamper the effective conduct of criminal proceedings.

Organizations pointed out that this cannot be true as ‘in jurisdictions where the right to access to a lawyer is fully respected in practice, the integrity of the criminal justice system is protected and the costs associated with mistrials, retrials and miscarriages of justice are reduced.’¹⁶⁸ It is true, that in Member States where system of legal assistance is functioning properly the risk of carrying out unnecessary actions pertaining to the case and needed for investigation is relatively small. Also the need to recourse to appeal procedure is reduced.

Besides, rights envisaged in directive are not absolute. As ECtHR held in special circumstances some aspects of right to legal advice can be limited. Such exceptions are envisaged in art. 8 (postponements and derogations).

One important remark must be taken here. As mentioned, the current shape directive, does not envisage possibility of derogation from the right to access to a lawyer itself but only its postponement which is limited to pre-trial stage. In initial version of directive derogations were entailed in art. 8 (general provision on derogations) which used the general clauses to limit the scope of its application. Does current broad scope of access to a lawyer may affect the efficiency of proceedings? The need to ensure access to a lawyer in minor offences may not always be desirable. On the other hand, this is always a very sensitive and subjective issue. In fact, perception of particular circumstances of the case may varied substantially among different persons. For these reasons - as it was already pointed out in previous chapters - it is important to provide suspect or accused with comprehensive information about their rights and particulars of accusation. Only then persons in question will be able to assess whether legal assistance is necessary. If they decide so, the right to legal assistance should be available.

This argument is supported also by the fact of increasing importance of adversarial instruments in criminal proceedings in EU. In this aspect absolute right to legal assistance undoubtedly contributes to „equality of arms”.

Moreover, complaint of hampering the effectiveness of proceeding must be assessed in the light of more widespread use of procedural agreements (institutions like mediation, or ‘plea bargaining’) which are more and more common across the Europe. Such institutions tend to speed up the criminal proceedings and increase their efficiency. They are envisaged mainly for minor offences and deemed as very efficient. However, their effectiveness is ransomed by the reduction of particular procedural safeguards. This is why it is frequently emphasized that the right to legal assistance whilst resorting to above-mentioned institutions is so crucial.

¹⁶⁷ Open letter regarding the Proposal for 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 signed by: Amnesty International, JUSTICE, ECBA, Fair Trials International, Open Society Justice Initiative (29 September 2011).
< http://www.ecba.org/extdocserv/20110929_jointletter_measureC.pdf> accessed 13 April 2012.

¹⁶⁸ Ibid.

Further, it is also worth to look at the third argument presented by organizations. They claimed that broad scope of directive's application is justified to provide formal safeguards against ill-treatment.¹⁶⁹

To sum it up – the broad scope of right to legal advice remains to be controversial issue. One may not exclude that it could somehow hamper the effectiveness of proceedings. On the other hand, there are many compelling arguments which speak in favor of the adopted solution and which in my opinion should ultimately prevail.

2. Clarity on the Directive's relationship to the requirements of the European Convention on Human Rights.

The directive is grounded on the European Convention of Human Rights and jurisprudence of ECtHR. It contains many references to ECtHR in recitals as well as non-regression clause (art 14) in the light of which nothing in directive 'shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in ECHR'. Also intentions of legislators were clear: directive aims to make the existing system of procedural safeguards more efficient. Nevertheless, many delegations expressed that in their view relationship with ECHR is watered down and that directive goes much further than requirements of ECHR and judgments of ECtHR.

The organizations didn't agree with this argument and pointed that 'the European Convention on Human Rights is a "living instrument" to be interpreted in the light of present-day circumstances'.¹⁷⁰ In their opinion, taking into account such an interpretation, Directive in no event goes beyond ECtHR requirements.

Such a point of view is convincing. Moreover, I would add that most of criticism of issue in questions related to the really first draft of directive. Under current proposal such a criticism went out of date. To give an example, Member States claimed that it is unacceptable to enshrine in the directive 'the right to have a lawyer inspect the place of detention' as it was not found by ECtHR. While the first draft indeed contained such a right, the recent version is deprived of it. During the progress of work on directive delegations reported many remarks with regard to certain measures. UE responded to their concerns by removing the controversial provisions. These same to many issues which I presented in previous part of this paper (e.g. some aspects of confidentiality, waiver, derogations, remedies). The current trend shows that the degree of influence of directive is rather being narrowed down than enlarged. It is result of cooperation between MS and European Union. Sometimes it works to the detriment of directive, but on the other hand contributes to avoid allegations of exceeding the competence of the EU. Furthermore, this cooperation leads to taking into account the differences between the legal traditions and systems of the Member States what is requirement imposed by art 82(2) of TFEU (legal basis for directive).

