



The Law Society

**The Law Society of England and Wales response to
the Ministry of Justice Discussion paper on the EU
Draft Directive on the right of access to a lawyer in
criminal proceedings and on the right to communicate
upon arrest dated 17 June 2011**

13 July 2011

supporting
solicitors

The Law Society of England and Wales response to the Ministry of Justice Discussion paper on the EU Draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest dated 17 June 2011

The Law Society of England and Wales (the Society) welcomes the European Commission proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest dated 8 June 2011.¹ The Society welcomes this opportunity to respond to the Ministry of Justice Discussion paper on the proposal.

The proposal is an essential measure to contribute to the protection against abusive coercion or ill-treatment on the part of the authorities, to ensure equality of arms between the investigating or prosecuting authorities and the suspect or accused and to prevent miscarriages of justice. The Society calls on the UK to opt in at the outset. The Society calls on the UK to take a leading role to ensure that the rights of its citizens are no longer under threat and that the integrity of the criminal justice system is thereby preserved and security is thereby maximised;² that the right people are convicted and the right people are acquitted and that the right platform for mutual recognition is created.

This response has been prepared by the Law Society of England and Wales, which represents around 140,000 solicitors in England and Wales. The Society negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice.

1. Do you consider that the draft Directive would help to provide the level of mutual trust necessary to support the mutual recognition of decisions or judgments between Member States?

The Society emphasises that the right of access to a lawyer at the outset and the right to communicate with another third person is essential to ensure that the Prohibition against ill treatment (Article 4 EU Charter³ and Article 3 ECHR⁴), the Right to liberty and security (Article 6 EU Charter and Article 5 ECHR), the Right to an effective remedy and to a fair trial (Article 47 EU Charter and Articles 6 and 13 ECHR) as well as the Presumption of innocence and right of defence (Article 48 EU Charter and Article 6 ECHR) are respected. It contributes to the protection against abusive coercion or ill-treatment on the part of the authorities, equality of arms between the investigating or prosecuting authorities and the suspect or accused and the prevention of miscarriages of justice.

¹ COM(2011) 326 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF>

² The Conservative-Liberal Democrat "The Coalition: our programme for Government" states on Europe that it "will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system.", page 19, http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

³ Charter of Fundamental Rights of the European Union, 7 December 2000, http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁴ European Convention on Human Rights, 1950, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

Without respect for such basic rights, the European Union Area of Freedom, Security and Justice and indeed the human rights of all individuals in the European Union are under threat. Respect for such basic rights should have been ensured before the European Union embarked on, and before the UK signed up to, mutual recognition, where a decision in one Member State, such as a European Arrest Warrant or a conviction, is recognised and enforced by another.

Mutual recognition instruments reduce the grounds for refusal and the time taken to execute requests. Such quasi-automatic mutual recognition presupposes mutual trust between all actors that rights are fully respected. Mutual recognition requires all actors to subscribe to make it work effectively. It is essential that the European Union provides for effective minimum rights and safeguards to enable individuals, let alone the courts, to have trust in the system and to have their fundamental rights respected. It is essential to enhance confidence in the systems of other Member States in order to feel comfortable using mutual recognition instruments. Individuals should have confidence that anywhere within the European Union their fundamental rights are respected.

The Society questions how any citizen, let alone Member State, could have faith in a European Union in which the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights, commitments made by European Union Member States in the Council of Europe, and reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment are not uniformly implemented and respected. The Society observes that seeking to impose mutual recognition in the absence of respect for such rights taints all Member States, undermines those that would otherwise respect such rights and if mutual recognition is exercised makes all Member States accountable for such failings.

The European Commission's impact assessment⁵ sheds even more light on the inexcusable lack of respect for the basic rights concerned. It observes, for example, that a suspect is entitled to meet with his lawyer some time before a police interrogation in only three Member States. Moreover, in a significant proportion of Member States the right to contact a lawyer cannot be exercised immediately after arrest⁶ and in Belgium only after the first police interview.⁷ The suspect does not have the right for his lawyer to be present throughout questioning in all Member States. For example the suspect does not have the right for his lawyer to be present in: Belgium during the first police interview;⁸ Ireland;⁹ and, except in relation juveniles, the Netherlands;¹⁰ and, under the "*garde à vue*" procedure, in France.¹¹ In eleven Member States, it is possible to supervise the oral and/or the written communication between lawyer and suspect and to limit the right of the lawyer to visit

⁵ Impact Assessment accompanying the Proposal for a Directive on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings, 8 June 2011, SEC(2011) 686 final, [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/0686/COM_SEC\(2011\)0686_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/0686/COM_SEC(2011)0686_EN.pdf)

⁶ Page 14.

⁷ Page 20.

⁸ Page 56.

⁹ Page 99.

¹⁰ Page 20.

¹¹ Page 20.

his client at the police station or in prison.¹² In Poland, the consultation with the lawyer may be monitored for up to 14 days after the detention.¹³

The Society welcomes this opportunity for the UK to honour its commitments made in the Council of the European Union Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings dated 30 November 2009.¹⁴ The Society calls on the UK to opt in at the outset and take a leading role to ensure that the rights of its citizens are no longer under threat and that the integrity of the criminal justice system is thereby preserved and security is thereby maximised; that the right people are convicted and the right people are acquitted and that the right platform for mutual recognition is created.

2. In your view, do the provisions of the draft Directive add value to the European Convention on Human Rights?

The European Convention on Human Rights, the jurisprudence of the European Court of Human Rights, commitments made by European Union Member States in the Council of Europe, and reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment are not uniformly implemented and respected by Member States. This results in substantially diverging standards throughout the European Union. Such standards are frequently sub-standard and inadequate.

Incorporating minimum standards in an EU Directive would serve to make such rights practical and effective, rather than theoretical or illusory to be cast aside and disregarded deliberately or otherwise.

It will promote improved and uniform compliance and provide clarity enabling all actors to understand and comply with their rights and obligations on the ground. After 60 years of the European Convention on Human Rights, that there is alleged confusion as to when, for example, the right of access to a lawyer arises is testament to the need for this measure.

