Ius Comparatum – Global Studies in Comparative Law

Lorena Bachmaier Winter
Stephen C. Thaman
Veronica Lynn *Editors*

The Right to Counsel and the Protection of Attorney-Client Privilege in Criminal Proceedings

A Comparative View

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Introduction

Lorena Bachmaier Winter

Abstract Lawyer-client confidentiality is facing new challenges and risks, making it necessary to approach its study from a comparative point of view. Within these new challenges, two elements require special attention: first, the impact of the digital world coupled with more intrusive IT investigative measures in almost all criminal investigations; and second element, the increasing transnational character of criminal proceedings and criminal investigations. A third important challenge in relation to the protection of the lawyer-client privilege is linked to the implementation of compliance programmes.

Keywords Criminal procedure · Comparative law · Right to counsel · Attorney-client communications · Defense lawyer

The right to counsel in criminal proceedings would not be effective without the guarantee of the confidentiality of communications between lawyer and client. For lawyers to practice their profession effectively and properly, clients must have complete trust in their lawyers' discretion. Without this trust clients, for fear of confidential information being disclosed to the prosecution or third parties, would not grant their lawyers insight into all the relevant information necessary for them to properly counsel or defend their client in court. On the other hand, if clients tell their lawyers of their guilt and disclose evidence, the lawyers' knowledge, offices and files become a source of evidence the prosecution would like to gain access to. This indispensable trust is safeguarded by the rules on lawyer-client confidentiality and it follows that the right to counsel would not be effective without the guarantee of the confidentiality of the communications between lawyer and client.

Given the importance of and the international recognition as fundamental rights necessary for the right to a fair trial, it could therefore be assumed that the right to

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counsel and the confidentiality of the communications between lawyer and client would not need to be further discussed. However this assumption is not correct: despite the recognition of this fundamental right, as the rules and practice in the different countries included in this book show, the system to ensure the confidentiality of the communications between the defendant and his/her defence counsel are not only not homogeneous, but remains clearly unsatisfactory in many cases.

In addition to the divergences in the regulation and implementation at the national level, it will be seen that the right to lawyer-client confidentiality at present is facing new challenges and risks, that makes it necessary to approach its study from a comparative point of view. Within these new challenges, two elements require special attention: first, the impact of the digital world coupled with more intrusive IT investigative measures in almost all criminal investigations; and the second element, which is closely linked to the digitalisation of our lives, is the increasing transnational character of criminal proceedings and criminal investigations.

Regarding the impact of the digital data and e-evidence in criminal investigations, very few systems establish rules on how to carry out computer searches in order to prevent disclosing confidential communication between the lawyer and his client; and the existing ones do not provide for an adequate procedure of sifting and filtering the privileged files. The digitalisation has caused also the "transnationalisation" of the criminal proceedings, a new reality that also requires a new legal approach.

Nowadays where the cross-border evidence plays an increasingly important role, it is not longer enough to provide for the protection of the procedural safeguards at the national level, because the data and the communications electronically stored may be used in a different jurisdiction where those communications took place. A simple example may serve to illustrate the problems that are to be faced: let us put that in country A the communications between defence counsel and defendant cannot be tapped (e.g. The Netherlands), but the Dutch authorities request the tapping of conversations of the suspect in country B (e.g. Spain). The requested country will carry out the interception of communications according to its own law, thus without applying a precise filter that would allow segregating the protected conversations. The recorded conversations—including the ones affecting the confidential lawyer-client relationship, will finally end up in the requesting state. This is just one example that shows that in the present transnational and digital scenario, the protection of confidentiality of communications between lawyer and client provided at the national level, are not sufficient, because the transfer of that data can ultimately cause the level of safeguards to be lowered or even disappear.

It could be considered that the infringements of such safeguards in the collecting of evidence could be balanced by way of exclusionary rules of evidence: despite the infringement of the right to lawyer-client confidentiality in the gathering of transnational evidence, exclusionary rules of evidence should counterbalance the possible lowering of the safeguards at the stage of the collecting of evidence. However, as will be seen throughout the chapters of the book, this assumption is not correct either.

Most legal systems do not have a consistent and comprehensive regulation on transnational criminal proceedings and rules on the applicable law or conflicts of law

rules are largely missing.[1] With regard to evidence obtained abroad, the practice varies greatly. In some cases it is admitted without any further control, whilst on other occasions it is subject to exhaustive domestic filters in order to check its compliance with domestic legal principles and sometimes also with the statutory provisions of the executing state. The divergence and overlapping of rules, principles and practice increases the complexity of transnational justice and causes major uncertainty having a negative impact on the protection of fundamental rights, on the efficiency of the international judicial cooperation and on the admissibility of evidence at trial.

These factors that are increasingly present in every criminal procedure, require to approach the rules on lawyer-client privilege from a comparative point of view. Even if the transnational dimension of the lawyer-client privilege has not been the direct objective of the study, it explains why a deep knowledge on the different legal systems from a comparative perspective is necessary.

A third important challenge in relation to the protection of the lawyer-client privilege is represented by the mixed role that in-house lawyers play when it comes to the implementation of compliance programmes, the loyalty towards the investigated company and the protection of internal whistle-blowers, *vis á vis* their obligation to testify and to report possible crimes. The scope of the lawyer-client privilege in relation to crimes committed by corporations and corporate criminal liability proceedings is still unclear. In those countries where corporate criminal liability has been introduced, it is discussed whether the in-house lawyer deserves the same level of protection as independent lawyers and whether lawyer-client privilege is applicable to in-house lawyers in internal investigations. Despite the efforts of the European Court of Justice in the landmark case *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*[2]—establishing that the lack of independence of the in-house lawyer prevented the application of the lawyer-client privilege in subsequent criminal proceedings—, the reasoning of this judgmnt is still very much debated. The Swiss law takes a different path, which shows also a very pragmatic approach, by providing at the same time for certainty: in-house corporate lawyers cannot act as defence lawyers for the company.

Finally, another important challenge is illustrated by the apparent contradiction in the approach to the fundamental right of the lawyer-client confidentiality: while there is an increasing awareness of the importance to protect the lawyer-client confidentiality, at the same time rules have been adopted for fighting against money laundering and prevention of financing terrorism that point in the opposite direction, either reducing the safeguards and allowing the breach of the confidentiality or by establishing the obligation of the lawyer to report certain suspicious activities to the police or to the financial intelligence units. Furthermore, in some countries law enforcement authorities are demanding to limit the scope of the lawyer-client

[1] See Bachmaier (2013), pp. 126–148.

[2] ECJ Case C-550/07 P, Judgment of the Court (Grand Chamber) of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, §§ 40 and 41.

privilege as it seriously hinders the investigations into tax evasion and organised crime, especially in countries where the lawyer-client privilege extends to all documents held by the lawyer in connection with the lawyer's professional capacity.