Staying a bit beyond this discussion one may also wonder whether art. 82(2) TFEU and its goal to achieve mutual recognition itself doesn't create a sound empirical basis for all the articles contained in the Directive. This approach was taken by organizations in the letter. They claimed that for these reasons there is at all no need to provide a clear basis in ECHR jurisprudence.

3. Problem of legal aid and impact assessment

The third objection boils down essentially to a question on whether right to legal aid is a precondition for establishing the right to legal advice. It is hard not to agree with the

¹⁶⁹ Open letter (n 167).

¹⁷⁰ Ibid.

statement that these two rights should be inseparable. However, one cannot accept the argument of the Governments which claimed that directive on legal advice could be laid down only once MS agreed upon legal aid system. Such an assumption, although at first glance correct, in effect would lead to long-standing deadlock in the sphere of protection of suspected and accused persons in European criminal proceedings.

Problem of legal aid is complex and difficult to resolve. Traditions of Member States varies significantly in this matter (these difficulties are described in more details in the following chapter of this paper). Therefore, according to Organizations which supported a letter, Commission has adopted a pragmatic approach whilst deciding to divide Measure C into two parts. One must agree with the opinion expressed in the letter that ‘once the framework of principles surrounding that right of access to a lawyer has been settled, it will be far more straightforward for Member States to determine the likely consequential costs and implications for their legal aid systems.’¹⁷¹ In effect system of legal aid, based on the previous experiences arising from the application of directive on legal advice, will have a chance to be more efficient and adjusted to the real needs.

Lack of common legal aid rules is the weakest point of the Directive. However, it seems that the only alternative to this solution, at least for the moment, would be simply the lack of any regulation which would even partially deal with the problem of legal assistance. This cannot at all be taken into account as existing system of protection of accused persons in Europe turned out to be inefficient and demanding of significant improvements.

V The right to legal aid

1. The right to legal aid in different Member States

The right to legal aid as it was already mentioned is enshrined in European Convention on Human Rights. To stress it once again it refers to ‘free legal assistance when accused has not sufficient means to pay’. Jurisprudence of ECtHR set what minima member states are obliged to respect. The doctrine of *Salduz* requires that right to legal aid must be ‘practical and effective’, and that the accused should be provided with free legal assistance ‘already at the initial stages of police interrogation.’¹⁷²

The right to legal aid is also an important part of European Charter of Fundamental Rights. Its wording is similar to ECHR. In accordance with article 47 of the Charter ‘Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’¹⁷³

In one of the previous chapters I described requirements recognized by the ECtHR when it comes to the right to legal aid. The court gave precise clues on how to interpret the notion of interest of justice which determines when legal aid should be absolutely granted. The three aspects might be indicated as most crucial: the seriousness of the alleged offence and severity of the potential sentence, the complexity of the case and the social and personal situation of the accused.¹⁷⁴

The right to free assistance of a lawyer is a concept which has a strong grounds in European and international law. It would seem that harmonization of this issue should not be problematic. Well, nothing could be further from the truth. It is right to say that system of legal aid exists in almost all Member States (except for Germany). However, as research shows the exact shape of this right varies significantly from country to country.

¹⁷¹ Ibid.

¹⁷² *Salduz v Turkey* (n 63).

¹⁷³ Charter of Fundamental Rights of the European Union, 18 December 2000, OJ C 364/01.

¹⁷⁴ *Quaranta v Switzerland* (n 101).

The differences concentrate around following issues: legal and criminal system, legal aid model, legal aid on criminal and non-criminal cases, budget on legal aid, number of cases granted with legal aid, number of cases incoming to the courts.¹⁷⁵

The differences stems also from the different traditions in Member States - adversarial in common law and inquisitorial in civil law systems. Those legal systems provide for different roles of lawyers before and during the trial. Another problem is model of legal practice which may affect the qualifications of lawyers. Different economies and size of the countries cause difficulties in comparison of eligibility criteria. Some authors while describing problem in question indicates two another aspects. First concerns the increasing cultural diversity across Europe. We may distinguish many different ethnic minorities but, similarly, many over-represented in criminal justice system (Roma, African, Afro-Caribbean).¹⁷⁶ The last aspect which should be take into account while harmonization of right to legal aid regards increasing use of trans-border crime and extradition (EAW).¹⁷⁷