Member States will be obliged to transpose the Directive into national legislation. The European Commission will be able to monitor implementation and bring infringement proceedings before the Court of Justice of the European Union against Member States that refuse to comply with it. It will not have to wait until there is a specific breach of the obligations in respect of a particular individual.

In contrast, the European Court of Human Rights must be seized in a particular case following the exhaustion of all domestic remedies. A breach of obligations would have already occurred in respect of a particular individual. Exhaustion of domestic remedies is a lengthy process. Added to this is the additional length entailed by the huge backlog of cases before the European Court of Human Rights. At the end of 2010, nearly 140,000 allocated applications were pending before the European Court

¹² Page 14.

¹³ Page 127.

¹⁴ Roadmap for Strengthening procedural rights for suspected or accused persons in criminal proceedings, 30 November 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.

of Human Rights and there were nearly 22,000 pending applications not yet allocated to a judicial formation.¹⁵

There is the *de facto* limitation that the applicant, in most cases detained, complaining of a breach, for example of his right to access to a lawyer, will not have the resources, know how, assistance and will to exhaust all domestic remedies let alone to bring an application before the European Court of Human Rights.

Further benefits of incorporating minimum standards in an EU Directive are that it will be applicable before domestic courts upon transposition and in any event, pursuant to the doctrine of direct effect, should take precedence over conflicting domestic provisions. Moreover, in the course of domestic proceedings the national court can seek clarification of the obligations imposed by the Directive from the Court of Justice of the European Union by making a reference for a preliminary ruling, which it is bound to take into account. Accordingly, a remedy will exist at national level.

3. Do you think that the provisions set out in Article 3 with regard to when a suspect or accused person should be granted the right to access a lawyer are both fair to that person and workable in practice?

The Society observes that all actors should be seeking to achieve justice, that the right people are convicted and that the right people are acquitted.

The Society emphasises the rationale for affording access to a lawyer at the outset, drawing on the Charter of Fundamental Rights of the European Union (EU Charter), the European Convention for Human Rights (ECHR), the case law of the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommendations and commitments in the Council of Europe to which it refers.

Rationale

Access to a lawyer at the outset is essential to ensure that the Prohibition against ill treatment (Article 4 EU Charter and Article 3 ECHR), the Right to liberty and security (Article 6 EU Charter and Article 5 ECHR), the Right to an effective remedy and to a fair trial (Article 47 EU Charter and Articles 6 and 13 ECHR) as well as the Presumption of innocence and right of defence (Article 48 EU Charter and Article 6 ECHR) are respected. Indeed rights guaranteed by the ECHR, and by analogy, the EU Charter, must be “practical and effective” and not “theoretical and illusory.”¹⁶

Access to a lawyer at the outset contributes to the protection “against abusive coercion on the part of the authorities,” “the prevention of miscarriages of justice” and “equality of arms between the investigating or prosecuting authorities”¹⁷ and the suspect or accused.

Access to a lawyer at the outset addresses “... the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained

¹⁵ European Court of Human Rights Annual Report 2010, Statistical Information, page 146, http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAC7E934A1D6/0/2010_Rapport_Annuel_EN.pdf

¹⁶ *Salduz v Turkey*, [GC] no. 36391/02, 27 November 2008, paragraph 51, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=36391/02&sessionid=73409350&skin=hudoc-en>.

¹⁷ *Salduz v Turkey*, paragraph 53.

during this stage determines the framework in which the offence charged will be considered at the trial,” and to an extent compensates for the “particularly vulnerable position” of the suspect or accused at this stage and ensures respect of the right “not to incriminate himself” which “presupposes that the prosecution in a criminal case seek to prove their case ... without resort to evidence obtained through methods of coercion or oppression in defiance of the will” of the suspect or accused.¹⁸

Access to a lawyer at the outset acts as a “fundamental safeguard against ill treatment.”¹⁹ Indeed, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to which the European Court of Human Rights refers “has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.”²⁰

No watering down

Against this fundamental rights framework, the Society believes that the provisions set out in Article 3 (The right of access to a lawyer) with regard to when a suspect or accused person should be granted access to a lawyer should not be watered down.

The Society observes that in *Salduz v Turkey*, the European Court of Human Rights considered that “in order for the right to a fair trial to remain sufficiently “practical and effective” ... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police ...”²¹

As pointed out in certain concurring opinions in *Salduz v Turkey*, “The legal principle to be derived from the judgment is ... that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs. Failure to allow that possibility, regardless of the question of interrogations and their use by the courts, amounts, subject to exceptions, to a violation of Article 6 of the Convention.” Moreover “the fact that defence counsel may see the accused throughout his detention in police stations or in prison is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention”²²

The reasoning in these concurring opinions is instructive:

“The generally recognised international standards, which the Court accepts and which form the framework for its case-law, provide: “An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to

¹⁸ *Salduz v Turkey*, paragraph 54.

¹⁹ *Salduz v Turkey*, paragraph 54.

²⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 12th General Report on the CPT's activities, CPT/Inf (2002) 15, 3 September 2002, paragraph 41, <http://www.cpt.coe.int/en/annual/rep-12.htm>.

²¹ *Salduz v Turkey*, paragraph 55

²² *Salduz v Turkey*, Concurring Opinion of Judge Zagrebelsky, Joined by Judges Casadevall and Türmen and see also Concurring Opinion of Judge Bratza.

receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions...”

It is therefore at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer, and not only while being questioned.

The importance of interrogations in the context of criminal procedure is obvious, so that, as the judgment makes clear, the impossibility of being assisted by a lawyer while being questioned amounts, subject to exceptions, to a serious failing with regard to the requirements of a fair trial. But the fairness of proceedings against an accused person in custody also requires that he be able to obtain (and that defence counsel be able to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on.”