In addition to the "traditional" problems regarding the protection of the lawyer-client confidentiality examined in this study—such as, authorities overhearing conversations between lawyer and client in detention centres, sanctions for the breach of the duty of confidentiality by the bar associations, the scope of the crime-fraud exception—the above mentioned new challenges create major risks with regards to the protection of the right lawyer-client confidentiality. In order to analyse these issues it is necessary to examine first the role the defence counsel plays in each legal system. While most systems champion the notion that defence counsels are entirely independent, abandoning the idea that the lawyer should cooperate with the justice system as a kind of "representative of justice" in the search for truth, there are still some systems where this notion has not been completed erased, as happens still in some courts in Japan.

In situations where a lawyer's duties might conflict with their role within the justice system most of the legal systems studied in this book clearly establish that defending the interests of the client prevail over any duty to cooperate with the administration of justice, as long as the defence of the client does not involve becoming an accomplice of the defendant. Still, the boundaries are not clearly defined, ranging from the obligation to report untrue statements of the defendant to supporting the client's right to lie.

To assess the meaning, scope and implementation of the right to communicate confidentially with the defence lawyer, it is first necessary to establish how the right to access a lawyer is guaranteed and at which procedural stage and in relation to what types of offences it is granted to the suspect or defendant. Hence, a good part of our comparative study, as well as the chapters addressing the lawyer-client confidentiality at the national level, deal first with the right to be assisted by a lawyer. Only once the context is clarified, the real extent and effectiveness of the right to lawyer-client confidentiality can be analysed.

As will be seen throughout our study, the right to access to counsel has undergone a major harmonization within the European Union since the adoption of the EU Directive 2013/48, of 22 October 2013, nevertheless presenting noticeable differences as to the right to waive the assistance or cases where mandatory assistance of a lawyer is required, as well as the cases where legal aid is provided. Beyond the European landscape, however, the moment of access to a defence lawyer and the right to communicate with them privately, varies greatly: for example, in the U.S. the constitutional right to defence counsel is ensured only after the suspect has been charged; and in China it is granted for the detained person, but not necessarily during police interrogations of suspects. Depending at which stage the access to a lawyer is guaranteed, the conditions in which the lawyer-client communications occur also vary greatly and can have a negative impact upon the right to confidential communication.

Regarding the protection of the lawyer-client communications in criminal proceedings the countries studied reveal that there are still many controversial aspects of

the attorney-client privilege, in particular regarding the extent of the protection against intrusions by the state, acting through judges, prosecutors, or investigative officials, interfering with the secrecy and confidentiality of lawyer-client communications in order to find incriminating evidence: e.g. attempts to compel lawyers to testify as to these communications, attempts to subpoena lawyers to turn over documentary evidence falling within the scope of the lawyer-client relationship, and finally, attempts to search lawyer's offices or intercept lawyer-client's communications, whether through wiretapping, bugging of offices, homes or jails, intercepting e-mail, or seizing written communications.

As mentioned above, all these issues have been addressed using the comparative law methodology, where all of the national contributors provided answers to a comprehensive questionnaire. However in the final chapters collected in this volume, the contributors were allowed to depart from the rigid question-answer format, in order for them to analyse problems specific to their legal system in depth. The book presents twelve chapters examining the main questions related to the right of access to a lawyer and the protection of the lawyer-client confidentiality, all of them written by highly qualified academics and practitioners. I want to express our gratitude in preparing, first the national reports that made the comparative analysis possible; and later agreed to prepare the chapters the reader will find in this volume. The chapters represent a wide diversity of legal systems, including common law systems, Asian legal traditions and European legal systems.

It will be interesting to see that continental European legal systems despite belonging to the same "legal tradition", offer diverse realities that undoubtedly enrich the comparative analysis. A stark contrast remains between the so-called old democracies or sufficiently consolidated democratic systems, and those countries that could be defined as more vulnerable democratic systems among the European Union countries. And on the other hand, the Turkish legal system or the Swiss legal system, both within the geographical Europe, reveal enormous differences in culture, economics and history that are also reflected in their rules on access to a lawyer and the protection of lawyer-client confidentiality.

The present study illustrates the process of slow convergence between common law and civil law systems in certain areas, as well as the process of approximation with regards to the understanding of human rights under the umbrella of the case law of international and supranational courts. A particular case is represented by the move towards a more decisive harmonisation of the right to access to lawyer within the EU. Such an approximation is also visible internationally, despite the richness of solutions and divergent levels of protection of the right and duty to confidentiality of the lawyer-client relationship. The panoply of problems detected show that the right is still poorly protected in many countries that have weaker safeguards in place or the ones they have adopted are not implemented.

From the comparative law view, it does not seem to be useful to use the legal metaphors—transplant,[3] translation[4] or a legal implant—for analysing the

[3]Watson (1993), p. 8 ff.

[4]Metaphor used by Langer (2004).

fundamental right to communicate confidentially with the defence lawyer. It seems that this right is so intimately—and intrinsically—embedded in the right to defence and the right to legal counsel that an import or transfer from one system to another is not visible. However, what is visible is the clear expansion of the right of access to lawyer and the consequences in case of its violation.

Notwithstanding the foregoing, in terms of protection of *work product* and the role of the in-house lawyers in relation to internal compliance systems, more reciprocal influences between the systems might be observed. If these influences can be called legal transplants—according to Watson[5]—or they should be labelled as implants, it may not be relevant in this context.

In this comparative law study, our intention was not so much to define the relationships between legal systems, but rather to identify how the lawyer-client confidentiality in the criminal procedure process of the twenty-first century, dominated by a strong digitalization and internationalization is regulated and implemented. Our humble aim is to contribute to the understanding of, and not only on the academic level, the lawyer-client confidentiality relationship, in order to provide future guidance towards the strengthening of the defence rights in the criminal justice. A future that the legal scholarship has to travel hand in hand with comparative law to address the challenges of an increasingly global world.

References

Bachmaier L (2013) Transnational criminal proceedings, witness evidence and confrontation: lessons from the ECtHR's case law. Utrecht Law Rev, Special issue 9(4):126–148

Langer M (2004) From legal transplants to legal translations: the globalization of plea bargaining and the Americanization thesis in criminal procedure. Harv Int Law J 45(1)

Watson A (1993) Legal transplants. An approach to comparative law, 2nd edn. The University of Georgia Press, Athens-London

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[5]Ibidem.

