



**PRACTITIONERS' TOOLS ON EU LAW**

## **RIGHT TO INFORMATION DIRECTIVE**

**THE LETTER OF RIGHTS**

**RIGHT TO INFORMATION ON THE ACCUSATION**

**RIGHT OF ACCESS TO THE CASE FILE**

## About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>

This toolkit is created as a part of the project “Litigating to Advance Defence Rights in Europe” funded by the European Union. The Project acknowledges the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights abuses. They operate on the front-line of the justice system, deciding which legal arguments to make and whether to apply EU law. The project aims to strengthen the ability of defence lawyers to effectively engage in litigation at domestic and EU levels where rights have been violated, and use EU law to tackle abuse of fundamental rights in criminal justice systems across the EU.



### Contacts

Laure Baudrihaye-Gérard

Senior Lawyer (Europe)

+32 (0)2 894 99 55

[laure.baudrihaye@fairtrials.net](mailto:laure.baudrihaye@fairtrials.net)

Ilze Tralmaka

Legal and Policy Officer

+32 (0) 279 23 958

[ilze.tralmaka@fairtrials.net](mailto:ilze.tralmaka@fairtrials.net)

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# INTRODUCTION

## A. INTRODUCTION

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### 1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('EAW'). Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR' or 'the Convention').

However, cooperation was progressively undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU started in 2009 setting minimum standards for the procedural safeguards of suspects and accused persons to regulate certain aspects of criminal procedure through a programme called the 'Stockholm Roadmap'.<sup>1</sup>

Whilst the original objective of these measures is ensuring mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element. These cover the right to interpretation and translation,<sup>2</sup> the right to information,<sup>3</sup> and the right of access to a lawyer<sup>4</sup>, procedural safeguards for children<sup>5</sup>, the right to the presumption of innocence and to be present at trial<sup>6</sup> and the right to legal aid<sup>7</sup> (collectively, the 'Roadmap Directives').

This toolkit focuses on Directive 2012/13/EU on the right to information in criminal proceedings<sup>8</sup> (the 'Directive'), which became directly applicable as from the end of the transposition deadline on 2 June 2014.

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<sup>1</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p.1](#)).

<sup>2</sup> Directive 2010/64/EU of the European parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, ([OJ 2010 L 280, p. 1](#)).

<sup>3</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ([OJ 2012 L 142, p. 1](#)).

<sup>4</sup> 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 ([OJ 2013 L 290, p. 1](#)).

<sup>5</sup> Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings ([OJ L 132, 21.5.2016, p.1.](#)).

<sup>6</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings ([OJ L 65, 11.3.2016, p. 1](#)).

<sup>7</sup> Directive 2016/1919 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 ([OJ L 297, 4.11.2016 p.1.](#); corrigendum OJ L91 5.4.2017, p.40).

<sup>8</sup> Note 3 above.

This toolkit includes a general approach on how to use the Directive in domestic proceedings and covers four specific areas: information about the rights of suspects, notification about reasons of arrest and accusation, access to case file and information to witnesses and other non-suspects.

## 2. Purpose of this toolkit

This toolkit is designed to give practical advice, mainly to defence practitioners, on how to use the Directive in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the LEAP network to date in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Directive. The toolkit compiles the latest relevant developments in the jurisprudence of Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights ('**ECtHR**') and identifies the key problems as regards the implementation of the Directive across the EU Member States. This toolkit also suggests arguments that can be used by lawyers in domestic criminal proceedings where national law or practice falls short of the standards set by the Directive.

Please refer to the [Using EU law in Criminal Practice Toolkit](#) ('**Using the EU law Toolkit**') for a general introduction on how to use EU law in national proceedings. A short overview of the basic principles of EU law is given in Section B of this introduction.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the [CJEU Preliminary Reference Toolkit](#) ('**Preliminary Reference Toolkit**').

Please also feel free to refer to the other materials on EU law produced by Fair Trials, notably:

- The [toolkit on the Access to a Lawyer Directive](#);
- The [toolkit on the Right to Interpretation and Translation Directive](#);
- The [toolkit on the Legal Aid Directive](#);
- The [toolkit on the Presumption of Innocence Directive](#);
- The [toolkit on the Charter of Fundamental Rights of the European Union](#);
- The online [legal training on pre-trial detention](#).<sup>9</sup>

## 3. Scope of this toolkit

The introductory part of this toolkit offers a general overview of the basic principles of the European Union ('**EU**') law, including the direct effect of directives and the obligation of conforming interpretation. The toolkit also offers an overview of the approach of the European Court of Human

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<sup>9</sup> Follow our website on [EU law materials](#) for the upcoming and updated toolkits.

Rights ('**ECtHR**') in relation to key aspects of the Directive, such as notification about charges, access to case file in detention proceedings and main criminal proceedings etc.

Parts I to IV cover the content of the rights enshrined in the Directive - notification of rights to suspects, including in EAW proceedings (I), notification of reasons for arrest (II) and access to case file (III).

## 4. How to use this toolkit

### a. How the content is organised

Each part of this toolkit starts with a presentation of the main issues (Section A). It then details the relevant provisions of the Directive and the related legal arguments (Section B) before providing specific guidance on how to use them in practice (Section C).

As most of the provisions of the Directive leave considerable room for interpretation, we included other legal arguments when presenting the provisions of the Directive. Where possible, we highlighted any guidance on interpretation handed down by the CJEU. However, there are currently a limited number of CJEU judgments interpreting the Directive.<sup>10</sup> Therefore, where necessary, we fill in the gaps with additional sources.

In particular, we include relevant references to the Charter of Fundamental Rights of the European Union ('the **Charter**'),<sup>11</sup> and, in particular, Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and right of defence) of the Charter.<sup>12</sup>

We also review Article 6 of the European Convention on Human Rights ('**ECHR**')<sup>13</sup> and the relevant case-law of the European Court of Human Rights ('**ECtHR**'). One of the aims of the Directive was to articulate ECtHR standards, as they stood at the time of drafting of the Directive, as standards of EU law binding upon all EU Member States. ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECtHR standards do not fall below the scope of rights and limits of derogations set in the Directive.

Much of the law laid down by the Directive still remains open to interpretation; therefore, this toolkit inevitably involves our own reading of the Directive standards. Based upon our understanding of the Directive, we make concrete suggestions about how to use its provisions in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court).

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<sup>10</sup> For latest update on these cases see Fair Trials' "[Mapping CJEU Case Law on EU Criminal Justice Measures](#)" tool.

<sup>11</sup> The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union ([OJ C 326, 26.10.2012, p. 391](#)).

<sup>12</sup> For further information on how to use the Charter, see Fair Trials' [Toolkit on Charter of Fundamental Rights of the European Union](#).

<sup>13</sup> Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

In order to distinguish clearly between these different levels of analysis:

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border.

*Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border. They are presented in italics.*

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directives in the local legal context. We try to be up front about when we are making a suggestion with the symbol '→' or marking it with the title '**Litigation strategy**'.

## b. Terminology

In this toolkit, we use the term '**questioning**' to refer to questioning as to the facts of an offence by police, prosecutors and/or investigative judges; this may have the same meaning as the terms '**interview**' and '**interrogation**' in some jurisdictions.

We will also use the term '**lawyer**' to refer to any legal professional that is entitled in accordance with national law to provide legal assistance and represent suspects or accused persons at any stage of criminal proceedings; this may have the same meaning as '**defence attorney**' or '**legal counsel**' in some jurisdictions.

A '**suspect**' in the context of this toolkit may refer not only to persons who have been recognized as such in accordance with formal procedures under national law, but also cover persons who have not been formally declared suspects but whose '**situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him**'.<sup>14</sup>

## c. A word of caution

This toolkit is drafted based on certain assumptions. We have endeavoured to identify these clearly in the body of the text. This is both in acknowledgment of the fact that there may be other points of view, and in order to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in national criminal procedure in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. So, you will need to adapt our suggestions to work within your own local context.

