Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers

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Abstract
Although national laws implementing Directive 2013/48/EU on the right of access to a lawyer provide a legal framework, the protection of the rights of suspects must be carried out by defence lawyers in their day-to-day practice. National legal frameworks may be internally inconsistent or may fall short of European Union requirements. Research shows that, for these or other reasons, defence counsels may encounter a variety of difficulties in fulfilling their role at police interviews, which often leads them to adopt a passive approach. An approach focused on adherence to new regulations appears insufficient to prepare lawyers for this role. It is essential that lawyers are given practical tools to effectively fulfil their role, especially where regulations do not provide any guidance. To this end, a new practical training programme has been developed and piloted in four countries, with these initial experiments providing promising results.

Keywords
Access to a lawyer, interview of a suspect, legal assistance, training

Introduction
On 1 March 2017, Directive 2013/48/EU on the right of access to a lawyer (hereinafter – the Directive) effectively entered into force in most European Union (EU) countries.1 This Directive strengthened the rights of criminal suspects in order to obtain (effective) legal protection.

1. With the exception of Denmark, Ireland and the United Kingdom, which have opted out of the Directive Official Journal of the European Union (OCJ) 2013 L 294/1.

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assistance at the early stages of proceedings, particularly during police detention and police interview. Most EU countries have adopted legislation attempting to implement the Directive. However, legal transposition may not be enough to ensure its practical implementation. Other accompanying measures may be necessary, such as training justice professionals (including criminal defence lawyers) who will apply its provisions in their day-to-day practice.

The Directive arguably requires lawyers to exercise an active defence at the earliest stages of proceedings (namely, during police detention and police interviews). However, the lawyer’s right to effective participation and active defence at these stages has not been fully embedded, be it in accusatorial or in inquisitorial traditions. Thus, for many European criminal defence lawyers, some aspects of their role as presented in the Directive—which they are expected to fulfil in the context of police interviews and police custody—will be relatively new.

This article describes an approach to training criminal defence lawyers for this new and challenging role. It has been tested in four European countries so far (Belgium, Hungary, Ireland and the Netherlands). The article begins by providing the legislative background for the right to custodial legal assistance in three of these four jurisdictions: Belgium, Ireland and the Netherlands. It then depicts the practice of legal assistance at police interviews in the given countries and identifies gaps and issues in the practical implementation of the right to effective custodial legal assistance. In the final part, this article describes a training programme aiming to address these gaps and inconsistencies, one which has been both developed and implemented in the countries mentioned above.

**Legislative implementation of the right of access to a lawyer at police interview**

Although in some European countries lawyers have been permitted in the interrogation room for many years, in other countries developments leading to the introduction of a right of access to a lawyer were to a large extent driven by Europe. The following three examples of legislative implementation can illustrate this.

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2. A. Soo, ‘How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed’, *New Journal of European Criminal Law* 8(1) (2017), p. 67.

3. Thus, Article 3 (b) of the Directive includes the right to have a lawyer present and ‘participate effectively’ in any questioning, including by police, as well as the right for a lawyer to attend certain investigative actions with participation of the suspect.

4. England and Wales form a jurisdiction, where the right to custodial legal assistance has perhaps been given the broadest expression. However, even in England and Wales, lawyers do not have the right to attend other investigative actions than interviews of suspects and are further entitled to very limited disclosure. See J. Jackson, ‘Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence’, *The Modern Law Review* 79(6) (2016), p. 994.

5. The implementation of the training in Hungary, however, falls outside of the scope of this article.

6. Although the financial aspects of the right to custodial legal assistance remain subject to debate, their discussion falls outside the scope of this article.
The Netherlands

Only since 1 March 2016 have all criminal suspects in the Netherlands acquired a right to the assistance of a lawyer during police interviews. The Dutch Supreme Court initially interpreted the ruling in Salduz v. Turkey as entailing a right of access to a lawyer during the police interview but exclusively for juvenile suspects. Adult suspects could merely consult a lawyer before the first police interview. This reflects the overall reluctance to allow the lawyer inside the interrogation room, a position which had been dominating the debate since the late 80s. It finally took more than 6 years before the Supreme Court corrected this by additionally recognizing the right to have a lawyer present during police interviewing, after prompting the legislator to take a progressive approach to the matter.