A Comparative View of the Right to Counsel and the Protection of Attorney-Client Communications

Lorena Bachmaier Winter and Stephen C. Thaman

Abstract This chapter aims at providing a comparative overview on the protection of the fundamental right to counsel and the lawyer-client confidentiality in criminal proceedings. It will first explore the extent of the right to access to a lawyer, at which procedural stage and in relation to what types of offences it inures and what activities it entails. Before analysing the protection of the right to counsel and its content at the national level, the principles set out by the ECtHR will be addressed, as it shows the higher degree of harmonization achieved among the European countries. The impact of the EU Directive on the Right to Access to Lawyer, crucial to understanding the gradual approximation of the laws of the EU countries in this area, will also be mentioned.

The chapter will then discuss the breadth of the attorney-client privilege and the related confidentiality of attorney-client communications: the types of communications to which it applies and the extent to which it derives from the constitutional right to counsel, or only from national legislation. Following this it will be discussed how the different national legal systems protect the lawyer against confidential attorney-client material being the subject of judicial subpoena, an office search, a search of a computer or stored digital files, or any kind of interception of attorney-client communications. Finally, the consequences of the infringements of the right to counsel and the right to confidentiality of communications between lawyer and client will be analysed, going from exclusionary rules of evidence to sanctions to the lawyer breaching the duty of confidentiality. At the end, we have tried to draft certain conclusions with suggestions as to where improvements could be made in the protection of this fundamental right.

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Keywords Criminal procedure · Comparative law · Right to counsel · Attorney-client communications · Defense lawyer

Abbreviations

ABA	American Bar Association
ACHR	American Convention of Human Rights
CC	Criminal Code
CCBE	Council of the Bars and Law Societies of the European Union
CCP	Code of Criminal Procedure
CH	Switzerland
CN	China
DAL	Directive 2013/48/EU on the right to access to lawyer of 22 October 2013, the European Parliament and the Council
DE	Germany
DSCC	Defence Solicitor Call Centre
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ES	Spain
EU	European Union
FISA	U.S. Foreign Intelligence Surveillance Act
GR	Greece
ICCPR	International Covenant on Civil and Political Rights of the U.N.
IT	Italy
JP	Japan
LSC	Legal Services Commission
NL	the Netherlands
NSA	National Security Agency
PACE	Police and Criminal Evidence Act England and Wales
PL	Poland
PT	Portugal
RIPA	The Regulation of Investigatory Powers Act 2000
TFEU	Treaty on the Functioning of the European Union
TR	Turkey
U.K.	United Kingdom
U.N.	United Nations
U.S.	United States of America
USDOJ	U.S. Department of Justice
USSC	United States Supreme Court

1 Introduction

Since its earliest articulations, what we call "criminal procedure" has been aimed at inducing suspects of criminal wrongs to admit their guilt. A person caught *in flagrante* or as to whom strong suspicions existed as to criminal transgressions, faced the accusing party and the pretrial organs, such as investigating magistrate or justice of the peace, alone and defenceless. The only help an accused might have had in early customary procedures, was the ability to hire a "champion" to act on his or her behalf in a trial by battle. These "champions", available to suspects who were too weak or old to represent themselves, could be seen as precursors of criminal lawyers.[1] In inquisitorial systems on the European continent and in Asia torture was legally permitted to compel confessions of guilt and continental European lawyers played no role in pretrial proceedings until after the case had already been investigated and the preliminary hearing dossier prepared.

In the adversarial system in Great Britain, as well, the defendant confronted his or her accuser at trial without the aid of counsel, and was compelled to speak and, either by admitting guilt, showing remorse, or alleging mitigation, tried to get the jury to spare him the death penalty.[2] Counsel in felony cases, where the death penalty was threatened, was only allowed in the eighteenth century, around the time the English courts began recognizing the right to silence.[3]

Today, criminal procedure still attempts to induce confessions of guilt through mechanisms such as pretrial detention, plea bargaining, confession-bargaining at trial, penal orders, and various methods of eliminating the full-blown criminal trial. The "trial", where a lawyer was always considered to be the most necessary, is rapidly disappearing as the way of testing the prosecution's case and determining guilt or innocence. Thorough criminal investigations, once more or less the norm, are only conducted today in a handful of serious cases.

The right to defence counsel, which is now recognized as a human right and is included in all human rights conventions and all modern constitutions, is a right, without which the presumption of innocence and the right to remain silent would be of little value. Only counsel stands between the state and the criminal suspect and in order to effectively represent both the guilty and the innocent client, the defence lawyer must be trusted by the client not to reveal potentially incriminating admissions or evidence that the client entrusts to the lawyer. Thus the importance of the attorney-client privilege and the confidentiality of communications and interactions between criminal defence lawyer and criminal suspects or defendants.

It has been said that, in the criminal context, confidentiality between attorney and client should be treated like the church confessional and that the relationship is so crucial to the administration of justice that a lawyer's duty of confidentiality never ends. In a 1981 decision, the U.S. Supreme Court stated: "The attorney-client

[1] Thaman (2010), pp. 303–304; Bachmaier Winter (2008), pp. 11 ff.; Vogler (2005), pp. 20 ff.

[2] Langbein (2003), pp. 11–40.

[3] *Ibid.*, at 106–174.

privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice [. . .].”[4]

The European Court of Human Rights (ECtHR) has recognized that professional secrecy is the basis of the relationship of confidence between lawyer and client,[5] and: “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 [. . .]”.[6] And in *Viola v. Italy* the ECtHR stated that “[. . .] the right, for the accused, to communicate with his lawyer without being heard by third parties is among the basic requirements of the equitable process in a democratic society and derives from article 6.3 c) of the Convention”.[7]

This chapter aims at providing a comparative overview on the protection of the fundamental right to counsel and the lawyer-client confidentiality in criminal proceedings.[8] Although many of the general principles of the confidentiality duty are also *mutatis mutandis* applicable to the lawyer-client confidentiality in civil and administrative proceedings, the analysis is focused on the regulation, safeguards and implementation in criminal proceedings.

This chapter will first explore the extent of the right to counsel, at which procedural stage and in relation to what types of offences it inures. Before analysing the protection of the right to counsel and its content at the national level, the principles set out by the ECtHR will be addressed, because the case law of the ECtHR explains the higher degree of harmonization of the right to counsel in the European countries. We will also mention the impact of the EU Directive on the Right to Access to Lawyer, crucial to understanding the gradual approximation of the laws of the EU countries in this area.

[4] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). For a comprehensive approach on the lawyer-client privilege in the U.S., see generally Epstein (2017), pp. 1 ff. where throughout the two volumes all aspects of attorney-client privilege in the U.S. system are addressed.

[5] *André and Another v. France*, Appl. no. 18603/03, of 24 July 2008, § 41; *Xavier da Silveira v. France,* Appl. no. 43757/05, of 21 January 2010, § 36.