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<sup>14</sup> See ECtHR, [Simeonovi v. Bulgaria](#), App. No.21980/04, Judgment of 12 May 2017, paragraph 110.

#### d. Keep in touch

With those qualifications, we encourage you to follow the steps in this toolkit, try out the arguments we propose and to let us know how you get on by contacting us via the contacts in the preface.

**We are keen to hear from you about your experience and to share lessons learned from others.**

**We may also be able to offer support and assistance in individual cases.**

## B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW

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### 1. Supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. This is called the ‘principle of supremacy’ and it means that in case of contradiction between national law and EU law, the latter takes precedence and under certain conditions can be invoked directly by individuals to claim their rights against the state.

For example, if national law does not provide for access to documents essential for effective challenge of detention in accordance with Article 7(1) of the Directive, a suspect or accused person, who is arrested and denied access to these ‘essential documents’ could rely on the Directive over the national law to claim his/her rights.

### 2. Direct effect of EU law

EU law works through a system of ‘decentralised’ enforcement where the national court is the primary driver of compliance. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,<sup>15</sup> in which the European Court of Justice (now the CJEU) established the principle of ‘direct effect’. The idea is that when obligations upon Member States are there to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was originally recognised for primary law (Treaties) when the obligation in question was ‘precise, clear and unconditional’ and ‘does not call for additional measures’ by Member States or the EU. It was then extended to regulations, and subsequently to directives.

### 3. Direct effect of directives

Directives set objectives for Member States, who can decide by what means to reach them. Therefore, Member States need to give effect to directives by adopting national legislation that transposes the directives into national law. However, provisions of directives can have direct effect

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<sup>15</sup> CJEU, [Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration](#), Judgment of 5 February 1963, ECLI:EU:C:1963:1.

too, as was originally established by the CJEU in the *Van Duyn*<sup>16</sup> and *Ratti*<sup>17</sup> cases and more recently in *Difesa*:

'(...) [W]herever the provisions of a directive appear (...) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (...) A [n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (...)'.<sup>18</sup>

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

- 1) the transposition deadline of the directive has passed but the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;<sup>19</sup>
- 2) it is invoked against a state;
- 3) it gives rights to an individual; and
- 4) it is **unconditional and sufficiently precise**, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

The first three criteria are clearly fulfilled for the Right to Information Directive with regard to the different aspects of the right to information.

Even if a provision is arguably not 'unconditional and sufficiently precise' because it is spelled out in general terms and may require some interpretation, this does not necessarily prevent you from relying on it in national court. The CJEU has recognised that:

- The fact that a provision needs interpreting does not prevent it having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.<sup>20</sup>
- The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.<sup>21</sup>
- A provision which 'limits the discretionary power'<sup>22</sup> of the Member State or impose Member States to 'pursue a particular course of conduct'<sup>23</sup> may also be invoked in national courts. An individual may invoke such a provision to argue that the national

<sup>16</sup> CJEU, Case 41/74 *Van Duyn* [ECLI:EU:C:1974:133](#).

<sup>17</sup> CJEU, Case 148/78 *Ratti* [ECLI:EU:C:1979:110](#).

<sup>18</sup> CJEU, Case C-236/92 *Difesa* [ECLI:EU:C:1994:60](#), paragraphs 8-10.

<sup>19</sup> CJEU, Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise*, [ECLI:EU:C:2002:435](#), para.

27.

<sup>20</sup> CJEU, Case 41/74 *Van Duyn*, see above note 16, para. 14.

<sup>21</sup> *Ibid.*, para. 7.

<sup>22</sup> *Ibid.*, para. 13.

<sup>23</sup> CJEU, Case 51/76 *Verbond van Nederlandse Ondernemingen* [ECLI:EU:C:1977:12](#), para. 23.

authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.<sup>24</sup>

#### 4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of a directive in order to ensure its full effectiveness.

'The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (...), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.'<sup>25</sup>

In this toolkit we occasionally refer to the preamble of the Directive, called the “**recitals**”, as an interpretative source. Recitals of directives have no legal binding force. They do not in themselves contain any enforceable rights or obligations and cannot alter the content of substantive provisions.<sup>26</sup> However, they explain the background and the objectives of each directive. They are therefore important for understanding the directive and can be used as an interpretative source.

### C. BEFORE THE DIRECTIVE: OVERVIEW OF KEY ECHR PRINCIPLES

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Although the Directive provides for a set of rights under the EU law, they were largely based on the ECHR standards at the time of their drafting. These standards, as far as they do not fall below the level of protection afforded by the text of the Directive as interpreted (where relevant) by the CJEU, continue to be relevant for filling the interpretation gaps. According to the Recital 40 and 42 of the Directive:

'(42) The provisions of the Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights.'

Recital 40 of the Directive further specifies that the level of protection should never fall below the standards provided by the ECHR as interpreted in the case-law of the ECtHR.

The Directive covers certain areas of defence rights which have been developed by the ECtHR under Articles 5 (right to liberty) and Article 6 (right to a fair trial). Therefore, we refer to the following key aspects established by the ECtHR.

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<sup>24</sup> Ibid., para. 24.

<sup>25</sup> CJEU, Case C-69/10 Samba Diouf [ECLI:EU:C:2011:54](#), paragraph 60.

<sup>26</sup> The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, Case 134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j. [ECLI:EU:C:2009:229](#), paragraph 16.

**Article 6 case-law on being ‘charged’:** The cases confirm that a person becomes entitled to guarantees under Article 6 at the point when they are ‘charged’, which is interpreted as meaning the point at which they are made aware they are suspected or when the interests of the person are substantially affected, which can mean when there is evidence that they have committed an offence.<sup>27</sup> However, the concept of “charged with criminal offence” is “autonomous”; it has to be understood within the meaning of the Convention and not solely within its meaning in domestic law. It may thus be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (...).<sup>28</sup>

**Article 6 case-law on notification of rights:** The principles established in ECtHR case-law<sup>29</sup> point to the need for clear notification of the (separate) rights to silence, not to incriminate oneself and to legal assistance at the point of arrest,<sup>30</sup> individually and in such a way as to enable the suspect to understand them and exercise their rights. There is suggestion that oral notification is insufficient in some cases and the case-law points to a need to take account of the specific characteristics of the individual (e.g. youth, ability to understand the language),<sup>31</sup> and specific circumstances in which the notification takes place.<sup>32</sup>

**Article 5/6 case-law on notification of accusations:** The cases suggest that the suspect must be aware of the accusations at the point of questioning at the pre-trial stage.<sup>33</sup> A separate strand of case-law concerns the requalification of offences at different stages of proceedings, e.g. on appeal; the principles require that the defence be notified of changes in qualification in such a way as to prepare a defence effectively; changes in qualification, even if operated by the court without inviting argument, are acceptable provided such requalification could be anticipated.<sup>34</sup>

**Article 6 case-law on access to the case file:** At the trial stage unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are recognised as important guarantees of a fair trial. The failure to afford such access has weighed, in the Court’s assessment, in

<sup>27</sup> ECtHR, [Bandeltov v. Ukraine](#), App. no. 23180/06, Judgment of 31 October 2013, paragraph 56.

<sup>28</sup> ECtHR, [Mikolajova v. Slovakia](#), App. no. 4479/03, Judgment of 18 January 2011, paragraphs 40-41.

<sup>29</sup> ECtHR, [Zaichenko v. Russia](#), App. no. 39660/02, Judgment of 18 February 2010, paragraph 38; ECtHR, [Pishchalnikov v. Russia](#), App. no. 7025/04, Judgment of 24 September 2009, paragraph 71. ECtHR, [Stojkovic v. France and Belgium](#), App. no. 25303/08, Judgment of 27 October 2011 (French only), paragraph 54; ECtHR, [Panovits v. Cyprus](#), App. no. 4268/04, Judgment of 11 December 2008, paragraph 65.