This is no longer just a matter of concurring opinions as in *Dayanan v Turkey*, the European Court of Human Rights considered that:

“... the equity of criminal procedure requires in general for the purposes of Article 6 that the suspect has the possibility to be assisted by a lawyer from the moment he is taken into police custody (“garde a vue”) or pre-trial detention (“detention provisoire”).”²³

“an accused must when he is deprived of his liberty benefit from the assistance of a lawyer and this is independent from the interrogations he is subject to ... In effect, the equity of the procedure requires that the accused is able to obtain the whole wide range of services associated with legal assistance. In this regard, discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress and checking the conditions of detention are the elements fundamental to the defence that the lawyer must be free to exercise.”²⁴

Indeed the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment cites the right of access to a lawyer as a “fundamental safeguard against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).”²⁵

As regards timing the Society reiterates that rights should remain “practical and effective.” Accordingly, in a *Fatma Tunç v. Turkey (no. 2)* where the applicant had seen her lawyer for only 5 minutes, the European Court of Human Rights concluded that “although the applicant had met her lawyer during police custody, this meeting

²³ *Dayanan v Turkey*, no. 7377/03, 13 October 2009, paragraph 31, unofficial translation from French, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=7377/03%20%7C%207377/03&sessionid=73409891&skin=hudoc-en>.

²⁴ *Dayanen v Turkey*, paragraph 32, unofficial translation from French.

²⁵ 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, 13 April 1992, paragraph 36, <http://www.cpt.coe.int/en/annual/rep-02.htm>.

cannot be considered to have been sufficient by Convention standards.”²⁶ In *Öcalan v. Turkey* the Court considered that “the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hour meetings per week with his lawyers in order to prepare for a trial of that magnitude.”²⁷

Strengthening the proposal

Rights to be exercised effectively

As regards access to a lawyer being granted in such a time and manner to allow the suspect or accused person to “exercise his rights of defence effectively”, the Society would question why for example, “the Prohibition against ill treatment”, the “Right to liberty and security” and the “the Right to an effective remedy” are omitted.

Persons other than suspects and accused persons

The Society refers to Article 10 (Persons other than suspects and accused persons) of the proposal that seeks to “ensure that any person other than a suspect or accused person who is heard by the police or other enforcement authority in the context of a criminal procedure is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.” The Society welcomes addressing such scenarios, essential to ensuring that rights are practical and effective. The Society recalls that in *Brusco v France* the European Court of Human Rights considered that “The argument that [the applicant] was heard only as a witness is irrelevant, because it is purely formal, where the judicial and police authorities had at their disposal elements of a nature to suspect that he had participated in the offence.”²⁸

The Society emphasises that it will be important to provide for effective access to a lawyer in such circumstances also before the questioning, interrogation or hearing continues, to reiterate Article 3 (The right of access to a lawyer in criminal proceedings), so that for example “access to a lawyer shall be granted in a time and manner as to allow the suspect or accused person to exercise his rights of defence,” Article 4 (Content of the right of access to a lawyer) and Article 7 (Confidentiality). It will also be important to provide for access to a lawyer if during the course of questioning, interrogation or hearing the person wants a lawyer irrespective of whether the person is a suspect.

Scope: also from when “should be made aware” a suspect or accused

The Society observes that Article 2 (Scope) of the proposal provides that the Directive “applies from the time a person is made aware by the competent authorities ... that he is suspected or accused of having committed a criminal offence ...” The

²⁶ *Fatma Tunç v. Turkey* (no. 2), no. 18532/05, 13 October 2009, paragraph 14, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=18532/05&sessionid=73410390&skin=hudoc-en>.

²⁷ *Öcalan v. Turkey*, [GC] no. 46221/99, 12 May 2005, paragraph 135, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=46221/99&sessionid=73410793&skin=hudoc-en>.

²⁸ *Brusco v France*, no. 1466/07, 14 October 2010, paragraph 47, unofficial translation from French, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=1466/07%20%7C%201466/07&sessionid=73411164&skin=hudoc-en>.

Society calls for the words “or should be made aware” to be added. Indeed, the scope of the Directive should not be restricted to when a person is made aware that they are a suspect or accused. Otherwise, the Directive could simply be avoided by not making a person aware that they are a suspect or accused. It should also cover those who should be made aware that they are a suspect or accused. Moreover various provisions in the Directive explicitly state that they only apply to persons to whom Article 2 refers, including Article 5 (The right to communicate upon arrest), Article 6 (The right to communicate with consular authorities) and Article 13 (Remedies), so the scope of Article 2 should not be so restrictive.

Scope: final determination unnecessarily restrictive and counterproductive?

The Society also believes that it will be important to give further consideration to whether Article 2 (Scope) of the proposal is unnecessarily and counter-productively restrictive. It states that it applies “until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.” The Society emphasises that this end point is premature in terms of access to a lawyer as a safeguard of fundamental rights. There are many other issues that would need to be resolved in matters that would arguably fall within the Article 82(2) legal basis, for example, of “the rights of individuals in criminal procedure,” following the final determination of the question of whether the suspected or accused person has committed the offence. Not least, the ongoing issue of detention conditions. Furthermore, the European Union has already deemed fit to legislate in this area. For example:

The Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty, which is to be implemented by 5 December 2011. This establishes a system for transferring convicted prisoners back to the Member State of nationality or habitual residence or to a Member State with which they have close ties to serve their sentence.

The Framework Decision of 27 November 2008 on the application of the principle of mutual recognition of probation decisions and alternative sanctions, which has to be implemented by 6 December 2011. This relates to the post-trial stage. It applies the principle of mutual recognition to alternatives to custody and measures facilitating early release.

The Society is of the view that it will be important to give further consideration to going beyond the final determination phase in order to sufficiently enhance the mutual trust that mutual recognition requires.

Independent lawyer

The Society also calls for the right of access to a lawyer to be a right of access to an “independent” lawyer, independent of the investigating or prosecuting authorities.