[6] *Castravet v. Moldavia*, Appl. no. 23393/05, of 13 June 2007, §§ 49–50. In the same sense, *Sakhnovskiy v. Russia*, Appl. no. 21272/03, of 2 November 2010, §§ 102 and 104; *Foxley v. United Kingdom*, Appl. no. 33274/96, of 20 June 2000.

[7] *Marcello Viola v. Italy*, Appl. no. 45106/04, of 5 October 2006. If a lawyer could not meet his client without such supervision and receive confidential instructions from him, his assistance would lose much of its usefulness. In the same sense *S. v. Switzerland*, Appl. no. 12629/87 and 13965/88, of 2 November 1991; or *Brennan v. United Kingdom*, Appl. no. 39846/98, of 16 October 2001.

[8] This comparative chapter is based on the general report prepared for the XXth Congress of the International Academy of Comparative Law, held in Fukuoka, Japan, 22–28 July 2018.

Then it will discuss the breadth of the attorney-client privilege and the related confidentiality of attorney-client communications: the types of communications to which it applies and the extent to which it derives from the constitutional right to counsel, or only from national legislation. Following this will be a discussion of the extent to which national laws protect the lawyer against confidential attorney-client material being the subject of a government subpoena, an office search, a search of a computer or stored digital files, or an interception of attorney-client conversations or e-mail. Finally, it will be examined under what conditions will violations of the right to counsel and the right to confidentiality of communications between lawyer and client actually lead to excluding evidence from the trial or rendering the entirety of the proceeding a nullity.

Thereafter will follow a conclusion as to the state of the law and practice in this area with suggestions as to where improvements could be made.

2 The Right to Counsel During the Criminal Process

2.1 The Right to Counsel in General

The right to counsel in criminal cases is guaranteed at the international level by Art. 14(2)(d) of the International Covenant on Civil and Political Rights of the U.N. (ICCPR) which guarantees the accused the right "(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[9] At regional level Art. 8(2)(d) and (e) of the American Convention of Human Rights (ACHR) similarly guarantees "(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel" and "(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law" and has been ratified by all countries in South and Central America.

The right to counsel is recognized in all member states of the Council of Europe by virtue of Art. 6(3)(c) European Convention of Human Rights (ECHR), which guarantees a criminal defendant the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". The ECtHR

[9]There are 171 state parties to the ICCPR. China and Cuba and a few small island states have signed the ICCPR but not ratified it. Another 20 states, among them Saudi Arabia, U.A.E., Malaysia, Myanmar and other small states have neither signed nor ratified.

has also stated that "[. . .] while Article 6 (3)(c) confers on everyone charged with a criminal offence the right to 'defend himself in person or through legal assistance [. . .]', it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial".[10]

The right to an effective remedy and to a fair trial is also guaranteed in Art. 47 of the EU Charter of Fundamental Rights, including the right to legal assistance: "Everyone shall have the possibility of being advised, defended and represented. 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."

The right to counsel is also explicitly recognized in most modern democratic constitutions and all democratic codes of criminal procedure (CCP) as well. Thus, we shall presume that there is a right to hire a lawyer of one's choice in all countries[11] at any stage of the criminal investigation, although some countries require that a lawyer be specially qualified as reliable to defend in cases involving state secrets.[12]

Furthermore, some countries will prevent gang members from freely hiring counsel of their choice if there is cause to believe that the lawyer may be involved in the criminal organization's activities.[13] There is also a system of providing appointed lawyers for those who cannot afford to hire a lawyer with their own funds. Where the systems differ, however, is with respect to the types of criminal cases where the suspect or defendant has a right to counsel, and thus to court-appointed counsel, and to the stage of the proceedings in which this right inures. But before discussing those issues, it is important to provide an overview of the supra-national harmonization of the right to defence counsel within the European landscape.

2.2 *The Increasing Harmonization on the Right to Counsel at the European Level*

Within the European landscape the ECtHR has defined the content of the right to legal counsel under Art. 6 (3)(c) ECHR and its scope within criminal proceedings.

[10] *Quaranta v. Switzerland,* Appl. no. 12744/87, of 24 May 1991, § 30; *Öcalan v. Turkey*, Appl. no. 46221/99, of 12 May 2005, § 135.

[11] An exception may be China, where officials may use pressure to get an accused to not hire a lawyer who is seen as zealous and effective. See Sun and Chen in this volume.

[12] This is true in the U.S. See Thaman, para. 4.2.

[13] For Spain, see Villamarín López, para. 1, in relation to lawyers supposedly sympathetic to the Basque terrorist group ETA. See also Art. 138a and 138b German CCP, providing for exclusion in prosecutions involving national security or membership in a terrorist organization.

For this comparative approach it is worth to briefly recall the content of this right as defined in the case law of the ECtHR.[14]

The Strasbourg Court has made clear, on numerous occasions, that one of the fundamental elements of the right to a fair trial consists in every accused's right to be granted access to a lawyer, and that the state has to provide for its appointment in case this is required for the interests of justice and the defendant is not able to appoint one by himself.[15] According to well-established case law of the ECtHR, this right of the suspect or accused, which is not absolute, exists from the time of arrest.[16] However, only since the judgment *Salduz v. Turkey* in 2008[17] the ECtHR has explicitly recognized that statements made by the suspect during a police interrogation without being assisted by counsel cannot be used as evidence in trial. The right to access to a lawyer, is closely connected to the protection of the right to remain silent, but both rights are independent. Thus, even if the defendant remains silent, the ECtHR has found that "where laws systematically prevent persons charged with a criminal offence from accessing legal assistance in police custody, Article 6 ECHR is violated."[18]

The right to counsel not only involves legal assistance to the accused in the preparation and development of the defence strategy, but it is also crucial for ensuring that all procedural safeguards are respected throughout the whole criminal process, including the pretrial stage.[19] In addition, it requires that legal assistance is effective and not a mere formality,[20] and therefore the state authorities must ensure that the defence lawyer receives all necessary information to provide an adequate defence[21] and has due access to the record.[22] The ECtHR, however, allows the defendant to waive his right to counsel as protected by Art. 6 (3)(c) ECHR, as far as such a waiver is done willingly and in an unequivocal fashion (explicitly or tacitly);

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[14]See generally the Handbook on European Law relating to access to justice, 2016.

[15]See, among others, *Croissant v. Germany*, Appl. no. 13611/88, of 25 September 1992; *Poitrimol v. France*, Appl. no. 14032/88, of 23 November 1993; *Demebukov v. Bulgaria,* Appl. no. 68020/01, of 26 February 2008; *Karadag v. Turkey,* Appl. no. 12976/05, of 29 June 2010.

[16]See *John Murray v. United Kingdom*, Appl. no. 18731/91, of 8 February 1996; *Magee v. United Kingdom*, Appl. no. 28135/95, of 6 June 2000, among many others.