<sup>30</sup> ECtHR, [Salduz v. Turkey](#), App. no. 36391/02, Judgment of 27 November 2008, paragraphs 50-55.

<sup>31</sup> ECtHR, [Panovits v. Cyprus](#), cited above note 29, paragraphs 67, 73.

<sup>32</sup> ECtHR, [Zaichenko v. Russia](#), cited above note 29, paragraph 58.

<sup>33</sup> ECtHR, [Mattoccia v. Italy](#), App. no. 23969/94, Judgment of 25 July 2000, paragraphs 63-64.

<sup>34</sup> ECtHR, [I.H. and others v. Austria](#), App. no. 42780/98, Judgment of 20 April 2006, paragraphs 36-38.

*favour of the finding that the principle of equality of arms had been breached.<sup>35</sup> Case-law on access to case file at trial stage usually concerns the withholding of information on public order grounds, and the case-law envisages a balancing of the interests at stake.<sup>36</sup> At the pre-trial stage, there are a number of cases concerning the alleged prejudice caused to the defence by practical restrictions on access to the case file prior to trial, inhibiting trial preparation.<sup>37</sup> At the stage of initial police interrogations, there is an open question as to whether Article 6 requires a certain amount of case material to be provided; one judgment suggests it might<sup>38</sup> but, in general, this area is not sufficiently explored.*

**Article 5 case-law on access to the case file:** *Due to the serious nature of the decision at issue, the case-law relating to Article 5(4) ECHR (review of continued detention) applies the ‘equality of arms’ principle drawn from Article 6 fair trial requirements to pre-trial detention decision-making. The Court has recognised that equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention.<sup>39</sup> Not all documents have to be disclosed, but those which are needed in order to challenge the lawfulness of detention effectively must be provided.<sup>40</sup>*

## D. OVERVIEW OF THE DIRECTIVE

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### 1. Purpose and objectives

We will cover the substantive requirements of the Directive in Parts I – III below. However, in this introductory part it is already worth considering the general objective of the Directive, as this informs the way all the substantive provisions should be interpreted. The recitals – which do not establish obligations in themselves, but will help interpret the obligations in the Directive – first provide some general wording:

‘(14) This Directive (...) lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence (...) This Directive builds on the rights laid down in the Charter, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 ECHR as interpreted by the European Court of Human Rights.’

...

<sup>35</sup> ECtHR, [Beraru v. Romania](#), App. no. 40107/01, Judgment of 18 March 2014, paragraph 70.

<sup>36</sup> ECtHR, [Jasper v. The United Kingdom](#), App. no. 27052/95, Judgment of 16 February 2000, paragraph 52.

<sup>37</sup> ECtHR, [Iqlin v. Ukraine](#), App. no. 39908/05, Judgment of 12 January 2012, paragraph 60; ECtHR, [Vyrentsov v. Ukraine](#), App. no. 20372/11,, Judgment of 11 April 2013, paragraphs 73-76; ECtHR, [Öcalan v. Turkey](#), App. no. 46221/99,, Judgment of 12 May 2005, paragraph 142.

<sup>38</sup> ECtHR, [Sapan v. Turkey](#), App. no. 17252/09, Judgment of 20 September 2011, paragraph 21.

<sup>39</sup> ECtHR, [Korneykova v. Ukraine](#), App. no. 39884/05, Judgment of 19 January 2012, paragraph 68.

<sup>40</sup> ECtHR, [Lamy v. Belgium](#), App. no. 10444/83, Judgment of 30 March 1989, paragraph 29; ECtHR, [Schops v. Germany](#), App. no. 25116/94, Judgment of 13 February 2001, paragraph 44.

‘(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights (...)’.

These recitals capture the general tone of the EU directives on procedural safeguards, which aim to build upon and consolidate rights arising from the ECHR as interpreted by the ECtHR and establish them as EU law. This is why, in this toolkit, in addition to the interpretation provided by the CJEU, we also highlight the relevant principles of ECtHR case-law.

However, the Directive is clearer, easier to use, and it may also provide more robust protection than the ECtHR, so we encourage you to base your arguments on the Directive itself as a rule. The other recitals then relate to, and in some cases elaborate upon, the specific rights in the Directive which are covered in this toolkit.

The recitals also refer to the Charter and we encourage the use of the Charter to strengthen your EU law-based arguments. The Charter has the same legal strength as the Treaties. This means that it is directly applicable as it does not need to be transposed into national law. It cannot be used on its own to invoke rights, but it may be used to support interpretation and application of other EU law such as the Directive. Articles 47 and 48 of the Charter (right to a fair trial and rights of the defence) will be particularly useful to refer to in arguments based on the Directive before national authorities. For more information on how to use the Charter to support your arguments, see Fair Trials’ [Toolkit on Charter of Fundamental Rights](#).

## 2. Overview of the Directive’s provisions

Provision	What it covers	Particular aspects
Article 1	Subject matter	<ul style="list-style-type: none"> <li>The Directive lays down rules concerning the right to information of suspects and accused persons in relation to their rights in criminal proceedings and to the accusation against them.</li> <li>Applies also to European Arrest Warrant proceedings.</li> </ul>
Article 2	Scope	<ul style="list-style-type: none"> <li>Applies from the time persons are ‘made aware by the competent authorities ... that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings’.</li> <li>Where minor offences are sanctioned administratively and only the appeal is before a court, the Directive applies only to proceedings before the court.</li> </ul>
Article 3	Right to information	<ul style="list-style-type: none"> <li>Suspects or accused persons must to be provided promptly with information concerning at least the following procedural rights:</li> </ul>

about rights	<ul style="list-style-type: none"> <li>○ access to a lawyer;</li> <li>○ any entitlement to free legal advice and the conditions for obtaining such legal advice;</li> <li>○ to be informed of the accusation;</li> <li>○ interpretation and translation; and</li> <li>○ remain silent.</li> </ul> <ul style="list-style-type: none"> <li>● The information must be given orally or in writing, in simple and accessible language, taking into account the needs of the suspects/persons (especially vulnerable).</li> </ul>
Article 4 Letter of Rights on arrest	<ul style="list-style-type: none"> <li>● Entitles suspects or accused persons, who are arrested or detained, to a written Letter of Rights. They should be able to read the letter and keep it throughout the time they are detained.</li> <li>● The Letter of Rights<sup>41</sup> is given in addition to information in Article 3 and must contain information about the following rights: <ul style="list-style-type: none"> <li>○ access to the materials of the case;</li> <li>○ to have consular authorities and one person informed;</li> <li>○ access to urgent medical assistance;</li> <li>○ the maximum number of hours they may be deprived of liberty before being brought before a judicial authority; and</li> <li>○ information about challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.</li> </ul> </li> <li>● Drafted in simple and accessible language.</li> <li>● Suspect or accused must receive the letter written in a language that they understand.</li> </ul>
Article 5 Letter of Rights in EAW Proceedings	<ul style="list-style-type: none"> <li>● Persons who are arrested for the purpose of the execution of a European Arrest Warrant must be promptly provided with a Letter of Rights<sup>42</sup> to safeguard the fairness of proceedings and the effective exercise of the rights of the defence.</li> </ul>
Article 6 Right to	<ul style="list-style-type: none"> <li>● Entitles suspects or accused persons to information about the</li> </ul>

<sup>41</sup> A model example of the Letter of Rights in criminal proceedings can be found in Annex 1 of the Directive. See also Fair Trials' and Hungarian Helsinki Committee's 2016 report on the [Accessible Letters of Rights in Europe](#).