On 1 March 2017, the new regulations which aim to implement Directive 2013/48/EU (hereinafter – the Directive) entered into force in the Netherlands. According to the implementing regulations, the lawyer can address questions and comments to the interrogating officer but he can only do so before or at the end of the interview. During the interview, a lawyer may intervene to signal that undue pressure is allegedly being exercised, that the suspect does not understand a question or that the suspect is unfit for questioning due to his physical or mental state. The suspect and their lawyer can request an additional private consultation, but it is at the discretion of the interrogating police officer to reject this if he believes that allowing multiple consultations would hinder the interview.

Dutch lawyers’ responses to the legislative implementation of the right of access to a lawyer during the interrogation have been less than enthusiastic. The restrictions on the lawyer’s participation in the interrogation fostered concerns about whether suspects are able to effectively
exercise their rights deriving from the jurisprudence of the European Court of Human Rights (ECtHR) and EU law. The Dutch Association of Defence Counsel challenged these limitations in light of the ECtHR case law, but national courts ruled that the Dutch regulations did not impose unacceptable restrictions on the rights of suspects. A valid question is whether the Dutch regulations on the role of the lawyer during interrogation sufficiently enable the lawyer to ‘ask questions, request clarification and make statements’ as is provided by the Directive. Further litigation on these issues, including before the Court of Justice of the European Union, is to be expected. For the moment, Dutch lawyers face the difficult task of attempting to effectively fulfil their role while facing these restrictions.

**Belgium**

Belgian lawyers have several more years’ experience in comparison to their Dutch counterparts as they have been attending interrogations since 2012. Following the **Salduz**-judgment, the Belgian legislature implemented a right to legal assistance before and during police interview for detained suspects, in order to comply with the requirements set by the ECtHR. Suspects’ rights were recently sharpened by the so-called ‘**Salduz+**’ law implementing Directive 2013/48/EU.

The lawyer’s presence at the interrogation is to serve three purposes: (a) to guard the right not to incriminate oneself and to ensure that the suspect’s freedom to answer questions, give a statement or remain silent is respected; (b) to supervise how the suspect is treated and make sure he is not subject to undue pressure; and (c) to supervise reading of the rights and adherence to procedural rules during the interview. The role of the lawyer is not merely passive; the lawyer is permitted (albeit to a limited extent) to intervene to defend his client’s fundamental rights. The lawyer is not, however, allowed to answer questions on behalf of the suspect or to hinder the interrogation, by which the legislature emphasized that the interview is not a place for pleas or debate. In the same vein lies the notion that the interrogating officer is under no obligation to answer the lawyer’s questions. Questions should be connected to the interview (e.g. asking for clarification), and the interrogating officer may nonetheless have reasons to withhold certain information. Upon request of the lawyer or suspect, the interview can be paused for one additional 15-minute private consultation.

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19. See, for example, K. M. G. Demandt and A. C. M. Klaasse, ‘Bijstand van de advocaat bij het verhoor: loopt Nederland in de pas met Europa?’, Strafblad 14(6) (2016), pp. 360–369.
20. Rb. Den Haag 7 Oktober 2016, ECLI: NL: RBDHA:2016:11981.
21. Recital 25 of the preamble to Directive 2013/48/EU.
22. Wet Salduz, 13 August 2011, into force 1 January 2012.
23. Wet betreffende bepaalde rechten van personen die worden verhoord, 21 November 2016, into force 27 November 2016.
24. Article 47 bis §7 Wetboek van Strafvordering.
25. GwH 14 February 2013, nr. 7/2013 (Valentijnsarrest).
26. Article 47 bis §7 Wetboek van Strafvordering.
27. Omzendbrief 08/2011 version d.d. 25 October 2016, p. 41.
28. Omzendbrief 08/2011 version d.d. 25 October 2016, pp. 41–42.
29. Article 2 bis §5 Wet voorlopige hechtenis.
Ireland