Lawyer of choice

The Society also calls for the right of access to a lawyer to be a right of access to a lawyer of choice. Indeed, Article 6 § 3(c) of the ECHR provides for “legal assistance of his own choosing ...” and *Salduz v Turkey* details a range of commitments by Member States at Council of Europe and international level to access to a lawyer of choice. Notably:

Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73)5 of the Committee of Ministers of the Council of Europe): “An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ...”

Recommendation of the Council of Europe Committee of Ministers to Member States on the European Prison Rules (Rec(2006)2): “23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice ...”

Article 14 § 3 (b) of the International Covenant on Civil and Political Rights (ICCPR), which provides that everyone charged with a criminal offence is to be entitled “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”.

Disclosure

The Society would also call for the content of the right of access to a lawyer to include the right to have full disclosure.

4. Do you think that it is always necessary for a suspect or accused person to meet their lawyer, rather than, for example, gaining legal advice over the telephone?

The right of access to a lawyer should be physically in person. The Society is concerned by moves to restrict access to telephone or video. The lawyer client relationship is based on mutual trust and understanding. Body language is an essential part of communication. It is crucial that meetings are face to face not least:

- to establish whether the suspect or accused is vulnerable, has any mental health difficulties or other medical problems and can read or write;
- to counteract adverse psychological effects on the suspect or accused of only seeing their interrogator and not having anyone representing them present and the sense of isolation and fears that the person they are speaking to not physically in person is anyone other than their lawyer and concerns over confidentiality;
- to prevent ill-treatment - the Society also adds in this regard that the very presence of lawyers in places where people are deprived of their liberty safeguards against ill-treatment not just in the particular case in question but also more generally as ill-treatment is less likely to occur where lawyers are routinely present and the very presence of lawyers therefore has a deterrent effect;
- to, as set out in *Dayanan*, “support an accused in distress.”²⁹

The Society recalls that as set out in the Concurring Opinion of Judge Zagrebelsky, Joined by Judges Casadevall and Türmen in *Salduz v Turkey*:

“The generally recognised international standards, which the Court accepts and which form the framework for its case-law, provide: “An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to

²⁹ *Dayanan v Turkey*, no. 7377/0, 13 October 2009, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=7377/03%20%7C%207377/03&sessionid=73417507&skin=hudoc-en>.

receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions...”.

“The legal principle to be derived from the judgment is therefore that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs. Failure to allow that possibility, regardless of the question of interrogations and their use by the courts, amounts, subject to exceptions, to a violation of Article 6 of the Convention. ... the fact that defence counsel may see the accused throughout his detention in police stations or in prison is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention.”

Indeed, as referred to in *Salduz v Turkey* Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73)5 of the Committee of Ministers of the Council of Europe) provides: “An untried prisoner shall be entitled, as soon as he is imprisoned ... to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions.”³⁰

Moreover, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment standard, endorsed by the Committee of Ministers of the Council of Europe, provides that:

“38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation.”³¹

The Society recalls that in *Brusco v France*, the European Court of Human Rights states that “... la personne placée en garde à vue a le droit d’être assistée d’un avocat dès le début de cette mesure ainsi que pendant les interrogatoires ...”³² Moreover, the Society recalls that in *Šebalj v. Croatia*, the European Court of Human Rights found “... a violation of Article 6 §§ 1 and 3(c) of the Convention on account of the applicant’s questioning by the police ... without the presence of a defence lawyer.”³³

Furthermore, the Society observes that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

Emphasised that “From the standpoint of prevention of ill-treatment the introduction of video-conferencing would be totally inadequate.”³⁴ in its Spain visit report.

Condemned the “common practice for duty lawyers to provide advice by telephone” in its Report to the UK on its Jersey Visit 2010. It observed that “It would appear that

³⁰ *Salduz v Turkey*, paragraph 37

³¹ CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010 English, page 6 re endorsement and paragraph 38 on page 8, <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

³² Paragraph 45.

³³ *Šebalj v. Croatia*, no. 4429/09, 28 June 2011, paragraph 257, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=4429/09&sessionid=73432402&skin=hudoc-en>

³⁴ Spain Visit Report 2007, CPT/Inf (2011) 11, 25 March 2011, paragraph 56, <http://www.cpt.coe.int/documents/esp/2011-11-inf-eng.htm>.

a duty lawyer's presence was rigorously provided only when the detained person was suspected of a very serious offence such as rape or murder." It emphasised that "In the CPT's experience, it is during the period immediately following the deprivation of liberty that the risk of intimidation and ill-treatment is greatest. The possibility for persons taken into police custody to have access to a lawyer during that period will have a dissuasive effect on those minded to ill-treat detained persons; moreover, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. In the Committee's view, for this right to act as an effective safeguard against ill-treatment, it should include the lawyer's presence at the police station ..."³⁵

In its Portugal Visit Report 2008 emphasised that "The right of access to a lawyer must include the possibility to meet with the lawyer in private and to have a lawyer present during any interrogation."³⁶ It emphasised shortcomings *vis-a-vis* the right of a witness to consult a lawyer in private and *vis-a-vis* not providing for the physical presence of a lawyer and instead contact by telephone.³⁷

5. With regard to Articles 3(1)(b) and 4(3), what do you think would be the practical implications of granting lawyers the right to attend any procedural, investigative, or evidence-gathering act, albeit, only in cases where national law permits or requires the presence of a suspect or accused person and where it would not prejudice the acquisition of evidence?

As regards applying to "any procedural or evidence gathering act at which the person's presence is required or permitted as a right in accordance with national law," the Society would be concerned by moves to water this down not least given the rationale for providing access to a lawyer at the outset.

The Society observes that in England and Wales the lawyer also has a right to be present in certain circumstances where the person's presence is not permitted as a right in accordance with national law. For example, in the case of video identification. The Society observes that the lawyer's presence in such circumstances is very important for the suspect or accused person to exercise his rights of defence effectively. It will therefore be worth considering whether the provision should in fact be widened.

The Society believes that further thought will need to be given to whether the wording "unless this would prejudice the acquisition of evidence" is too wide. The Society recalls the rationale set out above for having a lawyer present. It extends not only to the rights of defence but also for example to the prohibition on ill treatment.