Research shows that most Member States (15) use merit test to determine in which legal situations legal aid should be granted. However, the exact shape of such a test is different. Member States use diversified criteria in order to determine whether interest of justice supports the grant legal assistance (partially) free of charge. In general in Central and Easter-European Countries it mainly concerns situations of obligatory defence. The other criteria are for instance the fact of detention, or type of crime. Once the merit test is carried out, the Most Member States (20) use means test providing for legal aid.¹⁷⁸ Usually it will be granted on the basis of certain monthly income. Sometimes more vague criteria are established, like lack of sufficient means to cover the legal costs of defence (Poland, Slovakia). Differences exists also with regard to the way interested person have to prove that he is unable to pay for legal assistance.¹⁷⁹

Most crucial aspect concerning right to legal aid are financial matters. In nearly all Member States legal assistance is financed from the budget of state. Average amount per criminal case varies from about 80 euro (in Estonia) to about 2000 euro in UK (England and Wales). One may divide Member States in two groups when it comes to expenses on legal aid:

Central and Eastern European countries (low contribution in legal aid, and also high prison rate) and UK and Scandinavian countries (high contribution in legal aid and low prison rate).¹⁸⁰

It is impossible to present in this paper all relevant data regarding statistics on legal aid. However, it is worth to have a closer look at a few more aspects of them.

With some regret it should be noted that procedural aspect of granting free legal in many Member States does not even meet basic principles required, it would seem, by the standards of the fair trial. Namely, in 4 countries obligation to inform suspect of his right to legal aid does not exist at all and in only 4 out of 25 countries which impose such a duty, information is provided to the suspect by means of a letter of rights.¹⁸¹ Accordingly, the research also shows that time limit for granting such a right varies. In some Member Countries there is no time limit for a decision. Moreover, 'in a few Member States there is no legal remedy available when the request for legal aid is denied'.¹⁸² One should also note that not in all MS

¹⁷⁵ Council of Europe, The European Commission for the Efficiency of Justice 'Scheme for evaluating judicial systems' (CEPEJ 2009).

¹⁷⁶ Roger Smith, 'Legal Aid in the EU – state of play today' (Legal Aid in Criminal Proceedings in the EU, Warsaw, 5-6 December 2011).

¹⁷⁷ Ibid.

¹⁷⁸ G. Vermeulen (n 28) 80.

¹⁷⁹ Ibid.

¹⁸⁰ CEPEJ Survey (n 175).

¹⁸¹ G. Vermeulen (n 28) 80.

¹⁸² Ibid.

exist a mechanism which would guarantee that lawyer who will be responsible for providing legal assistance has sufficient knowledge and experience on criminal matters. Also in most of countries availability of a lawyers is not taken into account during appointment of a lawyer.¹⁸³

The last concern I would like to mention here regards the fact that *de facto* large part of the cost of legal aid is shifted from the state to a lawyers. The money provided by the state does not take into account specifics of the case. This results in legal situation where regardless of the level of complicity of the case, amount of means for legal aid remain the same. One can imagine that it makes a difference whether the case concerns serious allegations with many legal uncertainties or the case where, for instance, accused is willing to enter a no contest plea. In Poland (which is situation also in other Central European countries) money provided for legal aid very often is insufficient to cover even the administrative costs of the procedure (like cost of copies of documents, letters, stamps, phone calls) etc. It affects the quality of the legal assistance. The existing systems doesn't create any "incentive" for lawyers to provide assistance at a high standard.

Across Europe lawyers contribute to legal aid also by rendering *pro bono* services and accepting the cases when it is pretty obvious that accused will never be able to pay for representation. These, and similar situations must affect the quality of legal advice. Similar opinion was expressed by M. Kilian:

I have serious doubts that the profession is willing to continue this (contribution to guaranteeing the population's access to justice – O.L) if it is forced to take on a role that first and foremost must be the role of the state – I am pretty sure that any such development would result in a left pocket, right pocket scenario and in the end overall access to justice would suffer.¹⁸⁴

In summary, above statistics and facts undoubtedly speaks for adoption of common rules with regard to legal aid, but on the other hand they demonstrate how many difficulties UE will still have to overcome whilst agreeing on system of its financing.

2. Current situation

Huge differences between legislation and the specificity of the matter decided that legal aid will be subject to another EU directive. It was not possible to include provisions on legal aid in proposal directive on right to legal advice and communicate upon arrest. This issue is especially sensitive because harmonization in this sphere leads to substantial financial consequences for the member states.

The Importance of legal aid has been already expressed in the Roadmap:

The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.¹⁸⁵

¹⁸³ Ibid.