Ireland is an example of a country where developments concerning the right of access to a lawyer for suspects in police detention have not followed European developments. Irish jurisprudence has recognized the right of access to a lawyer prior to the interrogation since 1990,30 when the Supreme Court recognized a constitutional right to ‘reasonable access’. This required police to advise a suspect of the right of access and, whenever requested by the suspect, to make bona fide efforts to contact a lawyer. Once those bona fide efforts had been made, police could question the suspect, even while waiting for the lawyer to attend.31 On the influence of the Salduz-judgment, this changed in 2014 when the Supreme Court ruled that a suspect could not be interrogated without having had the opportunity to consult a lawyer if he had so requested.32 A right to legal assistance during the interrogation was not explicitly at issue, but the Court did suggest that the lawyer’s presence during a police interview might in future form part of the right of access to a lawyer. The Director of Public Prosecutions subsequently issued a directive providing that access should be granted by the police. Both the police and the Law Society of Ireland introduced detailed guidelines to ensure this. Following the Law Society’s Guidance, lawyers should not hesitate to ask for a pause or to act immediately upon any concern.33 The lawyer may seek clarification and challenge a question if the latter is, for example, leading, oppressive, overly informal or based on incorrect assumptions.34

However, the presence of the lawyer during a police interview is not constitutionally protected: Ireland did not opt into the Directive and there is no legislation on the issue. In January 2017, the Supreme Court, in the case of DPP v. Doyle, declined to find that having the lawyer attend the interview formed part of the constitutional right of access.35 The decision involves a restrictive reading of the findings in Salduz, as seen in the statement that ‘there is no decision of the ECtHR stating that there must be a solicitor in the room during the time when a person is being questioned by police in relation to a crime’. However, several judges have indicated that there may be circumstances in which the right of access to a lawyer at police interview may be extended in the future. But as yet the DPP has not withdrawn the policy directive currently implementing assistance at the police station.

Practical implementation of the right to a lawyer at police interview

In Belgium, Ireland and the Netherlands, legal implementation of the right to legal representation during police interviews has at times been following a bumpy road. Regulations are still subject to interpretation and changes. While in Belgium the Constitutional Court has already ruled on the matter,36 discussions about the lawyers’ role and participation during interviews continue in the Netherlands, and the Irish still await further developments on the constitutionality of the right in itself.

30. DPP v. Healy [1990] 2 IR 73.
31. DPP v. Buck [2002] 2 IR 268.
32. DPP v. Gormley and White [2014] IESC 17.
33. Law Society of Ireland, Guidance for Solicitors Providing Legal Services in Garda Stations, 2015.
34. The Guidance specifies many types of questions to which lawyer should oppose.
35. DPP v. Doyle [2017] IESC 1.
36. GwH 14 February 29013, nr. 7/2013 (Valentijnsarrest).
Yet, an effective defence of the suspect’s rights does not obviously follow from the mere application of the legal right of access to a lawyer. There are many extralegal factors influencing the respect of suspects’ rights in the police detention stage.37 Both lawyer and police find themselves confronting one another in a relatively new professional situation, often coming to regard each other as opponents.38

Growing pains in the interrogation room

Various experiences in England and Wales, as well as in Belgium, show that introducing regulations allowing lawyers’ attendance at interviews notably increases disunion between police and lawyers.39 At the beginning of what can be considered a transition period, a strong resistance could be seen on both sides.40 Police were known to use compensatory strategies to mute expected negative effects of the lawyer’s presence.41 They would, for example, encourage suspects to waive their right to a lawyer by downplaying the seriousness of the offence or by making suspects believe that their detention would be prolonged if they asked for a lawyer.42 During the interrogation, police would try to limit the lawyer’s influence by, for example, asking the lawyer to sit away from his client.43

Lawyers would often take a passive approach at the interview as it would be unclear what exactly was expected of them or what they were allowed to do.44 Such an approach is hardly compatible with the practical and effective defence of the suspect’s rights that lies at the heart of the right of access to a lawyer. On the contrary, a passive approach can be detrimental to the suspect’s case. Exercised broadly, it can have the effect that police get used to a practice in which lawyers do not intervene (much). The fear that lawyers legitimize the course of conduct during the interview, while being limited in their possibilities to intervene, has also been reason for some – in the first period after the new rules came into force – to refuse to attend interviews.45