6. Can you think of any circumstances when it would be necessary in the interests of justice to restrict the right proposed at Article 4(2) regarding a lawyer's right to be present at any questioning and hearing?

The Society would be concerned by moves to restrict the right for the lawyer to be physically present in person at any questioning and hearing and reiterates the points made in response to Question 4 above.

³⁵ Report to UK on Jersey Visit 2010 CPT/Inf (2010) 35, 19 November 2010, paragraph 16, <http://www.cpt.coe.int/documents/qbr/2010-35-inf-eng.htm>.

³⁶ Portugal Visit Report 2008, CPT/Inf (2009) 13, 19 March 2009, paragraph 23, <http://www.cpt.coe.int/documents/prt/2009-13-inf-eng.htm>.

³⁷ Portugal Visit Report 2008, paragraph 24.

The Society is concerned that the derogation in Article 8 (Derogations) is a blanket one. The Society believes that any such derogation should be restricted to the particular lawyer in question and that there should be an obligation to provide an independent substitute lawyer in the meantime. As referred to in *Salduz v Turkey*, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has emphasised that where “it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice; however, in such cases, access to another independent lawyer should be arranged.”³⁸

The Society draws attention by analogy for example to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment report to the UK Government published on 1 October 2008.³⁹ In relation to extensions of pre-charge detention by video-link it emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority. It emphasises that from the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of a judge. Further, it explains that it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video-conferencing link.

The Society observes that it will also be important to clarify that the rights conferred on the lawyer do not restrict the right of the suspect or accused for example to be physically present in person at the hearing, to avoid any potential for misunderstanding in this regard.

The Society observes that it will also be important to make clear that the various rights of the lawyer set out in Article 4 (Content of the right of access to a lawyer) are also rights of the suspect or accused to have the lawyer exercising such activities.

7. Do you think that granting lawyers routine access to the place where a person is detained would add any value to the existing measures in place in the UK to monitor custody conditions?

In England and Wales there is often a lawyer in the detention area. However, this may change in England and Wales unless the deeply concerning move towards telephone advice is stopped. This would remove a very valuable safeguard.

Granting lawyers routine access to the place where a person is detained is a starting point. In addition to the right to check detention conditions, the Society would at least add the right to check and to have maintained a custody record. The maintenance of a written custody record accessible to the suspect and accused and the lawyer is a simple tool that focuses the minds of custodians and reduces inadvertent law breaking. It prevents inadvertent abuse of rights as by having a custody record custodians would need to engage in a deliberate cover up. It also protects custodians in demonstrating that obligations have been complied with.

³⁸ *Salduz v Turkey*, paragraph 39.

³⁹ Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf (2008) 27, 2 to 6 December 2007, paragraph 9 and 10, <http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.pdf>.

Indeed, the Society recalls that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

“... considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them) ... Further, the detainee's lawyer should have access to such a custody record.”⁴⁰

The Society would also add that in addition to the right to check the detention conditions there should be an effective remedy in place to redress shortcomings in detention conditions and the applicant should have the right of access to a lawyer to pursue such a remedy.

8. Can you think of any circumstances when it would be necessary in the interests of justice to limit the duration and frequency of meetings between the suspect or accused person and his or her lawyer?

The proposal provides that “The duration and frequency of meetings between the suspect or accused person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights of defence.” The Society would again question why for example, “the Prohibition against ill treatment”, the “Right to liberty and security” and the “the Right to an effective remedy” are omitted.

The Society reiterates that rights must be “effective” and the European Court of Human Rights has examined restrictions on the duration and frequency of meetings with this in mind.

Accordingly, in *Fatma Tunç v. Turkey* (no. 2) where the applicant had seen her lawyer for only 5 minutes, the European Court of Human Rights concluded that “although the applicant had met her lawyer during police custody, this meeting cannot be considered to have been sufficient by Convention standards.”⁴¹ In *Öcalan v. Turkey* the Court considered that “the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hour meetings per week with his lawyers in order to prepare for a trial of that magnitude.”⁴²

9. Do you think that a derogation to any of the rights outlined in this Directive need to be authorised by a judicial authority, rather than the police or other law enforcement authorities?

⁴⁰ Extract from the 2nd General Report [CPT/Inf (92) 3], <http://www.cpt.coe.int/en/annual/rep-02.htm>.

⁴¹ *Fatma Tunç v. Turkey* (no. 2), (2005) App. No. 16608/02, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=16608/02&sessionId=73248549&skin=hudoc-en>.

⁴² *Öcalan v. Turkey*, no. 46221/99, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=turkey%20%7C%2046221/99&sessionId=73249991&skin=hudoc-en>.

The Society reiterates that the limited derogation set out in Article 8 should be restricted to the particular lawyer in question and that there should be an obligation to provide an independent substitute lawyer in the meantime.

The Society would add that the duly reasoned decision should be recorded in writing and also entered in the custody record. The specific derogation in question must on the face of it be clearly defined and strictly limited in time.

The Society would be concerned by moves to enable anyone other than a “judicial authority” to authorise the derogation from such fundamental safeguards. The Society observes in this regard that in England and Wales magistrates courts routinely deal on demand with time critical requests for warrants. It will be important to define a “judicial authority” to ensure that it means an independent judicial authority.

10. Are the derogations in Article 8 adequate? Should they only apply to Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6? What are the practical implications of the derogations?

The Society would be concerned by moves to extend the derogations.

The Society welcomes the recognition of the need for absolute confidentiality. There should be no derogation in respect of confidentiality.

The Society recalls in the words of the European Court of Human Rights that:

“... One of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers. ... confidential communication with one's lawyer is protected by the Convention as an important safeguard of one's right to defence

... Indeed, if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective ...”⁴³

Moreover, the European Court of Human Rights 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 hamper the detained person's right effectively to challenge the lawfulness of his detention.”⁴⁴

The Society asserts that where there is reason to suspect that the lawyer chosen by the suspect or accused is acting to further criminal activity, then it is for the authorities to bring criminal proceedings against the lawyer in question.