<sup>42</sup> A model example of the Letter of Rights in EAW proceedings can be found in [Annex 2](#) of the Directive.

	information about the accusation	<p>criminal act that they are suspected or accused of having committed.</p> <ul style="list-style-type: none"> <li>• Persons who are arrested or detained must be informed of the reasons for their arrest or detention (including of the criminal act they are suspected/accused of).</li> <li>• Requires the authorities to provide, at the latest in court, detailed information on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused.</li> <li>• Any changes in the above information must be promptly notified to the suspect or accused person.</li> </ul>
Article 7	Right of access to the materials of the case	<ul style="list-style-type: none"> <li>• Documents which are essential to the effective challenge of the lawfulness of the arrest or detention should be made available to arrested persons or their lawyers.</li> <li>• Access must be granted at least to all material (including exculpatory) evidence in possession of the competent authorities, to those persons or their lawyers.</li> <li>• Access to the materials must be granted in due time to allow for the effective exercise of defence rights and at the latest upon submission of the merits of the accusation to the court.</li> <li>• Derogation: access may be refused if it may lead to a serious threat to the life or the fundamental rights of another person or to safeguard public interest. This derogation does not apply to the right to access case materials essential in order to challenge arrest or detention.</li> <li>• Refusal of access to certain materials must be taken by a judicial authority or at least be subject to a judicial review.</li> <li>• Access must be provided free of charge.</li> </ul>
Article 8	Verification and remedies	<ul style="list-style-type: none"> <li>• When information is provided to suspects or accused persons, it must be noted through a recording procedure.</li> <li>• Right to challenge a possible failure or refusal of the competent authorities to provide information.</li> </ul>
Article 9	Training	<ul style="list-style-type: none"> <li>• Requirement to provide for training of 'judges, prosecutors, police and judicial staff' on the right to information.</li> </ul>
Article 10	Non-regression	<ul style="list-style-type: none"> <li>• Directive does not limit safeguards arising under international or national law offering a higher level of protection.</li> </ul>

# I – NOTIFICATION OF RIGHTS TO SUSPECTS

## A. THE ISSUE

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You will know only too well the importance of suspects being informed of their rights early in proceedings. For example, if the client knows that he has the right to remain silent and that this may not – in most places – be held against him, this may prevent the client from giving a statement that could incriminate him. Equally, if not more crucially, if suspects are advised of their right to legal advice, and understand that it is not obstructive to invoke it, they are more likely to enjoy the other rights, in particular the right to silence and the right to interpretation, if needed.

The Directive addresses the problem of ineffective notification of rights. The Commission stated in relation to this Directive that, in many of the 8 million criminal proceedings in the EU every year, suspects are only informed about their defence rights orally, in technical and incomprehensible language, or not at all.<sup>43</sup>

This deficiency has grave implications for the defence strategy, the likelihood of conviction and challenging detention. Anyone arrested and/or interrogated by the police will be in a stressful situation and particularly vulnerable. The failure to inform a suspect effectively of his rights in such a way as to ensure he understands them means he may not know of them or be prepared to exercise them. Research<sup>44</sup> conducted by Fair Trials revealed a number of problems:

- Written notifications of procedural rights given to suspects are often drafted in complex legal terminology (sometimes simply reproducing provisions of the criminal procedure code) which are difficult to understand for many suspects;
- The right to silence is often notified in terms which make its exercise unattractive. The right may be expressed as the right to ‘refuse to answer questions’ and the letter may draw attention to possible adverse consequences such as increased possibility of pre-trial detention or the missing of an opportunity to clarify one’s innocence;
- Rights are notified only when a person is formally placed under suspicion / arrest / investigation; in some cases, persons questioned as witnesses are in fact suspected but are not informed of their rights and may provide answers which influence the course of the proceedings.
- The failure to notify rights effectively means that suspects ‘waive’ their rights to silence and to a lawyer without sufficient understanding of what those rights are, leading to doubt as to whether these ‘waivers’ are granted in knowing and unequivocal manner.

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<sup>43</sup> European Commission, [Fair trial rights: EU governments endorse law ensuring suspects' right to information in criminal proceedings](#), 3 December 2010.

<sup>44</sup> Fair Trials, [Where’s my lawyer? Making legal assistance in pre-trial detention effective](#), October 2019; Fair Trials, [Accessible Letters of Rights in Europe. International and Comparative Law Report](#), August 2019.

## B. RELEVANT PROVISIONS OF THE DIRECTIVE

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### 1. Notification of rights: the timing

The Directive requires information on rights to be notified to persons who are suspected or accused in criminal proceedings. The point it selects (as do the other Directives) to define its scope of application is, however, somewhat problematic. Article 2(1) provides:

'1. This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence.'

According to Recitals 19 and 28 of the Directive:

'The competent authorities should inform suspects or accused persons **promptly** (...) **in the course of the proceedings** or **at latest before the first official interview** of the suspect or accused person by the police or another competent authority.'

(28) (...) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and **at the latest before their first official interview** by the police or another competent authority (...)

The Directive requires provision of the information 'at the latest before the first official interview', an expression which poses difficulty: questioning may occur before formal notification of suspicion. The Directive<sup>45</sup> does not provide more clarity as to the moment the suspects or accused persons should be considered as having acquired that status and thus have the right to be notified of their rights. ECtHR jurisprudence sheds more light on this point. Under the ECHR, fair trial guarantees apply to a person "charged with criminal offence". ECtHR case-law, which is helpful in interpreting the starting point of the obligation to notify the rights, takes a substantive rather than a formal approach as to the moment a person is "charged with a criminal offence" or becomes a suspect or accused person:

*That concept of "charged with criminal offence" is "autonomous"; it has to be understood within the meaning of the Convention and not solely within its meaning in domestic law. It may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (...) A "charge" may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (...). The legislation of the State concerned is certainly relevant, but it provides no more than a starting point (...) The prominent place held in a democratic society by the right to a fair trial favours a "substantive", rather than a "formal", conception of the "charge" referred to by*

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<sup>45</sup> And at the time of updating this toolkit in August 2020, the CJEU had not clarified the timing of this obligation.

*Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6 (...). In particular, the applicant's situation under the domestic legal rules in force has to be examined in the light of the object and purpose of Article 6, namely the protection of the rights of the defence.<sup>46</sup>*

Thus the right to be notified of their rights in accordance with the Directive should apply also to persons who have not been formally notified of their status as suspects or accused persons, but whose situation "has been substantially affected." This would apply, for example, in cases where a person is initially questioned as a witness but becomes a suspect during the interview.<sup>47</sup>

The European Commission's report on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the rights to information in criminal proceedings<sup>48</sup> ('**Implementation Report**') notes that most Member States do not specifically address the moment at which a suspect or accused person is "made aware" of the suspicion or accusation, nor do they specify that the right to information applies throughout the criminal proceedings. In **Cyprus, Ireland and United Kingdom (Scotland)**,<sup>49</sup> the laws refer to the obligation to provide information about rights to persons who have been deprived of their liberty – either when arrested or when detained.<sup>50</sup> In **Bulgaria**, the obligation to be notified of right is only triggered when the person is formally charged.<sup>51</sup>

For litigation strategies on inadequate timing of notification of rights refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

## 2. Notification of rights: scope - content

All suspected and accused persons – arrested or not – are entitled to be notified of their rights. The relevant provision is Article 3(1) which provides:

'1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation, in accordance with Article 6;

<sup>46</sup> ECtHR, *Mikolajova v. Slovakia* cited above note 28, paragraphs 40-41.

<sup>47</sup> ECtHR, *Bandeltov v. Ukraine*, cited above note 27, paragraph 56.

<sup>48</sup> Report from the European Commission to the European Parliament and the Council on the implementation of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, 18 December 2018 ([Implementation Report](#)).

<sup>49</sup> European Union Agency for Fundamental Rights report, [Rights of suspected and accused persons across the EU: translation, interpretation and information](#), 2016, p. 65 (FRA Report).

<sup>50</sup> See also Implementation Report, cited above note 48, section 3.2.1.

<sup>51</sup> Fair Trials, [Where's my lawyer?](#), Report, 2019, p.15.