¹⁸⁴ M. Kilian, 'The Costs of Legal Aid for the Member State' (Legal Aid in Criminal Proceedings in the EU, Warsaw, 5-6 December 2011).

¹⁸⁵ Roadmap for strengthening procedural rights (n 1) 2.

The idea of introducing common rules with regard to this subject matter has occurred in the past. In 2004 the EC issued a draft Council Framework Decision¹⁸⁶ in this field and made clear that it was not its intention ‘to duplicate what is in the ECHR but rather to promote compliance at a consistent standard’.¹⁸⁷ Unfortunately all these plans end in failure. Member States were not willing to support this idea. They also (rightly) questioned EC competence in this sphere.

Current proposal on the directive on legal advice stipulates in Article 12 that it is without prejudice to domestic provisions on legal aid. In para 2 it follows that Member States must apply at least as favorable provisions on legal aid as those currently in place in respect of access to a lawyer provided in Directive. At this stage of completion of the Roadmap, the keynote is therefore to maintain the “status quo” between MS in field of legal aid. All practical arrangements of access to free lawyer advice envisaged in Directive are governed by national law.

However, the problem in question remains in the area of greatest interest of the European Union. This was expressed not only in the Roadmap. The right to legal aid is an important part of Stockholm program and as such priority in development of an area of freedom, security and justice.

3. The results of legal aid conference (5-6 December 2011, Warsaw)

In December 2011 the Polish presidency together with European Commission, the Council of the Bars and Law Societies of Europe (CCBE) and the Academy of European Law organized a conference devoted to right to legal aid in EU. It was an important step towards enhancing cooperation between Member States in the matter of free legal assistance. Although the results of conference cannot be considered as breakthrough, undoubtedly they are important contribution to the work on the common system of legal aid. As most of important aspects of legal aid were raised during the discussions, it is appropriate to summarize its conclusions. I believe that it is a good way of presenting the point from which EU will commence work on the new directive.

1) During the conference it was highlighted that firstly, EU must agree on what “criminal legal aid” is and what benchmarks we need to set. Currently, there is no common notion of right to legal aid. Although in most Member States legal aid is financed by state (and this is significant differentiator) it is not the case in whole Europe. In Germany exists a system of “forced representation”. No one is asked about the will of having representation and whether she or he has a sufficient means. Representation of lawyer must be paid, and in case when accused cannot afford to cover provided services, system resembles repayable loan rather than “legal aid”.

Because of such a huge differences it is of greatest importance to adopt one conception which will allow to reconcile distinct legal traditions in particular countries. Member States must agree upon one comprehensive system and only after that it will be possible to begin a work on exact shape of legislation.¹⁸⁸

¹⁸⁶ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of 28 April 2004, COM (2004) 328 final.

¹⁸⁷ E. Cape and others, ‘Procedural Rights at the Investigative stage: towards a real commitment to minimum standards’ in J. Hodgson, and others (eds.) *Suspects in Europe. Procedural rights at the Investigative stage of the criminal process in the European Union* (Intersentia Antwerp-Oxford 2007) 4.

¹⁸⁸ M. Kilian (n 184).

2) One of the important questions of conference was how to guarantee quality of legal aid. Professor Ed Cape, drawing on the experience of England and Wales pointed out three crucial approaches to establishing and assuring standards:

- Assessing the competence of individual lawyers
- Ensuring appropriate management structures and processes of law firms/public defender offices
- Assessing standards of performance in real cases.¹⁸⁹

3) The next important discussion concerned the cost of right to legal aid. The opinion repeatedly presented during the conference was that the obligation to provide an effective legal aid system is 'an obligation on the state and that responsibility cannot be transferred to third parties no matter how well intentioned they might be.'¹⁹⁰ This is important to ensure financing from the side of the State despite the fact that increase in expenses on legal aid not automatically make legal aid more accessible to the indigent accused.

Regardless of financial matters of right to legal aid academic stressed an importance of the social aspect of the right legal aid. It is not appropriate to assess legal aid only from the economic perspective. M. Kilian stated that 'legal problems often lead to illnesses, stress symptoms, a loss of confidence, listlessness, problems at the work-place and have a negative effect on earning-power.'¹⁹¹ He stressed that in studies people faced with a legal problem had difficulties to lead a normal life, that they became ill, got into trouble at work, were faced with marriage problems etc.