⁴³ *Castravet v. Moldova*, no. 23393/05, 13 March 2007, paragraph 49 to 50, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=23393/05&sessionid=73416374&skin=hudoc-en>.

⁴⁴ *Castravet v. Moldova*, paragraph 51.

Consideration should be given as to whether the authorities should be able to apply to an independent court to remove the lawyer in question from the case where there are reasonable grounds to suspect that the lawyer is acting to further criminal activity.

In such circumstances, the suspect or accused should not be left lawyer-less but should instead have access to another lawyer independent of the investigating or prosecuting authorities.

In no circumstances should there be a derogation from confidentiality.

11. Do you think that the provisions in Article 9 with regard to the conditions that should be met to allow somebody to waive their access to a lawyer are fair to that person and workable in practice?

The Society recalls that the European Court of Human Rights has considered that a waiver:

“... must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance ...[and] it must be shown that he could reasonably have foreseen what the consequences of his conduct would be ..”⁴⁵

The Society believes that there should be no waiver of the right to a lawyer in the case of children and vulnerable adults.

The Society observes that the European Court of Human Rights emphasises that it is essential that children, and the Society adds by analogy, vulnerable suspects are:

“... dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings ... The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition ... and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent ...”⁴⁶

The European Court of Human Rights “... considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.”⁴⁷

⁴⁵ *Panovits v Cyprus*, no. 4268/04, 11 December, 2008, paragraph 68, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=panovits&sessionid=73416551&skin=hudoc-en>.

⁴⁶ Paragraph 67.

⁴⁷ Paragraph 68.

However, the Society is concerned that this will be very difficult to illustrate in practice and that the proposal can add value by prohibiting waiver of the right of access to a lawyer in the case of children and vulnerable suspects.

The Society recalls that having no waiver of the right of access to a lawyer in the case of children and vulnerable adults and making waiver of the right of access to a lawyer in other cases subject to stringent conditions not only safeguards the suspect and accused but also protects the investigating and prosecuting authorities. Indeed, in practice, right-thinking investigators and prosecutors are very keen to have a lawyer present. Moreover, restricting waivers on access to a lawyer will lead to cost savings at the end when the trial process may otherwise derail.

The waiver should not only be subject to “prior legal advice” but also “prior independent legal advice.”

12. Do you think that the provisions set out in Article 11(2) regarding the rights that a person who is subject to a European Arrest Warrant has in respect of access to a lawyer in the executing State are both fair to that person and workable in practice?

The Society would add the maintenance of a written custody record and the right of access to the custody record.

The Society calls for disclosure and the right of the lawyer and suspect or accused of access to disclosure in the executing and the issuing State. The Society emphasises in this regard that many cases can be resolved earlier with swift disclosure.

13. Do you think that it is necessary to ensure that a person who is subject to a European Arrest Warrant should upon request have the right to access a lawyer in the issuing State? What are the practical implications of that proposal?

The Society welcomes moves to provide access to a lawyer in the issuing State as opposed to just in the executing State.

The Society emphasises that this will lead to many cases being resolved quickly and errors being redressed up front, saving time and money.

The Society observes that access to a lawyer in issuing States will represent a big cost saving for Member States, such as the UK, that issue far fewer European Arrest Warrants than they receive.

It will also serve as a cost disincentive for Member States that repeatedly issue European Arrest Warrants disproportionately and contrary to the European Handbook on the European Arrest Warrant.

The Society observes that the wording in Recital 22 that “this should not entail any right to question the merits of the case in the executing Member State” is unnecessarily restrictive and counterproductive. Moreover, Article 11.4 (The right of access to a lawyer in European Arrest Warrant proceedings), which limits the lawyer in the issuing State to activities “needed to assist the lawyer in the executing State, with a view to the effective exercise of the person’s rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.” is also unnecessarily restrictive and counterproductive.

The Society calls for disclosure and the right of the lawyer, and the suspect or accused, of access to disclosure in the executing and the issuing State. The Society emphasises in this regard that many cases can be resolved earlier with swift disclosure.

As acknowledged by the European Commission in its detailed impact assessment, the risk pertaining to lack of mutual trust is expected to be "magnified" when mutual recognition measures adopted at EU level since the Framework Decision on the European Arrest Warrant have been implemented, such as the Framework Decisions on Financial Penalties, Confiscation, Freezing Orders, European Evidence Warrant, Transfer of Prisoners and the European Supervision Order.⁴⁸ The Society observes that in this era of quasi-automatic mutual recognition, consideration must also be given to explicitly providing for access to a lawyer in both the issuing and executing States in relation to all mutual recognition instruments or even beyond, to the extent that such assistance would not otherwise fall within the general provisions on access to a lawyer.

14. What impact do you think that the Directive would have on the provision of legal aid?

Member States should comply with their obligations under the European Convention on Human Rights, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommendations and other commitments in the Council of Europe. Member States that do not will incur costs. But such costs are created by their own failure to comply with their current obligations and commitments. To this extent the Directive would be cost neutral. The Directive would also create cost savings in pursuing cases that would otherwise collapse at trial or on appeal and would also reduce pointless appeals.

As reiterated in the European Commission report on the implementation of the European Arrest Warrant, Member States should ensure that a proportionality check is applied to prevent European Arrest Warrants from being issued for offences which are not serious enough to justify the measures and cooperation which the execution of a European Arrest Warrant entails.⁴⁹ Moreover, as endorsed by the European Commission, the Council Handbook on the European Arrest Warrant also concerns proportionality and sets out factors to be assessed when issuing a European Arrest Warrant and possible alternatives to be considered before issuing a European Arrest Warrant.⁵⁰

The welcome right of access to a lawyer in the issuing State and the attendant costs of such access should serve to focus the minds of issuers to issue European Arrest Warrants proportionately. It would serve as a potential disincentive to Member States, such as Poland, who issued 4844 European Arrest Warrants in 2009 alone, in contrast to the UK which issued only 220 in 2009.⁵¹ It would also represent a big cost saving for Member States such as the UK.