- (d) the right to interpretation and translation;
- (e) the right to remain silent.

You will already note the emphasis on ensuring that rights are conveyed effectively, to enable their exercise: rights must be notified ‘promptly’, ‘in order to allow for those rights to be exercised effectively’; the language must be ‘simple and accessible language’ taking into account particular needs of the suspect.

The Implementation Report points to several problems with the implementation of Article 3 of the Directive. Notably, in three Member States only arrested and detained persons have the right to be notified.<sup>52</sup> European Union Agency for Fundamental Rights (FRA) in its report “[Rights of suspected and accused persons across the EU: translation, interpretation and information](#)” (‘FRA Report’) also concludes that several rights are missing from the lists of rights that are notified to suspects or accused persons in criminal proceedings. In **Austria**, for example, the list does not include right to free legal aid and in **Belgium, Czech Republic, Hungary** and **Portugal** the right to interpretation and translation is missing.<sup>53</sup>

The FRA Report also draws attention to how the rights are notified as an issue to look out for. In **France** suspects must be informed about the right to a lawyer only if the offence involves a potential prison sentence. In **Hungary** the written notification to suspects specifies that they have a right to make a statement in their mother tongue, but does not refer to the possibility to use any other language, or the right to free interpretation or translation or to the extent of those rights.<sup>54</sup>

For litigation strategies on the failure to adequately inform the suspect or accused person of their rights refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

### 3. Notification of rights: manner

Article 3(2) of the Directive states:

- 2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

A further detail as to the manner of notification, although with reference to suspects or accused persons who are deprived of liberty, is provided by recital 22. Recital 38 further clarifies how this could be achieved:

- (22) (..) information about procedural rights should be given by means of Letter of Rights drafter in an easily comprehensible manner so as to assist persons in understanding their rights.

<sup>52</sup> Implementation Report, cited above note 48, section 3.3.1.

<sup>53</sup> FRA Report, cited above note 49, p. 65.

<sup>54</sup> FRA Report, cited above note 49, p. 66.

(38) A practical and effective implementation of some of the provisions such as the obligation to provide suspects or accused persons with information about their rights in simple and accessible language could be achieved by different means including non-legislative measures such as appropriate training for competent authorities or by Letter of Rights drafted in a simple and non-technical language so as to be easily understood by a lay person without any knowledge of criminal procedural law.

The wording of the Directive suggests that information about rights should be given in a clear and comprehensible manner in all cases, especially if a suspect or accused person belongs to a vulnerable group. The notification of rights should be individualised and avoid using the exact wording of complex provisions of criminal codes. The ECtHR has pointed out that authorities should also take into account the circumstances in which the person receives the notification. In *Zaichenko v. Russia*, the applicant was notified about his right ‘not to give evidence against himself’ on the roadside, but subsequently gave self-incriminating statements. The ECtHR concluded in that regard:

*The Court considers that being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis for his prosecution for a criminal offence of theft. Consequently, the Court is not satisfied that the applicant validly waived the privilege against self-incrimination before or during the drawing of the inspection record.<sup>55</sup>*

The Implementation Report notes that in 2018, 14 Member States did not meet the requirement to provide the relevant information in a language that a person understands, or they do not require that information must be provided in ‘simple and accessible’ language. The European Commission also raises concerns that some Member States do not provide for special treatment for vulnerable persons. In one Member State the needs of vulnerable persons are only considered if the person is arrested.<sup>56</sup>

The FRA Report also highlights that the notification of rights is typically based on the actual wording of the relevant criminal law provision and is rarely adapted to the actual circumstances. In **Hungary** authorities do not provide information in a simple, plain and individualized manner and verification of understanding is usually limited to asking for confirmation of understanding at the end. In **Lithuania** a written list of rights is based on the wording of criminal procedural code and in **Romania** such a list even refers to “and other rights set by law.”<sup>57</sup>

For litigation strategies on ineffective notification of rights to the suspect or accused person refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

<sup>55</sup> ECtHR, *Zaichenko v. Russia*, cited above note 29, paragraph 55.

<sup>56</sup> Implementation Report, cited above note 48, section 3.3.2.

<sup>57</sup> FRA Report, cited above note 49, p.66.

#### 4. Notification of rights: arrested persons

The main innovation of the Directive is to establish a positive obligation on Member States to provide arrested persons with a 'Letter of Rights' explaining their rights. Article 4 provides:

'1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.

2. In addition to the information set out in Article 3, the Letter of Rights referred to in paragraph 1 of this Article shall contain information about the following rights as they apply under national law:

- (a) the right of access to the materials of the case;
- (b) the right to have consular authorities and one person informed;
- (c) the right of access to urgent medical assistance; and
- (d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

3. The Letter of Rights shall also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

4. The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I.'

Further detail is provided in Recital 22:

'Where suspects or accused persons are arrested or detained, information about applicable procedural rights should be given by means of a written *Letter of Rights drafted in an easily comprehensible manner so as to assist those persons in understanding their rights (...)*' (emphasis added).

The Directive sets a clear obligation to provide arrested or detained persons with a 'Letter of Rights' setting out their rights in a simple and accessible language. The letter should be provided as soon as a person is taken into custody by the police and must be allowed to stay with them throughout the detention.

According to the Implementation Report, multiple problems exist with transposition of requirements related to the Letter of Rights, from the content of the rights falling below the minimum set by the Directive, to the lack of provisions on clear and accessible language. Thirteen Member States have

not transposed the obligation to provide the Letter of Rights in a language the suspect or accused person understands.<sup>58</sup>

## 5. Notification of rights: EAW proceedings

Article 5 of the Directive provides for a separate Letter of Rights in EAW proceedings:

1. Member States shall ensure that persons who are arrested for the purpose of the execution of a European Arrest Warrant are provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/548/JHA in the Member State.
2. The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I.

In principle, persons arrested in EAW proceedings should also receive the same information as those deprived of liberty in the context of criminal proceedings, i.e., information governed by Article 4 of the Directive. The Letter of Rights in EAW proceedings should provide for additional information on rights guaranteed by the law implementing the Framework Decision 2002/548/JHA in the executing Member State. As a minimum, these rights should include information on rights provided for in the Framework Decision on EAW, as well as in the directives on access to a lawyer and to legal aid:

- the possibility to consent to surrender to the issuing judicial authority<sup>59</sup>;
- the right to have a hearing by the executing judicial authority in the absence of consent to surrender<sup>60</sup>;
- right to be assisted by a legal counsel in the executing<sup>61</sup> and the issuing Member States<sup>62</sup>;
- right to interpreter<sup>63</sup>; and
- right to legal aid<sup>64</sup>.

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<sup>58</sup> Implementation Report, cited above note 48, section 3.4. In Hungary, for example, the Letter of Rights used for pre-trial detention states that detainees have to receive information about a number of procedural rights covered by the Directive without stating what these rights actually are. Also not all Member States explicitly transposed the obligation to give the suspects and accused persons an opportunity to read and to keep the Letter of Rights. See FRA Report, cited above note 49, p. 69.

<sup>59</sup> [Framework Decision 2002/548/JHA on the European Arrest Warrant and the Surrender Procedures between the Member States](#) (Framework Decision on EAW), Article 11(1).

<sup>60</sup> Framework Decision on EAW, cited above note 59, Article 14.

<sup>61</sup> Framework Decision on EAW, cited above note 59, Article 11(2).

<sup>62</sup> [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, Article 10.

<sup>63</sup> [Directive 2010/64/EU](#) of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Article 2.

<sup>64</sup> [Directive \(EU\) 2016/1919](#) 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, Article 5.

The same considerations regarding the accessibility of information and manner of notification also apply to persons deprived of liberty in the context of EAW proceedings. ECtHR has also recognised that arrest for the purposes of extradition, such as the EAW proceedings, is covered by Article 5 ECHR.<sup>65</sup> Therefore, the guarantees applicable to all persons deprived of liberty under the ECHR, such as a clear and individual manner of notification, are also applicable to EAW proceedings.