For these reasons assessing the expenditures as an amount of attorney's fees don't have much sense. The lack of legal aid from the very beginning of the procedure may trigger problems much more costly in the long run.¹⁹²

4) The another discussion concerned the aspect of legal aid in cross border trials. It was pointed out that a biggest problems which will need to be solved relates to the cost sharing and proportionality. It concerns mainly EAW which was used many times in the past to pursue not always the most serious criminal offences. J. McGuill stated that there is palpable frustration on the part of some member states that 'they are having to use limited judicial resources in relation to hearings where the surrender of persons is being sought for patently trivial matters.'¹⁹³ Furthermore, Member States concerns that they are exposed on the cost that they would never have to cover if assessment of the case took place under their national law.

The findings of conference give some ideas on how the work of Commission will proceed and by which values it will be guided. The presented ideas and data collected so far are undoubtedly impressive. Still, it seems advisable and necessary to carry out further study on legal aid in criminal proceedings regarding the possible costs and the number of cases concerned in all countries of the European Union after adoption of the directive on legal advice.¹⁹⁴ The Commission expects to present a proposal on legal aid in the second half of 2013.

¹⁸⁹ E. Cape, 'How to guarantee quality of legal aid - Experience in England and Wales' State' (Legal Aid in Criminal Proceedings in the EU, Warsaw, 5-6 December 2011).

¹⁹⁰ J. Mac Guill, 'The Costs of Legal Aid for the Member State' (Legal Aid in Criminal Proceedings in the EU, Warsaw, 5-6 December 2011).

¹⁹¹ M. Kilian (n 184).

¹⁹² Ibid.

¹⁹³ J. Mac Guill (n 190).

¹⁹⁴ A. Gruszczynska, 'CEPEJ Survey Main Results' Legal Aid in Criminal Proceedings in the EU, Warsaw, 5-6 December 2011).

Conclusions

Right to legal advice is without any doubt one of the most important manifestations of the right to defense. It is enshrined in the legal systems of all Member States. Moreover, it is expressed *expressis verbis* in art. 6 par. 3 of European Convention on Human Rights. Such a guarantee is included also in European Charter of Fundamental Rights and in International Covenant on Civil and Political Rights. The essence of the right to legal advice and use of lawyer's assistance boils down to ensuring the accused complete and necessary help in efficient exercising of her or his rights. It is crucial especially in situations where the defendant's legal awareness is small. The need to enlist the help of other people stems from the fact that most frequently accused lacks of legal knowledge and also the experience in criminal proceedings. As far as the way of defense is usually the result of the initiative of the accused, the development of detailed plan of defence is most generally work of a lawyer. Furthermore, in some situations, accused regardless of the knowledge and experience has no real possibility to exercise his rights. For instance this is a case when accused or suspected is deprived of liberty.

Additionally, in many Member States exists some legal actions which cannot be undertaken by accused personally (appeal to the court of cassation) or in which he cannot participate (interrogation of minors). Only lawyer can represent rights of accused in such cases.

Activity of lawyer favors such principles as: the principle of adversary trial proceedings, the principle of objective truth and finally the principle of equal rights of parties to the proceedings.¹⁹⁵ Properly conducted defense is not only crucial for the real protection of fundamental rights but also is important help for the court. Why is it so? Whilst providing advocacy defender is a real participant of judicature. Work of a lawyer broadens the point of view of the Court and allows it to assess the case from the perspective of accused.¹⁹⁶

Literature emphasize four arguments in favor of participation a lawyer in the trial: reason of competency, reason of mental condition (lawyer is not involved in the dispute), reason of replacement and finally reason of mental support.¹⁹⁷

The role of a defence lawyer is crucial also in investigative stage of case and during evidence-gathering acts. The lawyer taking a part in investigation is able to control conduct of investigative bodies and also has the ability to affect the way in which investigation is carried out. Indicated the positive role of defender in the process give rise to an argument that most desirable form of the proceedings would be such in which accused has always a right to legal advice.

Right to legal advice is therefore crucial for protection of fundamental rights and ensuring fair trial. Although this right is of greatest importance, it is only one among of many rights which accused persons are entitled to.

For this reason it is important to ensure that accused are fully aware of their powers. This is the content of right to information which is the first step in achieving desirable protection of persons in question. Second step is to make aware of rights those who do not speak or understand the language of the proceedings. All these rights aim to ensure position equal to the prosecution in the trial.

Such a reasoning and accordingly an action plan was adopted by EU. As a part of a Roadmap to strengthen protection of suspected and accused persons in criminal proceedings and in broaden perspective – part of Stockholm program – so far directive on right to interpretation and translation was adopted. Right to information and to legal advice and to communicate upon arrest most probably will be adopted soon. The lacking element at this

¹⁹⁵ P. Wiliński (n 31) 235.