[17]*Salduz v. Turkey*, Appl. no. 36391/02, of 27 November 2008.

[18]*Dayanan v. Turkey*, Appl. no. 7377/03, of 13 October 2009, § 33: where the ECtHR found a violation of Art. 6 (3)(c) ECHR.

[19]However, the manner in which Art. 6 (1) and (3)(c) ECHR are to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Art. 6 ECHR—a fair trial—has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (*Imbrioscia v. Switzerland*, Appl. no. 13972/88, of 24 November 1993, § 38; reiterated in *Öcalan v. Turkey*, Appl. no. 46221/99, of 12 May 2005, §135).

[20]See *Artico v. Italy,* Appl. no. 6694/74, of 13 May 1980.

[21]See *Goddi v. Italy*, Appl. no. 8966/80, of 9 April 1984; also, later *Öcalan v. Turkey*, Appl. no. 46221/99, of 12 May 2005.

[22]See, among others, *Miailhe v. France*, Appl. no. 18978/91, of 26 September 1996; *Natunen v. Finland*, Appl. no. 21022/04, of 31 March 2009.

indeed, the ECtHR has emphasized that appropriate precautions must be taken to verify that the defendant knows his rights and the consequences of his waiver, and does so completely free.[23]

As a rule, the right to appoint a lawyer of one's own choice is only guaranteed to those who have sufficient resources to hire their own counsel.[24] Moreover, the right to choose is not absolute, and the state may legitimately impose restrictions with respect to the people that can be appointed as defence lawyers, especially when it is done, allegedly, for the benefit of the accused.[25] The Strasbourg case law has also deemed legitimate under Art. 6 (3)(c) ECHR to limit the number of lawyers that can represent the accused.[26]

According to Art. 6 (3)(c) ECHR, in case the suspect or the accused person do not have sufficient means to hire and pay legal assistance of their own choosing, they are entitled to have a duty lawyer appointed for free "when the interests of justice so require". The ECtHR has held that it is for the national authorities to assess if free legal aid is justified on the ground of "the interests of justice". As could be expected, there are remarkable differences among the legal systems of the Council of Europe's member states about the interpretation of what the interests of justice require; and the European Court of Human Rights has often found such differences legitimate applying the doctrine of the national margin of appreciation.

Nevertheless, the ECtHR itself has identified a number of aspects that must be weighed when deciding if free legal aid must be provided in the interests of justice.

[23]See *Kwiatotkowska v. Italy*, Appl. no. 52868/99, of 30 November 2000; *Sedjovic v. Italy*, Appl. no. 56581/00, of 1 March 2006; *Pavlenko v. Russia,* Appl. no. 42371/02, of 1 April 2010.

[24]See *X v. Germany,* Appl. no. 6946/75, of 6 July 1976; *Campbell and Fell v. United Kingdom,* Appl. no. 7819/77 and 7878/77, of 28 June 1984.

[25]A clear example of this can be found in the judgment *Mayzit v. Russia*, Appl. no. 63378/00, of 20 January 2005. In this case, the accused had appointed his mother and his sister as defence counsel. The Moskovskiy District Court rejected the applicant's request referring in particular to the fact that the case was complex and that therefore special legal knowledge and professional experience, which his mother and sister did not have, were required. The Strasbourg Court held that such restriction on the right to the free choice of counsel, as far as it was duly justified, and taking into account that the accused had been given the opportunity to appoint a lawyer, was not in violation of Art. 6 (3)(c) ECHR. We should keep in mind that in Russia, although in general it is necessary to have legal counsel for the defence in criminal proceedings, in cases of minor importance, the court may authorize that the defence is entrusted to people without legal qualification.

[26]Thus, in *Croissant v. Germany*, Appl. no. 13611/88, of 25 September 1992, the Strasbourg Court ruled that the limitation on the number of lawyers foreseen by Art. 137 German CCP is compatible with the ECHR. Such limitation, however, was not directly at issue in this case. The ECtHR had to decide if it was legitimate that a court imposed a duty counsel for the accused Klaus Croissant, who was himself a lawyer and had already appointed five lawyers for his defence (moreover, the duty counsel in question was of a political party contrary to that of the defendant). An additional question was if it was possible to oblige the accused to pay the remuneration of the duty counsel appointed by the court against his wishes. The ECtHR held that the rules of the German procedural law were compatible with Art. 6 (3)(c) ECHR, with regard to the limitation of the number of lawyers as well as with regard to the appointment of an additional duty counsel to guarantee the adequate development of the process and to the obligation to assume the payment for his professional services.

Among them are: the seriousness of the crime, which should be normally evaluated taking into account the applicable penalty; the importance of the interests at stake for the accused, which is of course susceptible of diverse interpretations, but usually related to the defendant's personal and social situation; and the complexity of the facts of the case.[27] All three factors should be considered, but they do not necessarily need to be added together; any of the three can justify granting legal aid.[28] A few examples are illustrative of how the ECtHR has understood the notion of "interests of justice" in this context.

In *Monnell and Morris v. United Kingdom*,[29] the ECtHR ruled that refusal to grant free legal aid for appellate proceedings was compatible with the interests of justice because of the reduced possibility of success of the appeal. But in *Pakelli v. Germany*,[30] which also involved a request for free legal aid on appeal, the ECtHR held that the complexity of the case justified the accused's request under Art. 6 (3) (c) ECHR. In a similar vein, in *Granger v. United Kingdom*,[31] the extreme difficulty and complexity of the case (which involved a defendant being sentenced for perjury) was considered by the ECtHR sufficient to find that refusing to provide free legal aid on appeal was in violation of Art. 6 ECHR, especially taking into account that such complexity had been recognized by the very decision that rejected the accused's request. In *Zdravko Stanev v. Bulgaria*,[32] after taking into account that the defendant was unemployed, could face prison sentence (although finally a fine was imposed), had no legal training and that despite the lack of complexity of the case there were several difficult procedural issues the ECtHR concluded that a qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter the arguments raised by the prosecution more effectively. In view of these circumstances, the ECtHR ultimately found a violation of Art. 6 (3)(c) ECHR.

With regard to lawyer's fees and the costs of legal assistance the Strasbourg Court has normally avoided entering the territory of assessing what the concrete economic circumstances are that determine if a person has the right to obtain free legal aid. The ECtHR has consistently avoided defining what is to be considered "sufficient means" or to undertake the financial test, stating that such decision must be deferred to the competent national authorities. However, the ECtHR has made clear that the right to legal assistance is not incompatible with the fact that, once the accused has been sentenced, he is required by the state to pay for the fees of the duty counsel that

[27] See *Pakelli v. Germany*, Appl. no. 8398/78, of 25 April 1983; *Granger v. United Kingdom*, Appl. no. 11932/86, of 28 March 1990.