## **C. USING THE DIRECTIVE IN PRACTICE**

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### **1. Preliminary point: the Directive governs notification, not the actual rights**

The Directive does not govern the substance of the rights to silence, counsel etc. which is left for national law subject to obligations under other Directives.<sup>66</sup> However, the Directive does impose standards relating to the way such rights, as they exist in national law, are implemented in substance.

As we have seen, the requirement for effective notification of rights arises in the ECtHR case-law as the necessarily corollary of any waiver of rights: the person must be informed of their rights if they can be taken to renounce them effectively and their statements held against them. The Directive thus has its effect in ensuring that prejudice does not arise through lack of awareness of procedural rights, in particular through the ill-advised renunciation by unrepresented suspects of rights such as to guarantee the right to a fair trial, the presumption of innocence and defence rights protected by Articles 47 and 48 of the Charter.

### **2. Take action at the point of notification (if you are there)**

Ensuring the Directive is respected means two things:

- (i) seeking to ensure it is complied with at the point of notification; and
- (ii) seeking a remedy if it is not complied with at the point of notification.

The possible need to seek a remedy later means you need to be careful to document the existence of the infringement of the Directive, so that you can rely on it in court.

#### **a. When assisting a suspect**

Clearly, the real value of the Letter of Rights is in giving the unrepresented client a protection against ill-advisedly waiving his right to counsel and silence. Does the fact that you are there, at the police station, not negate any issue surrounding the notification of rights? After all, if you are there, it is because the suspect has been advised of his right to a lawyer and has invoked it.

We take the view that the EU has sought to create an extra-safe approach whereby the arrested suspect has (i) a written notification of his rights and (ii) the protection of legal assistance if he so chooses. Whilst the first is intended to facilitate the second, it remains a self-standing right which is not expressed as being conditional.

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<sup>65</sup> ECtHR, [Pirozzi c. Belgique](#), App. no. 21055/11, Judgment of 17 April 2018, paragraph 45.

<sup>66</sup> See above notes 2-7.

Indeed, a Letter of Rights is not redundant if the counsel is present. For instance, a detained suspect may be questioned again following the departure of the lawyer and would benefit from having a Letter of Rights to remind him of the advice given by his lawyer on staying silent. Equally, although the Access to a Lawyer Directive guarantees the right to effective assistance, practice differs among Member States as to the extent to which the lawyer is allowed to intervene during questioning,<sup>67</sup> and it may be that physically being in possession of a Letter of Rights fortifies the suspect in exercising the right to silence as advised prior to the questioning by his lawyer. More obviously, it is clear that obtaining a Letter of Rights – in his own language, translated in accordance with Directive on Interpretation and Translation<sup>68</sup> – will be of use to a foreign suspect or accused person so it is important for the lawyer to insist upon it.

**Litigation strategy:**

**→ What happened?**

- The arrested suspect you are assisting has not been given a Letter of Rights or has not had his rights explained sufficiently.

**→ What to do?**

- Refuse to proceed to interview until the Letter of Rights has been provided and the suspect has had an opportunity to read it.
- Point out relevant factors such as the stressful nature of the situation, any signs of anxiety in the client which show why particular care needs to be taken to ensure the suspect understands his rights. Think about factors that could be relevant in this regard e.g. drug dependency, age etc.
- This will assist you later on if you need to claim a remedy for the failure to comply with the Directive, should you have a reason to do so.

### 3. Challenging the failure to notify rights

You may face the situation (later in the proceedings) when the client's interests have already been prejudiced by procedural acts (in particular, police questioning) taken before the suspect was notified of his rights in accordance with the Directive. This is most likely going to be the case when the suspect waived the right to legal assistance, meaning there was no one there to help him exercise his rights.

#### a. Failure to notify

**Litigation strategy:**

**→ What happened?**

- The client has not been notified of rights at all and made incriminating statements in the initial questioning.

<sup>67</sup> European Union Agency for Fundamental Rights, [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019, pp. 55-56.

<sup>68</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, cited above note 2.

→ **What to do?**

- Assume that this oversight is visible from the record established by the police.
- Refuse to proceed to interview until the Letter of Rights has been provided and the suspect has had an opportunity to read it.
- When (at a later stage) you are mandated to act in the case, you can say that there has been a clear violation of the Directive and claim a remedy (invalidity of the act, disregarding the evidence etc.) as there has been a breach of defence rights. You can see a clear ‘link’ here between an established violation of the Directive and the need for a remedy to ensure the useful effect of the Directive.

As regards the admissibility of evidence, this would also extend to the ‘fruit of the poisoned tree’<sup>69</sup>, i.e. subsequent procedural acts which were made possible only by the act which infringed the Directive. For example, if the suspect has not been informed of the right to remain silent and makes incriminating statements that lead to physical evidence, that physical evidence should also be excluded from the trial. This is helpful to bear in mind as you consider other realistic examples.

**b. Establish how notification was ineffective**

Ineffective notification of rights in essence has the same effect as failure to notify the defendant of his/her rights at all. The ECtHR recognises the ineffective notification of rights as capable of creating unfairness on its own as it makes any subsequent renunciation of rights and decisions taken as to the defence unreliable. The same approach should apply with the Directive: if prejudice arises due to the ineffective notification of rights, a remedial obligation arises in order to safeguard the fairness of the proceedings.

**i. Form and language**

A situation commonly described is that in which the suspect is advised of his rights but in such a way that he does not truly understand them and, as a result, fails to exercise them. Bear in mind the requirement of the Directive: information should be provided in ‘simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons’. The Directive also places a clear emphasis on providing the document as a separate item, disassembled from the bureaucracy of other documentation, such as written notification of suspicion (as showed by the indicative model in the Annex to the Directive, which is a standalone document). The requirement for the suspect to have ‘an opportunity to read’ the document means the requirement cannot be satisfied by recording in writing oral notification of rights immediately prior to questioning. Objective factors would, of course, relate to the manner in which the information is conveyed. Based on the conversations with members of the LEAP network we would recommend the following:

**Litigation strategy:**

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<sup>69</sup> ‘Fruit of the poisonous tree’ doctrine is derived from the exclusionary rule. Under this doctrine evidence which is obtained through, or stems from, illegally obtained evidence, such as a illegally obtained confession, must also be excluded from the trial.

→ **What happened?**

- Notification of rights was ineffective; your client did not understand the rights and did not make use of them.

→ **What to do?**

- Establish how the information was conveyed: look for both objective factors (e.g. Letter of Rights) and subjective factors (e.g. state of mind of your client or the circumstances in which notification was made);
- Was the letter provided: check the Letter of Rights, which should be in your detained client's possession, and compare it with the indicative model in the Directive;
- Compare the letter with other models and identify the ways in which you believe it is unclear;
- Compare the letter with the language of the criminal procedure code and establish whether it is explaining or simply reproducing it;
- Does the letter use legal terminology (such as 'harm your defence', 'prejudice your interests') which is difficult for most suspects to understand?
- Is the Letter of Rights provided as a separate item with a special status, or is it simply joined together with the notification of suspicion, without due prominence being given to the rights it contains?

In addition to these objective points, you should also consider the specific circumstances in which the suspect found himself when notified, including any vulnerabilities arising from this. In searching for relevant parameters, since the Directive (and the Charter) are to be read in light of the ECHR, it may be helpful to consider some of the factors such as vulnerability of the defendant or circumstances in which notification takes place, considered important by the ECtHR when determining whether suspects have knowingly waived their rights.

ii. **Timing of the notification**

You should also consider the timing of the notification of rights, bearing in mind the requirement of the Directive for the suspect to have the opportunity to read the Letter of Rights (which, to be of any use, would mean before initial police questioning).

**Litigation strategy:**

→ **What happened?**

- Your client was notified of rights during the questioning or was not given the time to read the Letter of Rights.