¹⁹⁶ P. Kruszyński, *Stanowisko prawne obrońcy w procesie karnym* (Seria Wydawnictw Filii UW 1991).

¹⁹⁷ S. Waltoś, *Proces karny: zarys systemu* (Lexis Nexis 2009).

stage is the lack of measure concerning right to legal aid which is a necessary element to make the whole system of protection of suspected and accused persons efficient. At this stage it is impossible due to too big differences in national legislation and possible financial consequences.

In this paper I tried to present current situation with regard to protection of rights of suspected and accused in Europe. The Lisbon Treaty introduced new competence of European Union also in matters regarding criminal procedure. Art 82(2) of TFEU allows to adopt minimum standards concerning among others the rights of individuals in criminal matters in aim to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters. The measures must be adopted in the form of directive which naturally impose an obligation on Member States to ensure that a particular result will be achieved. With new legal basis and possibility to adopt directives (instead of previously existing framework decisions) EU finally gained the opportunity to start approximation in the sensitive area of procedural rights. The question is therefore whether such opportunity was used in a proper way.

The one of the arguments addressed to the European Council was that the EU has limited competence in the sphere in question. However, directives do not impose new responsibilities on EU States, but rather reiterate existing international law obligations. In fact all obligations of Member States existed before, under the requirements of ECHR. Unfortunately the system of protection of human rights within Council of Europe turned out to be ineffective. One must agree that 'legislative action under the Roadmap is a necessary step towards bridging the gap between the theoretical right to a fair trial under the European Convention on Human Rights and the reality on the ground in many EU countries.'¹⁹⁸ It was shown that the ECtHR is overloaded with the cases and not able to provide efficient level of protection of accused and suspected. From this perspective new directives can serve as the good solution. Unlike ECHR, they include mechanism allowing to force MS to comply with adopted rules. The Commission has an ability to bring Member States to the Court of Justice when they infringe rights provided for in the Directives. It is fast and effective remedy. On the other hand use of directives still leaves to MS a certain scope of discretion and time to draft legislation at the national level.

The directives on right to interpretation and translation and right to information are first measures which were created under new legal basis. One must keep in mind that this is entirely new situation for MS and it may explain why they were initially met with some doze of reluctance and suspicion.

Even more far reaching is proposal for directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. The work on this directive is still in progress. As it was shown in this paper the changes introduced by initiative of Member States don't always go in the right direction. Unfortunately, very often achieved compromise cannot be deemed as fully satisfactory.

Notwithstanding that, we must note that Member States cooperates on the level which has never been seen before. Member States were (and still are) very active during the legislative process. UE try to responds to the all remarks and concerns addressed to the initial draft. Proposal on directive on legal advice has been already amended several times. These changes and approach of UE in shaping the directive in my opinion minimize the risk that competences introduced in Lisbon Treaty will be exceeded. The EU make every effort to take into account different legal traditions and don't go further than to achieve level necessary to build mutual trust and facilitate mutual recognition which limits its mandate. Proposal

¹⁹⁸ Heard (n 156) 1.

directives still respond to requirements set by the ECHR jurisprudence. Especially effects of *Salduz* case were taken into account in proposal on legal advice.

It is still too early to assess actions undertaken by EU in the sphere of protection of fundamental rights. The most important directive on the right to legal advice has not been adopted yet and in fact its final shape is still pretty much unknown. Nevertheless, cooperation on the level EU-MS allows to look at the future positively. It's too bad that we still have to wait for a directive on legal aid. But also here EU is active and analyzing the best solutions. It is important that additional cost will not refrain Member States from introducing high standard of protection of principle rights enshrined in European Convention on Human Rights. In fact 'article 6 (of ECHR) rights are absolute and the fact that some states may incur additional cost in raising their standards to give these rights sufficient protection is not a relevant objection.'¹⁹⁹

In summary, bearing in mind that the shape of current European legislation is still far from perfect I would venture to say that first great step has been taken to ensure high standards of protection of accused and suspected persons. We still have to wait for the end result of proposals and for introducing another directives envisaged in the Roadmap but it is rather unlikely that UE will depart from currently kept high standard of protecting fundamental rights. One can safely say that directives contribute to building mutual trust which can be used as a foundation for ever greater than so far mutual recognition of EU decisions.²⁰⁰ Hopefully Member States will be able finally to cooperate because of, and not despite, mutual trust between them. Only by continuing on this path UE can build a basis for lawful system of justice across Europe.

¹⁹⁹ Ibid 7.

²⁰⁰ Ibid.

Bibliography

Legislation

Universal Declaration on Human Rights, 10 December 1948.