[28] *Zdravko Stanev v. Bulgaria*, Appl. no. 32238/04, of 6 November 2012.

[29] *Monnell and Morris v. United Kingdom*, Appl. no. 9562/81, of 2 March 1987. This case was about an offence of burglary, for which the applicant received a 3 year sentence. When the court refused to give the applicant another solicitor for the appeal, it took into account the opinion expressed in writing by the counsel that had represented the accused (of his free choosing), indicating that "no prospect whatsoever exists of appealing the conviction successfully".

[30] *Pakelli v. Germany*, Appl. no. 8398/78, of 25 April 1983.

[31] *Granger v. United Kingdom*, Appl. no. 11932/86, of 28 March 1990.

[32] *Zdravko Stanev v. Bulgaria*, Appl. no. 32238/04, of 6 November 2012, § 40.

he was provided.[33] For the Strasbourg Court, the purpose of free legal aid is to adequately guarantee every person's rights of defence; hence, once this aim has been achieved and the process ended with a sentence, claiming the payment of the lawyer's fees is not contrary either to Art. 6(1) or (3) ECHR.[34]

In sum, according to the ECtHR's case law, the common core of the right to legal assistance in criminal proceedings is that all states must regulate and guarantee every accused's right to have a defence counsel during the criminal process, in its broadest meaning: i.e., such guarantee extends to each and every step of the process, from the pretrial stage to the end of the criminal proceedings. This right can be waived if the accused opts for self-defence, provided that the waiver is voluntary and unequivocal.[35] In addition, other state obligations include: the protection of the confidentiality of communications as a general rule; the guarantee of the right to be informed of the right to appoint a lawyer; and the organization of a system of free legal assistance for those suspects or accused who lack sufficient means, "when the interests of justice so require".

Despite such harmonization, it is clear that each member state of the Council of Europe retains a broad margin to determine, among other things, in which cases it is mandatory to grant legal assistance, which are the specific actions that define an "effective defence" and under which circumstances "the interests of justice" require that an accused without sufficient means is provided a duty counsel free of charge.

Undoubtedly, the case law of the ECtHR has played a significant role in setting minimum standards for the right to a legal defence within all the Council of Europe member states. However, Art. 6 (3)(c) ECHR does not detail the conditions for the exercise of this right, thus leaving a wide margin of discretion for each of the states to regulate the content and forms of exercising the right to legal assistance. Although the protection of the right to counsel has been clearly strengthened by way of the case law of the Strasbourg Court, the diversity found in the legal systems of the 47 member states to the Convention is enormous. Leaving aside the common core of

[33]See *Croissant v. Germany*, Appl. no. 13611/88, of 25 September 1992; *X v. Germany*, Appl. no. 6946/75, of 6 July 1976. In similar terms, see also *Luedicke, Belkacem and Koç v. Germany*, Appl. nos. 6210/73, 6877/75 and 7132/75, of 28 November 1978, with respect to the three applicants' obligation to pay for the expenses of the interpreter assisting them in the trial because they did not know the German language. The three convictions were for offences of different nature (road offence, traffic, robbery and injuries, respectively) but in all of them the same issue arose: whether it was legitimate to require the convicts to pay for interpretation costs *ex post*.

[34]The *Luedicke* judgment would deserve to be analysed also in the light of the Directive EU 2010/64/UE of the European Parliament and of the Council, of 20 October 2010, on the right to interpretation and translation in criminal proceedings. This EU Directive raises the level of protection of the accused's right to interpretation, which must be free of charge for every suspect or accused who does not understand the language of the proceedings. Art. 4 of the Directive (Costs of interpretation and translation) provides: "Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 [*Right to interpretation*] and 3 [*Right to translation of essential documents*], irrespective of the outcome of the proceedings."

[35]*A.T. v. Luxembourg*, Appl. no. 30460/13, of 9 April 2015, § 59; *Pishchalnikov v. Russia*, Appl. no. 7025/04, of 24 September 2009, §§ 77–78. The waiver can be also limited.

the protection of the right to counsel, national laws show a broad panoply of solutions in providing the right to legal assistance to the defendants. Not only do the legal frameworks present many differences, but empirical studies also show that the regulation is applied and interpreted in many different ways in practice,[36] sometimes even in a very questionable manner.[37]

At the end, the function of the Strasbourg Court is to verify whether the way in which that right has been protected in each specific case is in accordance with the requirements of the right to a fair trial, taking into account the proceedings as a whole and the legitimacy, necessity and proportionality of the restrictions on that right.

By stating that "the rights of the defence will be irretrievably prejudiced when incriminating statements made during the police interrogation without access to a lawyer are used for a conviction",[38] the *Salduz* case represented a milestone in safeguarding the suspect's rights in criminal proceedings at the European level. This caused various European countries to react almost immediately by amending their legislation and practice in this field. This was the case of France and its *garde à vue* system, or Scotland, where the suspect could be detained without having access to a lawyer for 6 h.[39]

However, out of this ruling, it was not perfectly clear what were the legal reforms to be adopted by the member states of the Council of Europe in order to adjust their system to the *Salduz* doctrine. One of the issues discussed was whether the right to legal assistance should be guaranteed only in the case of the police interrogation of the detainee—which was the specific situation in which Yusuf Salduz was—or if it should also be guaranteed when the suspect was summoned to testify and appeared voluntarily to answer the questions of the police. In this judgment the ECtHR did not address—and it was not its task—other important questions related to the right to counsel either, for example what was to be understood as "compelling reasons" that could justify an exceptional suspension of the right to counsel, or whether the right to legal aid also applied during police and pretrial interrogation of the suspect.

Representing a major advance in the protection of suspects and ensuring their right to counsel, *Salduz* did not provide for a harmonized standard within the European landscape.[40]

Within the EU, several Directives adopted on the right to defence and the protection of the procedural safeguards of suspects and accused persons in criminal

[36]Cape et al. (2007), pp. 10 ff.

[37]Before the adoption of the EU Directive different studies showed significant shortcomings in the protection of the right to access to lawyer and other procedural safeguards in practice, for example the EU project carried out by Spronken et al. (2009), and in particular on the right to counsel, pp. 21 ff. Interesting empirical data regarding the right to access to lawyer (until 2011) is summarised in Schumann et al. (2012a), pp. 31–48. This article is a summary of the broader study on right to access to lawyer in practice in four countries (Austria, Germany, Slovenia and Croatia) published in the book by Schumann et al. (2012b).

[38]*Salduz v. Turkey*, Appl. no. 36391/02, of 27 November 2008, § 55.

[39]Cras (2014), p. 33.