→ **What to do?**

- Take instructions from the client: when was the information conveyed?
- Was the suspect advised of procedural rights in due time to consider exercising them *before* being questioned?
- Was the suspect given an opportunity to read the Letter of Rights?

### iii. Dissuasive notification

You should also look for signs that the notification was dissuasive (e.g. through negative language suggesting that exercising the right to silence is uncooperative), such that the decisions cannot be said to have been taken freely.

#### **Litigation strategy:**

##### **→ What happened?**

- Your client was notified about rights in a manner that discouraged him/her from exercising the rights.

##### **→ What to do?**

- Establish whether there was a 'dissuasive notification': identify the manner in which the notification was dissuasive. In the case of a Letter of Rights, this can be done from the text.
- Were comments made by the police as to the consequences of exercising the rights mentioned in the letter or in relation to the significance of the document?
- Assess the extent to which this, combined with the pressure of the circumstances, can objectively be said to create a dissuasive effect.

### c. Document the violation

If you were not present at the point of questioning, you face a challenge: how do you establish key things like when and how the information was conveyed, whether it was understood etc.? We would suggest that there are two key avenues. Obviously, the key source of information is the client himself. You should speak with the client and ask basic questions to establish the circumstances:

##### **→ What to do?**

- Speak to the client to figure out what happened;
- Focus your enquiries on the points raised above (how and when they were notified of their rights, whether a Letter of Rights was provided, whether they were understood etc.);
- Do not assume that just because the Letter of Rights is in the file, it was effectively conveyed. Ask whether they have the Letter of Rights in their possession and if not, why not.

However, the courts are likely to be mindful of the perceived possibility of suspects all claiming that they were not properly notified of rights. In order to ensure the courts approach this fairly, you need to rely on the Directive and EU law more generally. Consider Article 8(1), in the provision entitled 'verification and remedies':

'1. Member States shall ensure that when information is provided to suspects or accused persons in accordance with Articles 3 to 6 this is noted using the recording procedure specified in the law of the Member State concerned.'

The Directive clearly places an onus upon Member States to positively document the provision of information in accordance with the Directive. If the record does not include key details (e.g. confirmation that the suspect understood the rights), you can use this in your favour and say that the court should take into account your client's version of events.

Even if the formal record positively suggests the Letter of Rights was provided, you should encourage the court to consider your client's evidence and not consider its jurisdiction fettered. This lies deep in the detailed procedures for raising procedural violations in your Member State, but EU principles apply. In particular, the principle of effectiveness requires that:

'detailed procedural rules governing actions for safeguarding an individual's rights under [EU] law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law'.<sup>70</sup>

We would suggest that you can reasonably construct an argument on this basis. In order to afford an effective remedy, the court must ensure that the procedural rules it applies do not deprive the suspect of the ability to invoke rights under the Directive. The court must be able to take into account the person's account as to how and when he was notified of his rights.

#### d. Establish prejudice

It seems sensible to establish the prejudice caused by the violation: in other words, how have the 'fairness of proceedings' or the 'exercise of defence rights' been adversely affected by the infringement of the Directive? Without this, *a priori*, there is no reason to invoke the Directive.

##### → What to do?

- Establish that lack of notification or the manner or timing of the notification caused prejudice to procedural rights;
- Did the client renounce his right to silence / counsel without full information?
- Did the client make a confession or any other incriminating statement without being aware of his rights?
- Did the client make statements which, though not incriminatory per se, are inconsistent with statements made later?
- Did the questioning lead to further investigative acts which would not have been possible in the absence of these statements?

#### e. Invoke the Directive

As mentioned above, the Directive does not regulate the specific rights so if your complaint concerns, for instance, a substantive restriction on the right to silence (e.g. the suspect's silence was held against him, as is possible in some jurisdictions), your complaint should be made under national law. However, to the extent that you can say that the conduct of the defence and, in particular, the renunciation of any rights leading to prejudice (in particular, through the making of a confession),

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<sup>70</sup> See, among others, CJEU, Case C-432/05 *Unibet* [ECLI:EU:C:2007:163:43](#), para. 43. The principle covers time-limits for bringing appeals, rules regarding standing, costs and court fee requirements for bringing claims etc.

arises due to the failure to comply with the Directive, this is an EU law question and it becomes incumbent on the court to ensure the fairness of the proceedings.

→ **What to do?**

- **Argue:** the Directive seeks to ensure that a suspect is effectively notified of his rights to ensure that he can exercise them and not waive them on an ill-informed basis. In particular, Articles 3 and 4 together require that an arrested person be provided with a Letter of Rights notifying him of, inter alia, the right to counsel and the right to silence in simple and accessible language such as to enable him to exercise defence rights. These provisions, intended to confer rights on individuals, undoubtedly have vertical direct effect.
- In this case, the requirement of the Directive was not respected. The client was not provided with a Letter of Rights at all / the Letter of Rights provided did not meet the requirement of simple and accessible language / the Letter of Rights was not provided before the questioning / insufficient care was taken to ensure the client was advised of his rights, as was called for in the particular circumstances. This is established by the record of proceedings / other evidence which the court must take into account in order to ensure the client can invoke his EU law rights.
- This violation of the Directive caused the client to incriminate himself without fully understanding his right to remain silent / otherwise caused prejudice to the defence of the client.
- **Ask for a remedy:** Article 8(2) of the Directive requires that there be a right to challenge the failure to provide information in accordance with the Directive. In accordance with Articles 47 and 48 of the Charter, a legally effective remedy is required and this should require the court to take such action as is available to it under national law to remedy the violation of the Directive, in particular by declaring the questioning / procedural act invalid and/or disregarding any evidence arising from that act. For more information about the right of challenge, see the [‘Using EU Law Toolkit’](#).

## II – NOTIFICATION OF REASONS FOR ARREST / ACCUSATIONS

### A. THE ISSUE

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Tightly linked to the issue of notification of rights is the requirement for notification of the accusation. The suspect will need to make important decisions about how to conduct his defence, including whether to seek legal advice, remain silent or answer questions. Such decisions can only be taken effectively if the suspect knows the case against them. Failure to specify the allegations can lead to unwise decisions.

For example, defence lawyers report that in drug cases, police may not clarify whether the suspect is suspected of drug possession or trafficking. Not knowing exactly what the alleged crime is greatly impedes, or even prevents, the development of an effective defence strategy – your client might want to confess drug possession, but might not want to do this if it is likely to ease the proof of a subsequent drug trafficking charge. And if facts of the crime are not known, it is difficult to provide an alibi or scrutinise the consistency of the allegations, which is not helpful for the client or the police.

Equally, if the charges are altered during the investigations or the trial, it is very important for the accused and his defence counsel to be informed immediately, in order to adapt the strategy. For example, if your client is charged with misappropriations under use of force (robbery) and you can successfully refute the force, you must know if the court is still considering sentencing for theft, or whether it considers the whole charge unsubstantiated.

### B. RELEVANT PROVISIONS OF THE DIRECTIVE

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The Directive protects the right to notification of the accusations through Article 6. In training on this Directive, Fair Trials has found that participants' preconceptions as to what these provisions mean vary according to the national system they are working within. The Article states:

1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.
2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.
3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.’

## 1. Notification of accusations: the timing

The Directive provides that information on accusation shall be provided promptly. Recital 28 gives more detail on the timing of the notification:

‘(28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at **the latest before their first official interview by the police or another competent authority** [emphasis added], and without prejudicing the course of ongoing investigations. (..)’

Accordingly, the information about the accusations should be provided to the accused as soon as possible to make sure that the accused can take steps to prepare his/her defence. If the accused is questioned by the police or another authority, the information about any charges should be given at latest before the start of the interview.