As police and lawyers have gradually become more experienced with the new rules, resistance has notably decreased and compensatory strategies have been less used.46 From more recent research in England, it appears that their views on each other have become more positive and lawyers have increasingly valued a good working relationship with the police in order to receive information and possibly negotiate case outcomes at an earlier stage.47 Increased guidance on, and experiences with, the defence of suspects’ rights also contribute to a more active approach by

37. J. Blackstock et al., Inside Police Custody (Cambridge: Intersentia, 2014), p. 3.
38. Inside Police Custody, p. 345.
39. M. Vanderhallen et al., Toga’s in De Verhoorkamer: De Invloed Van Rechtsbijstand op Het Politieverhoor (Den Haag: Boom Lemma, 2014), pp. 140–146.
40. Toga’s in De Verhoorkamer: De Invloed Van Rechtsbijstand op Het Politieverhoor.
41. Toga’s in De Verhoorkamer, pp. 130–140.
42. See, among others, A. Sanders and R. Young, Criminal Justice (London: Butterworths, 2000); L. Skinns, ‘The Right to Legal Advice in the Police Station: Past, Present and Future’, Criminal Law Review 1 (2011), pp. 19–39.
43. M. McConville and J. Hodgson, Custodial Legal Advice and the Right to Silence (London: HMSO, 1993).
44. See M. McConville et al., Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain (Oxford: Oxford University Press, 1994), pp. 102–127; L. Bridges and J. Hodgson, ‘Improving custodial legal advice’, Criminal Law Review (1995), pp. 101–113; Blackstock (n 45), pp. 397–400.
45. For example, in the Netherlands, see Blackstock (n 45), p. 393.
46. Vanderhallen (n 47), pp. 140–146.
47. Vanderhallen.
lawyers. In some countries, guidance is offered by, for example, standards of performance (England) or formulated guidelines (e.g. Belgium and Ireland).

**Filling in the blanks**

Although legislation offers a framework for the lawyer’s role, it offers little guidance on the qualitative aspects of legal assistance. Lawyers face many more challenges in practice. Ensuring that they were in the right place at the right time without endangering the financial viability of their practice requires thorough organizational reforms. Fulfilling their tasks at the police station is new to many (while there is hardly any possibility for a lawyer to shadow a mentor or to see peers in action at the police station). Moreover, the lawyer is faced with a client who, as a detainee, finds himself in a very vulnerable position.

The consultation constitutes an important element of legal assistance in the police custody stage. It is used to inform the client about the case, the role of the lawyer and to give him some advice for the interview, which implies a need to gather information about both case and suspect. Time is often limited and so is the lawyer’s access to information. This and possible psychological vulnerabilities, as well as the impact of emotions, pose challenges to an effective conversation in preparation for the interview. Furthermore, a quite distinct implication of the lawyer now being the first to speak to a detainee is that his assessment is relied upon when determining whether the suspect is fit for questioning.48

The lawyer is expected to take an effective part in the course of the interrogation.49 National regulations offer some guidance as to what this might entail (or rather as to the limitations involved), but many uncertainties remain as to what ‘effective part’ means. Advising clients, seeking to ensure that their rights are respected, challenging unclear, unfair and unlawful questioning, providing moral support and ensuring that the written report is accurate, can all be seen as functions of representation during interview.50 A recent study has demonstrated that lawyers have different views on their role.51 Some described representing the interests of their client as their primary goal, whereas others viewed it as to primarily ensure procedural compliance or to provide moral support.52 Research showed the quality of representation to be of similar variety.53

It is up to lawyers to determine the optimal approach to fulfil their role, especially in situations in which regulations do not offer guidance. For example, when deciding whether or not to intervene during an interview, they should consider the impact not only of an intervention on the situation, on the client’s position, and on further proceedings, but also of external factors like the working relationship with the interrogating officer. Effective representation, and hence effective implementation of the Directive, requires an independent and reflective approach to practical dilemmas. Mere implementation of theoretical regulations is not always sufficient.