[40]In the same sense, Spronken (2012), p. 99.

proceedings also have a significant impact on the right to counsel. Art. 82.2 b) of the Treaty on the Functioning of the European Union (TFEU) confers legislative competence on the Union to establish by means of directives minimum rules in order to "facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters with cross-border dimension". In exercise of that competence, on 22 October 2013, the European Parliament and the Council adopted Directive 2013/48/EU on the right to access to lawyer (DAL).[41] Suspects or accused persons shall have access to lawyer without undue delay "from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence" (Art. 2.1 DAL). To prevent that delays in such notifications may also cause in practice the denial to access to lawyer, the Directive also establishes that in any event the right to counsel shall be granted—with or without such notification—when the person is subject to one of the situations contemplated under Art. 3 DAL, and so ensuring also the right to counsel before being questioned by the police or by another law enforcement or judicial authority.

The conditions, time and duration of communications between suspect and lawyer are left to the member states, but national laws shall ensure that the suspect and accused person have access to a lawyer "in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively" (Art. 3.1 DAL).[42]

The understanding of what an effective defence requires at every stage of the proceedings is interpreted in a diverse way in the different legal systems as will be seen later, and it is not unusual that a minimum time for the meeting with the counsel is not regulated, neither is foreseen whether the interrogation can be interrupted to communicate privately with the lawyer.

The EU Directive also applies to persons who, in the course of being questioned by the police or by another law enforcement authority, become suspects or accused persons. Therefore, although the Directive is not of general application to witnesses, in accordance with the ECtHR case law[43] Art. 2.3 of the Directive provides that, from the moment a witness is considered a suspect or accused, the right to counsel

[41]Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

[42]Restriction on the number and length of the meetings with his lawyers—two one hour visits per week—was one of the factors that according to the Strasbourg Court in the *Öcalan* case "made the preparation of his defence difficult", *Öcalan v. Turkey,* Appl. no. 46221/99, of 12 May 2005, § 137.

[43]*Shabelnik v. Ukraine*, Appl. no. 16404/03, of 19 February 2009. In this case, the sentence of conviction was based on Shabelnik's confession made to the police regarding a homicide. The interrogation took place without informing him of his rights as a suspect, although the police already considered him as such: the fact that after his statements he ordered a reconstruction of the facts at the scene of the crime, in particular, confirms that he was considered a suspect, so his right to legal assistance had to be guaranteed. See also *Brusco v. France*, Appl. no. 1466/07, of 14 October 2010.

shall be granted. The Directive does not apply to proceedings on criminal misdemeanours.

Finally, the Directive also regulates the right of the suspect or accused in criminal proceedings—and those persons subject to European arrest warrant proceedings—to have a third person informed of their deprivation of liberty. It also provides for the right to communicate with third persons—be it a relative, consular authorities or any other person you trust—while deprived from liberty. This Directive on access to lawyer has further strengthened—and harmonized—the right to counsel of suspects and accused persons in criminal proceedings.

One of the problems that became manifest during the negotiations on the Directive was the absence of a common notion of what the right of access to a lawyer implies. Therefore the EU legislator opted to provide rules differentiating two situations: on the one hand the situation where the suspect or defendant being interrogated is not detained and, on the other hand, when he is deprived of liberty.

In the first case, the EU member states are obliged to offer the suspect or accused all the necessary information to facilitate the access to a lawyer. But, as explained in recital 27, the member states are not obliged to take active measures so that the suspect or accused to be interrogated is effectively assisted by a lawyer. This is left to be decided by the suspect or accused that is not detained, who shall undertake the necessary arrangements to be represented by lawyer, if he wishes to.

In the second case, the level of protection is raised and the authorities will have to actively contribute to the detainee being assisted by a lawyer and, where appropriate, free of charge, unless he waives this right. As can be seen, the right of access to a lawyer guaranteed in the Directive basically implies that the state will not prevent the presence and intervention of a lawyer in certain procedural acts if the accused wishes to be assisted by lawyer; and in the case of detention, a higher level of protection is granted, the states being obliged to take active measures to provide access to legal assistance to the detainee.

The content of the right to be assisted by a lawyer is regulated mainly in the lengthy Art. 3 of the Directive, complemented by the rules on confidentiality (Art. 4 DAL), exceptions and waivers of the right (Art. 8 and 9 DAL), and by specific rules concerning the proceedings of the European arrest warrant (Art. 10 DAL).

The European Union legislator, aware of the crucial role of attorneys to ensure full respect of the rights of the suspect or the accused, as well as to prevent situations of abuse during detention, focuses mainly on safeguarding those rights at the pretrial stage. Accordingly, Art. 3.3 DAL requires the member states to ensure that the suspect or accused person can meet and communicate privately with the lawyer who represents him, even before police or judicial interrogation. This right must be guaranteed "without undue delay" after deprivation of liberty or when performing certain procedural acts during the investigation phase, and specifically the right to

meet privately with an attorney before the suspect or accused is questioned by the police or by another law enforcement or judicial authority.[44]

The Directive not only recognizes the right of counsel to be present during the interrogation of the suspect or defendant, but also to participate "effectively" when they are questioned: "such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned" (Art. 3.3 (b) DAL).

Presence and participation during investigative acts shall be ensured at least during identity parades; confrontations and reconstructions of the scene of a crime, but only where "those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned" (Art. 3.3 (c) DAL). The EU Directive seeks to ensure the standards already set out by the ECtHR in the cases *Mehmet Serif Öner v. Turkey* (identity parades)[45] and *Shabelnik v. Ukraine* (reconstruction of the scene of a crime),[46] adding the right to have counsel present during confrontation.

The Directive requires the member states to respect the confidentiality of the communications between the suspect or accused and the lawyer, "in the exercise of the right of access to a lawyer provided for under this Directive (Art. 4 DAL). Lawyer-client confidentiality shall extend at least to "meetings, correspondence, telephone conversations and other forms of communication permitted under national law" without derogation.[47] However the crime-fraud exception is regarded as any

[44] Art. 3.2 DAL: Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;
(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
(c) without undue delay after deprivation of liberty;
(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

[45] *Mehmet Serif Öner v. Turkey*, Appl. no. 50356/08, of 13 September 2011, §§ 21 and 22. The facts in this case are very similar to the ones in *Salduz*, as the detainee was also denied access to a lawyer during the police interrogation, but the ECtHR further underlines that in the case at hand the line-up was carried out without the presence of counsel and that the conviction was mainly based upon such identification measure. The ECtHR, after recalling the principles set out in *Salduz*, states: "In this regard, the Court observes that when the applicant was in police custody, he took part in an identification parade and was identified by the intervening parties as the person who had taken part in the respective armed robberies which had occurred in 1993. The Court further notes that in convicting the applicant the trial court relied heavily on the result of this identification parade. (. . .) Having regard to the foregoing and bearing in mind that the restriction imposed on the applicant was systematic according to the domestic legislation in force at the time, the Court finds no particular circumstances which would require it to depart from its findings in the aforementioned *Salduz* judgment. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case."