European Convention on Human Rights, 14 November 1950.

European Convention for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment, 26 November 1987.

United Nations, Body of Principles for the Protection of Under Any Form of Detention or Imprisonment of 9 December 1988

UN Guidelines and Norms on Prosecutors - Basic Principles on the Role of Lawyers, 1990, adopted by the 8th United Nations Congress on the prevention of crime and the treatment of offenders, Havana, Cuba, 27 August to 7 September 1990.

Charter of Fundamental Rights of the European Union, 18 December 2000, OJ C 364/01

Green Paper from the Commission 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', Brussels, 19 February 2003, COM (2003) 75 final.

Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of 28 April 2004, COM (2004) 328 final.

Commission, 'Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen', of 10 June 2009 COM 262 final.

European Parliament resolution on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme of 25 November 2009 P7_TA-PROV 0090.

Resolution of the Council 295/01 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings of 30 November 2009 , OJ C 295

Council of the European Union, Notices from the European Union Institutions, Bodies, Offices and Agencies 2010/C , The Stockholm Programme – An open and secure Europe serving and protecting the citizens of 4 May 2010 OJ 115/1.

Council of the European Union, Interinstitutional file 9288/10 'Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters' of 21 May 2010, 2010/0817 (COD)

Commission, 'Commission staff working document: Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings' of 20 July 2010 COM (2010) 392 final. 9

Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings of 20 October 2010 OJ L 280/1

Opinion of the European Economic and Social Committee (EESC) 2012/C 43/11 on the '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' of 15 February 2011 OJ C 43/51

Conceptwetsvoorstel rechtsbijstand en politieverhoor [Draft Bill on Legal assistance and police interrogation], 22 March 2011

Commission, 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings' of 14 June 2011 COM (2011) 326 final.

Council of the European Union, Interinstitutional file 12897/11 'Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Orientation debate' of 2 August 2011 2011/0154 (COD),

Council of the European Council, Interinstitutional File 14495/11 'Note by Belgium / France / Ireland / the Netherlands / the United Kingdom' of 22 September 2011 2011/0154 (COD)

Council of the European Union, Interinstitutional file 16342/11 'Proposal for a directive on the right to information in criminal proceedings - Approval of the final compromise text with a view to a first reading agreement with the European Parliament of 11 November 2011', 2010/0215 (COD).

Council of the European Union, '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 - Revised text of 9 March 2012 2011/0154 (COD).

ECtHR Case Law

ECtHR 28 October 1978, Luedicke, Belkacem and Koç v. Germany.

ECtHR 13 May 1980, Artico v. Italy.

ECtHR 25 April 1983, Pakelli v. Germany.

ECtHR 9 April 1984, Goddi v. Italy.

ECtHR 28 June 1986, Campbell and Fell v. The United Kingdom.

ECtHR 24 November 1986, Gillow v. UK.

ECtHR 25 August 1987, Lutz v. Germany.

ECtHR 19 December 1989, Kamasiński v. Austria.

ECtHR 24 May 1991, Quaranta v Switzerland.

ECtHR 28 August 1991, F.C.B v. Italy.

ECtHR 25 September 1992, Croissant v Germany.

ECtHR 16 December 1992, *Edwards v. United Kingdom*.
ECtHR 21 September 1993, *Kremzow v. Austria*.
ECtHR 24 November 1993, *Imbrioscia v. Switzerland*
ECtHR 28 October 1994 *Murray v. the United Kingdom*.
ECtHR 25 March 1999, *Pélissier v. Sassi*.
ECtHR 15 June 2000, *Pullicino v. Malta*.
ECtHR 19 June 2001, *Kreuz v Poland*.
ECtHR 28 February 2002, *Biondo v Italy*.
ECtHR 26 September 2006, *Miroux v. France*.
ECtHR 13th March 2007, *Castravet v. Moldova*.
ECtHR 15 November 2007, *Galstyan v Armenia*.
ECtHR 18 March 2008, *Ladent v. Poland*.
ECtHR 27 November 2008, *Salduz v Turkey*.
ECtHR 20 January 2009, *Al-Khawaja and Tahery v UK*.
ECtHR 11 March 2009, *Panovits v Cyprus*.
ECtHR 24 September 2009, *Pishchalnikov v Russia*.
ECtHR 18 February 2010, *Zaichenko v Russia*
ECtHR 14 October 2010, *Brusco v. France*.
ECtHR 21 June 2011, *Orlov v. Russia*.
ECtHR 28 June 2011, *Sebalj v. Croatia*.
ECtHR 13 September 2011, *Wersel v. Poland*.