⁴⁸ Page 10.

⁴⁹ European Commission report On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States dated 11 April 2011, COM(2011) 175 final, point 5, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0175:FIN:EN:PDF>.

⁵⁰ Point 5.

⁵¹ Page 12.

The Society also emphasises the real and human costs of, among other things, not providing access to a lawyer at the outset in terms of the real and imminent threat of miscarriages of justice. Among other things:

- The costs of criminal proceedings that should not have been brought and attendant appeals against such proceedings. For example: court costs; the costs of keeping the person in detention; the costs in terms of the personal and human suffering of that person and of the complainant whilst the actual offender roams free; the costs of the authorities in having to relaunch their investigation; and the costs incurred in redressing such personal and human suffering, such as the potential costs to the National Health Service.
- The costs incurred in derailing criminal proceedings that should have been brought but would otherwise fail, not least the personal and human suffering of the victim and society in general and the costs and personal and human suffering in terms of the risk of repeat offences that could otherwise have been avoided.
- The potential for ill-treatment and the attendant physical and psychological suffering for all actors involved.
- The costs of European Court of Human Rights proceedings and consequences of findings against the Member State concerned.
- The adverse fall out in terms of mutual recognition not being forthcoming in cases where it would otherwise be appropriate and the attendant personal and human suffering of the victim in finding that due to the failure of Governments to respect fundamental safeguards, justice will never be done, and of society in general.
- The costs of not facilitating an early resolution of the matter, which with the advice of a lawyer, may otherwise be achieved.
- The costs of pointless appeals that, with the advice of a lawyer, would not have been brought.

In Measure C: Legal Advice and Legal Aid of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings dated 30 November 2009 the Council stated that: “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.”⁵²

Legislating on the right of access to a lawyer is legislating on a fundamental right, an undertaking not to be taken lightly. The right of access to a lawyer guaranteed must be practical and effective, rather than theoretical and illusory. The right to legal aid should ensure full equality of access to the right of access to a lawyer conferred in the Directive. Suspects or accused persons who do not have sufficient means to pay or have no access to such means because for example they are in detention or in another jurisdiction must not thereby be excluded from the right of access to a lawyer. Enshrining a fundamental right in EU legislation needs to be a right that all

⁵² Roadmap for Strengthening procedural rights for suspected or accused persons in criminal proceedings, 30 November 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.

Member States signing up to it will enforce and give effect to in practice for all individuals.

Accordingly, the Society calls for an explicit obligation that Member States shall ensure that a suspect or accused person has access to free legal aid to pay for the right of access to a lawyer.

The Society points out that the European Commission did feel able to propose an, albeit limited, right to legal aid for victims in its proposal establishing minimum standards on the rights, support and protection of victims of crime, which states that “Member States shall ensure that victims have access, in accordance with procedures in national law, to legal aid, where they have the status of parties to criminal proceedings.”⁵³

15. What should the remedy be where a person’s right of access to a lawyer has been breached?

The Society would be concerned by any attempt to water down the remedies set out in Article 13 (Remedies).

As regards using statements made by the suspect or accused person in breach of his right to a lawyer, the Society observes that as set out in *Salduz v Turkey*, “The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”⁵⁴ The Society agrees that the “rights of defence” test is accordingly the right benchmark to redress the case of suspects or accused persons in general. The Society would therefore be concerned by any attempt to water down Article 13(3) in the proposal, which provides that statements should not be used against the suspect or accused “unless the use of such evidence would not prejudice the rights of the defence.”

The Society would also be concerned by any attempt to water down the additional remedy afforded to Persons other than suspects and accused persons in Article 10. The Society observes that this provision is intended to redress the scenario in which disingenuous ploys are used to try and circumvent fundamental safeguards by pretending that the suspect or accused is instead a witness. The European Court of Human Rights has recognised that such ploys are completely unacceptable. Indeed in the case of *Brusco v France*, it stated that “The argument that [the applicant] was heard only as a witness is irrelevant, because it is purely formal, where the judicial and police authorities had at their disposal elements of a nature to suspect that he had participated in the offence.”⁵⁵ The Society welcomes this attempt to stamp out this practice by ensuring that “any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.”

16. Are there any other issues that we need to be aware of?

⁵³ Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime 18 May 2011 Article 12
http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_275_en.pdf

⁵⁴ *Salduz v Turkey*, paragraph 55.

⁵⁵ *Brusco v France*, no. 1466/07, § 47, 14 October 2010 paragraph 47 unofficial translation from French,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BRUSCO%20%7C%20FRANCE%20%7C%201466/07&sessionid=73249221&skin=hudoc-en>.

Right to communicate

As regards Article 5 (The right to communicate upon arrest), the Society would add that “the right to communicate with at least one person named by him” in Article 5.1 should make clear that it is in addition to the lawyer.

As regards Article 5.2, the Society would also add vulnerable adults to ensure that they are afforded the same protection as children. The Society would again add that the “legal representative,” “another adult,” or “another appropriate adult” should be in addition to the lawyer.

Mainstreaming children and vulnerable suspects

The Society would add that is essential to mainstream children and vulnerable suspects and accused in this proposal and indeed in all measures in this area, and not to just wait for a specific measure.

Evaluating and monitoring effectiveness and duty to collect data

The Society also recalls that the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union dated 28 April 2004⁵⁶ included provisions on Evaluating and monitoring the effectiveness of the Framework Decision (Article 15)⁵⁷ and Duty to collect data (Article 16).⁵⁸ It would

⁵⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0328:FIN:EN:PDF>

⁵⁷ “Article 15

Evaluating and monitoring the effectiveness of the Framework Decision

1. Member States shall facilitate the collection of the information necessary for evaluation and monitoring of this Framework Decision.