48. In Belgium, for example, the code of conduct requires the lawyer to check whether the client is physically and mentally fit for questioning (Article 3.3 Salduz-gedragscode 2017). In the Netherlands, the lawyer is to give his comment whenever he finds that his client is not fit for questioning (Article 6 sub c Besluit inrichting en orde politiehoor).
49. Article 3(3)b Directive 2013/48/EU.
50. Blackstock (n 45), pp. 394–395.
51. Blackstock, p. 337 onwards.
52. Blackstock.
53. Blackstock, pp. 311–329.
The SUPRALAT Training programme

To promote the development of an active, reflective and client-centred professional culture of criminal defence at the early stages of criminal proceedings, a new training programme has been developed within a cross-border project to strengthen suspects’ rights in pretrial proceedings through practice-oriented training for lawyers (SUPRALAT).\textsuperscript{54} The training programme aims to provide a practice and skills-orientated training for criminal defence counsels. It is based on the presumptions that, in addition to legal knowledge and skills, three elements are important to promote an active and effective defence: the development of reflective practice, interdisciplinary knowledge and communication skills. The training has been developed by an international and interdisciplinary team. Experts with different backgrounds from universities, non-governmental organizations, bar associations and other professional organizations in Belgium, Hungary, Ireland and the Netherlands have all contributed.

Training design

The training has been designed according to fundamental educational principles. Studies showed that new knowledge applied in practice leads to a higher retention rate.\textsuperscript{55} By making use of active learning, participants are asked to give input and participate in exercises at different points throughout the training. Learning is also made more active by responding to the participants’ training needs, for example, by inquiring about their learning goals and addressing these. Exercises are based on real cases to resemble authentic situations. Discussing with others, asking questions and giving feedback also enhance the learning process.\textsuperscript{56} To enable this, it is important that a certain level of trust be established between trainers and participants. It is for these reasons, as well as to ensure active participation, that the training is designed for small groups of 12–15 persons. Lastly, the training makes use of blended learning. As the training is designed for professionals, consideration must be given to time constraints. The training is therefore comprised of a theoretical part, which is provided through an electronic learning environment, and of several face-to-face sessions. The face-to-face sessions are focused on practicing skills.

Once training materials had been developed, training was conducted in the four participating countries. To promote and enable a uniform approach, the first pilot training sessions included a ‘train-the-trainer’ programme for experienced practitioners. Participants to this training could become active trainers when the programme was continued, and some of them soon joined the teaching team of the second pilot training.

Although no cut and dried answers can be given beyond the point of regulations, participants learn from each other’s experiences and gain insights from different areas of expertise. In addition to the relevant laws and regulations, the training includes insights from legal psychology, research findings on the practice and communication theory and skills. As to e-learning, modules are offered on the following topics: European law, national law, role of the lawyer in the stage of

\textsuperscript{54} Funded by the European Commission. The project is implemented by Maastricht University in cooperation with Antwerp University, Dublin City University, Hungarian Helsinki Committee and PLOT (Belgium).

\textsuperscript{55} D. Halpern and M. Hakel, ‘Applying the science of learning to the university and beyond: teaching for long-term retention and transfer’, Change: The Magazine of Higher Learning 35(4) (2003), pp. 38–39.

\textsuperscript{56} It has been argued that learning occurs to a large extent due to interaction with peers. K. Topping et al., Effective Peer Learning: From Principles to Implementation (New York: Routledge, 2017), p. 2.
police detention, consultation, police interview, communication and vulnerable suspects. These serve to provide knowledge and preparation for the face-to-face sessions. During the face-to-face sessions, participants then move on to apply theory in practice through a variety of exercises. In several of these, the team was strengthened by police officials who could offer insights in police practice and, for example, simulate interview settings.57

The road ahead

At the time of writing this article, the first pilot training sessions have now been concluded. With unambiguously positive responses during the evaluation phase, we consider this to have been a successful first trial. Participants particularly valued the practical, interactive and multidisciplinary approach of the training. After the second pilot, materials were reviewed and adjusted before being disseminated for further use by professional and educational organizations throughout Europe. Ideally, the needs for such training will continue to be met through a broad implementation process.

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57. In Belgium, the complete training was delivered with a police trainer and participated in by several police officers with experience with suspect interviewing. In the other countries, police were involved in simulating or discussing interviews.