Literature

Alegre S, 'Mutual trust – lifting the mask', in G. de Kerchove and A. Weyembergh (eds), *Mutual Trust in European Criminal Area*, (Editions de l'Université de Bruxelles 2005).

Cape E and others, 'Procedural Rights at the Investigative stage: towards a real commitment to minimum standards' in Cape E Hodgson J Prakken T Spronken T (eds.), *Suspects in Europe. Procedural rights at the Investigative stage of the criminal process in the European Union* (Antwerp 2007)

Chiavario M, 'Private parties: The right of the defendant and the victim', in Delmas-Marty M and Spencer JR (eds), *European Criminal Procedures*, (Cambridge University Press 2002)

Craig P and de Burca G, *EU Law: Text, Cases, and Materials* (Oxford 2012).

Guild E , 'Crime and the EU's constitutional future in an area of freedom, security and justice' [2004] *European Law Journal*

Kristen F, 'Special Issue on Changing Approaches to Authority and Power in Criminal Justice' 3 [2011] *Utrecht law Review* 1

Klip A, *European Criminal Law* (Intersentia 2009)

Kruszyński P, *Stanowisko prawne obrońcy w procesie karnym* (Seria Wydawnictw Filii UW 1991)

Morgan C, 'The potential of mutual recognition as a leading policy principle', in Fijnaut C and Ouwerkerk J (eds), *The Future of Police and Judicial Cooperation in the European Union* (Brill 2009).

Mowbray A, *Cases and Materials on the European Convention on Human Rights* (2nd edn OUP 2007)

Myjer E, 'Can the EU Join the ECHR - General Conditions and Practical Arrangements', in Pernice I, and Saunders C (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006)

Nowicki M A, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (Lexis Nexis 2010)

Police Foundation, *Independent Commission on Youth Crime and Anti-social Behaviour: Time for a New Hearing* (The Police Foundation 2010)

Trechsel S, *Human rights in criminal proceedings* (Oxford University Press 2005)

Valentini E, 'The 'other rights' and the information about the charge', in Arangüena Fanego C (ed), *Procedural safeguards in criminal proceedings throughout the European Union*, (Lex Nova 2007)

Vidal Fernández B, 'The right to accurate interpretation and translation of a high standard: Articles 8 and 9 of the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' in Arangüena Fanego C (ed), *Procedural safeguards in criminal proceedings throughout the European Union*, (Lex Nova 2007)

Vermeulen G and others, *EU Procedural Rights in Criminal Proceedings* (Maklu 2009)

__ 'How far we can go in applying the principle of mutual recognition' ? in Fijnaut C and Ouwerkerk J (eds), *The Future of Police and Judicial Cooperation in the European Union* (Brill 2009).

Waltoś S, *Proces karny: zarys systemu* (Lexis Nexis 2009)

Wiliński P, *Zasada prawa do obrony w polskim procesie karnym* (Zakamycze 2006)

__ *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* (Wolters Kluwer Polska 2009)

Internet sources

European Commission, EU Justice - Rights of suspect and accused
< http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm >

European Criminal Bar Association, 'Statement on the 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' (ECBA 8 June 2011) <http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf>

Heard C, Shaeffer R, 'Making defence rights practical and effective: towards an EU Directive on the right to legal advice' (Fair Trials International 2011) <<http://www.fairtrials.net/publications>>

International Commission of Jurists, 'Proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest - Briefing Paper' (ICJ 2011) <http://www.icj.org/dwn/database/ICJDir_Access_lawyer121011.pdf>

Jimeno-Bulnes. M, 'Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU ?', (Centre for European Policy Studies, February 2010) <<http://www.ceps.eu/ceps/download/3000>>

JUSTICE, 'Briefing on the Commission proposal for the purposes of the UK opt in decision' (Justice 2011) <<http://www.justice.org.uk/data/files/resources/290/JUSTICE-briefing-on-the-right-of-access-to-a-lawyer.pdf>>

Netherlands Institute for Human Rights, 'Summary of the case *Pischalnikov v Russia*' <<http://sim.law.uu.nl/sim/caselaw/Hof.nsf/233813e697620022c1256864005232b7/3122d879d193b4b7c12576380039d973?OpenDocument>>

Netherlands Institute for Human Rights, 'Summary of the case *Quaranta v Switzerland*' <<http://sim.law.uu.nl/sim/caselaw>>

Open letter regarding the Proposal for 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 (29 September 2011) <http://www.ecba.org/extdocserv/20110929_jointletter_measureC.pdf>