2. Evaluation and monitoring shall be carried out under the supervision of the European Commission which shall co-ordinate reports on the evaluation and monitoring exercise. Such reports may be published.”

⁵⁸ “Article 16

Duty to collect data

1 In order that evaluation and monitoring of the provisions of this Framework Decision may be carried out, Member States shall ensure that data such as relevant statistics are kept and made available , *inter alia*, as regards the following:

(a) the total number of persons questioned in respect of a criminal charge, the number of persons charged with a criminal offence, whether legal advice was given and in what percentage of cases it was given free or partly free,

(b) the number of persons questioned in respect of a criminal offence and whose understanding of the language of the proceedings was such as to require the services of an interpreter during police questioning. A breakdown of the nationalities should also be recorded, together with the number of persons requiring sign language interpreting,

(c) the number of persons questioned in respect of a criminal offence who were foreign nationals and in respect of whom consular assistance was sought. The number of foreign suspects refusing the offer of consular assistance should be recorded. A breakdown of the nationalities of the suspects should also be recorded,

(d) the number of persons charged with a criminal offence and in respect of whom the services of an interpreter were requested before trial, at trial and/or at any appeal proceedings. A breakdown of the nationalities and the languages involved should also be recorded,

(e) the number of persons charged with a criminal offence and in respect of whom the services of a translator were requested in order to translate documents before trial, at trial or during any appeal proceedings. A breakdown of the nationalities and the languages involved should also be recorded. The number of persons requiring a sign language interpreter should be recorded,

be useful to include such provisions in this Directive. Indeed, the reasoning given by the European Commission in its Explanatory Memorandum to the 2004 proposal for including such provisions is highly persuasive. Not least that:

Such provisions are “particularly important in the case of legislation that confers rights as those rights are meaningless unless they are complied with. Only regular monitoring will show that there has been full compliance.”⁵⁹

“... to achieve its stated objective of enhancing mutual trust, there must be public, verifiable statistics and reports showing that rights are complied with so that observers in other Member States (not only in government, but also lawyers, academics and NGOs) may be confident that fair trial rights are observed in each national system.”⁶⁰

“Evaluation and monitoring will benefit all Member States. It will enable them to show other countries that they observe fair trial rights and it will enable them to reassure those implementing the measures of the Mutual Recognition Programme in their home State, should such reassurance prove necessary, that safeguards ensuring equivalent fair trial standards are operated in other Member States.”⁶¹

Closing loophole

The Society observes that Recital 6 states that the Directive sets out minimum rules “in criminal proceedings, excluding administrative proceedings leading to sanctions such as competition or tax proceedings.” The Society is concerned that Member States would be able at their discretion by classifying an offence as administrative instead of criminal to simply avoid their obligations under the Directive. The Society would call for this loophole to be closed, not least because the words criminal offence in for example Article 6 (Right to a fair trial) of the European Convention on Human Rights have an autonomous meaning. The Society observes that even the draft European Investigation Order in criminal matters⁶² includes, for example, proceedings brought by administrative authorities where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.

The Society also reiterates its concerns that there is a carve out for sanctions regarding minor offences by an authority other than a court having jurisdiction in criminal matters in Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings⁶³ (recital 16⁶⁴ and Article 3⁶⁵)

(f) the number of persons questioned and/or charged in connection with a criminal offence who were deemed not to be able to understand or follow the content or the meaning of the proceedings owing to age, mental, physical or emotional condition, together with statistics about the type of any specific attention given,
(g) the number of Letters of Rights issued to suspects and a breakdown of the languages in which these were issued.

2. Evaluation and monitoring shall be carried out at regular intervals, by analysis of the data provided for that purpose and collected by the Member States in accordance with the provisions of this article.”

⁵⁹ Paragraph 84.

⁶⁰ Paragraph 84.

⁶¹ Paragraph 85.

⁶² Partial general approach of the Council on the Member State initiative for a Directive regarding the European Investigation Order in criminal matters, Document 11735/11, 17 June 2011, Article 4, <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf>

⁶³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:EN:PDF>

and in the General Approach on the proposal for a Directive on the right to information in criminal proceedings⁶⁶ dated 6 December 2010 (recital 15a and article 2.3) and that these Directives will apply only to proceedings before an appeal court in such cases.

The Society is again concerned that this carve out may cover cases which would ordinarily fall within the jurisdiction of a court having jurisdiction in criminal matters were it not for Member States having simply enabled other authorities for example the police to impose such sanctions. The Society notes in this regard that in England and Wales police are able to issue penalty notices for example in respect of “minor offences” of theft and criminal damage instead of the matter being pursued before the courts.⁶⁷ The Society would be opposed to introducing such a carve out into this Directive. The Society observes that in England and Wales a significant proportion of cases are dealt with by penalty notices and such penalty notices appear on a detailed criminal records bureau check. The Society is opposed to delaying the right of access to a lawyer to when an individual has without assistance lodged appeal proceedings.

17. Do you think that the UK should participate (opt in) to this Directive?

The Society calls on the UK to opt in to the Directive at the outset and to play a leading role in ensuring that the rights it seeks to give effect to are comprehensive and not watered down.

The Law Society of England and Wales, 13 July 2011

For more information please contact:

Susan Clements

Justice and Home Affairs Policy Advisor

The Law Societies Joint Brussels Office

Avenue des Nerviens, 85 - Box 10

B-1040 Brussels

Belgium

Tel: +32 2 743 85 85

Fax: +32 2 743 85 86

Email: susan.clements@lawsociety.org.uk

⁶⁴ “(16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal.”

⁶⁵ “3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.”

⁶⁶ <http://register.consilium.europa.eu/pdf/en/10/st17/st17503.en10.pdf>

⁶⁷ Background on penalty notices is at <http://www.homeoffice.gov.uk/police/penalty-notices/> and the Penalty Notice is at page 32 to 34 of the Police Operational Guidance for Penalty Notices for Disorder at <http://www.homeoffice.gov.uk/publications/police/operational-policing/penalty-notices-guidance/penalty-notices-police-guidance?view=Binary>).