[46] *Shabelnik v. Ukraine*, Appl. no. 16404/03, of 19 February 2009, § 57.

[47] Recital 33 *Explanatory Memorandum* DAL.

criminal activity of a lawyer and thus should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive.[48]

Rights mentioned under Art. 3.3 DAL may temporarily be derogated in exceptional circumstances and only at the pretrial stage upon compelling reasons, which are: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings (Art. 3.6 DAL). The suspect or defendant's waiver of his rights shall be possible only after enough information is provided and shall only be valid if given voluntarily and knowingly. Waiver of the right to access to lawyer as envisaged by the Directive shall be possible without prejudice to national law requiring mandatory presence of lawyer (Art. 9 DAL).

At the EU level, the right to have a lawyer is also safeguarded by ensuring that the suspect or accused will be informed about this right. Directive 2012/13/EU on the right to information in criminal proceedings requires that the suspect or accused person is informed promptly, among other rights, on the right to access to a lawyer.[49] This information is to be given in a simple language so that the suspect or accused really understands what his rights are, and how he shall proceed to appoint a lawyer (Art. 3 Directive 2012/13/EU). The provisions on the right to a lawyer are complemented by Directive 2016/1919/EU on legal aid.[50] This Directive requires the member states to provide legal aid in criminal proceedings in conformity to the Directive on access to lawyer. Legal aid shall be subject to a financial and merit test, according to national law. Although leaving a wide margin to the national laws to establish under which conditions legal aid will be provided, at least it includes the elements to take into account when undertaking the financial and means test. Following Art. 4 of Directive 2016/1919/EU:

1. Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.
2. Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.
3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.

[48] *Ibidem.*

[49] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

[50] Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

4. Where a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:

   (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
   (b) during detention.

2.3 *The Appointment of Counsel for the Indigent*

Of utmost importance for the integrity of the criminal justice system is that appointed lawyers will defend their clients with the same vigour as a lawyer paid by the suspect or accused would, that he will be completely independent from law enforcement organs such as criminal investigators, police, prosecutors or the courts, and will abide by the same standards of confidentiality as a paid lawyer would. Even in EU legal systems where, as seen above, there is a Directive establishing common minimum rules concerning the right to legal aid, it does still leave a wide margin for the EU member states to design the system and scope for granting legal aid. The EU Directive does not affect the provisions of national law concerning the mandatory presence of a lawyer but determines that the competent authority making the decision about legal aid "should be an independent authority that is competent to take decisions regarding the granting of legal aid, or a court, including a judge sitting alone. In urgent situations the temporary involvement of the police and the prosecution should, however, also be possible in so far as this is necessary for granting legal aid in a timely manner".[51] Again, here, despite a certain harmonisation at the EU level, the comparative analysis precisely shows the existing divergences in the system for appointing legal aid lawyer in the countries studied.

It is sometimes the official in charge of the procedural stage at which counsel is required who is responsible for getting counsel appointed to those who qualify, whether due to indigence or because defence counsel is mandatory.[52] In most democratic countries, however, the prosecutor, judge or investigative official must turn to local bar associations, which then, following their procedures, select a lawyer to represent that particular person.[53] In Greece, the presiding judge of the court will make the decision on legal aid, and proceed to appoint the legal aid lawyer from a list provided by the bar, following the alphabetical order.[54]

[51] See Recital 24 of the Explanatory Memorandum of the EU Directive 2016/1919/EU.

[52] See for instance, Art. 130 and 132(1)(b) CH-CCP, Lynn and Wohlers, para. 1.2.

[53] See Art. 767 ES-CCP. In Switzerland, the appointment procedure differs from canton to canton with most cantons having on-call lawyers organized by the local bar associations (Lynn and Wohlers, para. 1.2).

[54] See Triantafyllou, para. 5.2.

Some systems limit such appointments to lawyers who have signed up for criminal defence appointments and might have some experience in this field,[55] whereas others might just pick lawyers from the general roster of licensed practitioners,[56] or lists provided by local bar associations. Although the ECtHR has stated that there is no absolute right to choose one's own court-appointed legal aid lawyer,[57] in some countries, an indigent can request that a particular lawyer be named, subject, of course, to that lawyer's availability and willingness to take the case,[58] yet in most countries the indigent suspect or accused has no choice in this respect. Some systems have a special method of securing lawyers to provide assistance in jails and police stations shortly after arrest, called stationhouse lawyers in the U.S. or, in the UK, "duty solicitors." We will discuss such jailhouse lawyers in the next section.

In Russia, and other post-Soviet countries, this required independence has been undermined by so-called "pocket lawyers" who are named by investigative officials and actually work for them rather than in the interests of the suspect.[59] Most democratic countries law enforcement agencies may not suggest that particular lawyers be appointed to represent criminal suspects, and they may be subject to disciplinary punishment if they do so.[60] In Switzerland, however, where the prosecutor appoints counsel for suspects ("his own enemy") during the preliminary investigation, there has been criticism of a tendency to appoint counsel with whom they have a good relation.[61] There still may exist an informal tendency in some countries, like the U.S. and Germany, for judges to appoint lawyers they know will be easy for them to work with[62] and appointed solicitors in the U.K. are often seen as passive and tending to aid the police rather than their clients.[63]

A second method of providing defence for the indigent are public defender offices. These were first pioneered in Brazil and have since been instituted in many Latin American countries. They were first introduced in the early twentieth century in California in the U.S., and now exist in the federal system of courts, in most states and in nearly all metropolitan areas where crime-rates are high. In California, typically, large metropolitan counties have public defender offices, whereas smaller rural counties use a court-appointment system similar to what one finds in Europe. In San Diego County, on the other hand, private lawyers bid to represent all indigents, and if their bid is accepted, they form a kind of private public

[55]Such as in Portugal, see Costa Ramos et al., para. 1.3.

[56]Such as in Italy, see Ceresa-Gastaldo, para 1.2.1.

[57]*Lagerblom v. Sweden*, Appl. no. 26891/95, of 14 January 2003.

[58]This is true in Germany and Switzerland. See Weisser, para. 1.4; Lynn and Wohlers, para. 1.2.

[59]Thaman (2008b), p. 103.

[60]This is true in Germany and Italy. See Weisser, para. 1.4; Ceresa-Gastaldo, para. 1.2.

[61]Lynn and Wohlers, para. 1.2.

[62]Weisser, para. 1.4. On the "cozy" relations between some judges and appointed lawyers in death penalty cases which "keep the system running," see Thaman (2000), p. 1020.

[63]Stone and Lynn, para. 3.2.