The latest point at which detailed information about the accusation can be given to the accused is on submission of the merits of the accusation to the court. The CJEU has clarified this provision in *Kolev and others*:

The latest point at which the defence should be provided with detailed information on the accusation (“at the latest on submission of the merits of the accusation to a court”) may be after the initiation of trial but must be: **before the hearing of argument on the merits starts before the court** [emphasis added].

Subsequent amendments may be provided after the hearing of argument commences, but they must be provided (1) **before the deliberation stage** and (2) only if ‘**all necessary measures are taken by the court in order to ensure respect for the rights of the defence**’ [emphasis added].<sup>71</sup>

In the same case, the CJEU clarified that these criteria cannot be fulfilled formally. Namely, any amendments to charges should be introduced taking into account the principle of equality of arms:

‘Whenever the point in time when detailed information of the charges is provided and access to the case materials is granted, the person and his lawyer must have, inter alia, with due regard for the adversarial principle and the principle of equality of arms, sufficient time to become acquainted with that information and those case materials, and must be placed in a position to prepare the defence effectively, submit any observations and, when necessary, to make any application, such as an application for further investigation, that they are entitled to make under national law. (..) **that**

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<sup>71</sup> CJEU, Case C-612/14 *Kolev and others*, [ECLI:EU:C:2018:392](#), paras. 92 and 95.

requirement dictates that the case should, where necessary, be stayed and the case postponed to a subsequent date [emphasis added].<sup>72</sup>

The ECtHR also highlighted the main rationale for timely notification of any substantial changes in both the facts of the case and the charges:

*The accused must be duly and fully informed of any changes in the accusation, including changes in its “cause”, and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.<sup>73</sup> (..) The accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time.<sup>74</sup>*

The Implementation Report<sup>75</sup> and FRA Report<sup>76</sup> have identified a number of issues with the implementation of this obligation in some Member States:

- failure to comply with the requirement to provide the information promptly;
- merits of the case are first sent by the prosecution to the court and only afterwards to the accused person;
- the accused person can be notified of the charges only moments before being brought before the court;
- information has to be provided only when a person formally acquires the status of crime suspect;<sup>77</sup>
- there is an obligation to inform a person of the accusation only when they are deprived of liberty.<sup>78</sup>

## 2. Notification of accusation(s): the scope

Article 6(1) of the Directive provides that the information “about the criminal act they are suspected or accused of having committed” should be provided to suspects or accused persons. The level of detail in which this information should be provided is not clearly determined, with reference only to information “in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence” in Article 6(1) of the Directive. Recitals 27 and 28 of the Directive provide more detail on what information should be given at the early stages of the proceedings:

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<sup>72</sup> CJEU, Case C-612/14 *Kolev and others*, cited above note 71, para. 96.

<sup>73</sup> ECtHR, *Mattoccia v. Italy*, cited above note 33, paragraph 60.

<sup>74</sup> ECtHR, *I.H. and others v. Austria*, Application no. 42780/98, Judgment of 20 April 2006, paragraph 38.

<sup>75</sup> Implementation Report, cited above note 48, section 3.6.1.

<sup>76</sup> Implementation Report, cited above note 48, section 3.6.3.

<sup>77</sup> In Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain and Sweden national law requires authorities to provide this information in or together with the official decision or notification about suspicion or accusation, see FRA Report, cited above note 49, p.68.

<sup>78</sup> The obligation to provide information about the accusation is introduced only for suspects or accused who are deprived of liberty in Malta, Cyprus, Ireland, Italy and the United Kingdom (Scotland), see FRA Report, cited above note 49, p.68.

'(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings.

(28) (..) A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.'

Article 6(3) puts a clearer obligation on Member States to provide more detailed information at the trial stage:

'3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.'

Notification of charges is covered by Article 6 ECHR. The ECtHR has developed a standard statement of principle, specifying a right of information to enable defence at all stages of the process:

*The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (...). Article 6 §3 (a) of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed.<sup>79</sup>*

There is, in addition, a further set of principles relating to the reclassification of offences at different stages of proceedings. Such reclassifications are permissible provided that the suspect is afforded an opportunity to prepare a defence:

*If the courts hearing the merits of the case have (...) the possibility to reclassify facts of which they are validly seized, they must ensure that accused persons have had the opportunity to exercise their rights of defence on that point in a concrete and effective manner. This implies that they should be informed, in timely manner, not only of the cause of the accusation, that is to say the material facts which are put forward against*

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<sup>79</sup> ECtHR, [Kamasinski v. Austria](#), App. no. 9783/82, Judgment of 19 December 1989, paragraph 79; ECtHR, [Pélissier and Sassi v. France](#), App. no. 25444/94, Judgment of 25 March 1999, paragraphs 51-52, ECtHR, [Mattocia v. Italy](#), cited above note 33, paragraph 58.

*them and on which the accusation is based, but also, in a detailed manner, the legal classification given to those facts [our translation].<sup>80</sup>*

As you will see from the above, the ECtHR case-law places an emphasis on ensuring the person is advised of the accusation against them in order to enable them to defend themselves. This is now protected in clear requirements in the Directive.

Although detailed information about the charges should be provided promptly, in a few Member States the national legislation does not stipulate that the suspect or accused person must be informed in a detailed manner about the accusation, mention the nature and legal classification of the criminal offence, or specify the nature of participation by the accused.<sup>81</sup>

For litigation strategies on failure to adequately notify the suspect or accused person of accusations against them refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

### 3. Notification of reasons for arrest

Article 6(2) of the Directive requires Member States to ensure that suspects and accused persons who are arrested or detained are notified about the reasons for their arrest or detention:

*'2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.'*

In relation to Article 5(2) ECHR – right to be informed about the charges and reasons for arrest - the ECtHR has developed a general approach whereby the person must be provided with a sufficiently clear understanding of what is alleged against them, in appropriate language, in order for them to understand the basis of their detention:

*Paragraph 2 of Article 5 (art. 5-2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5 (...) [B]y virtue of paragraph 2 (...) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.<sup>82</sup>*

According to this provision, the reasons for arrest should also normally include notification of the charges or criminal act the person is suspected or accused of having committed. However, the reasons for arrest should not be limited to the criminal charge alone, but should also include

<sup>80</sup> ECtHR, [Drassich v. Italy](#), Application no. 25575/04, Judgment of 11 December 2007, paragraph 34 (French only).

<sup>81</sup> Implementation Report, cited above note 48, section 3.6.3.

<sup>82</sup> ECtHR, [Fox and others v. United Kingdom](#), App. no 12244/86, Judgment of 30 August 1990, paragraph 40.

information that is required under Article 5(1)(c) ECHR, namely the specific purpose for which of arrest or detention is applied.

Under Article 5(2) ECHR the reasons for arrest should be provided promptly, in line with the requirement to have the lawfulness of detention decided speedily.<sup>83</sup> The ECtHR has also reached some relevant findings as to the manner of providing reasons for the arrest:

*Arrested persons must be told in a simple, non-technical language that they can understand, the essential legal and factual grounds for arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness.*<sup>84</sup>

The Implementation Report has identified a number of issues with the implementation of this obligation in some Member States:

- this right is not explicitly ensured for persons who have been arrested, only for those who have been detained;
- information on the reasons for arrest or detention is provided only when the person is handed over to correction institutions; and
- the information about the facts is notified to the arrested or detained person, but it is not specified that the reasons for arrest or detention must be provided.<sup>85</sup>

For litigation strategies on failure to adequately notify the suspect or accused person of reasons for their arrest, refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

## C. USING THE DIRECTIVE IN PRACTICE

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### 1. Identify the deficiency in the notification of accusations

#### a. Failure to classify the offence

Consider the situation where the person is arrested but the offence is not specified. It may be that police are considering several possible charges (e.g. alleged facts may be regarded as either theft or robbery using force, or either simple possession of drugs or possession with intention to supply). It may be practice – though we do not suggest this is good practice – for police to decide upon a qualification only following further investigations, but nevertheless to question the suspect in the meantime (e.g., in respect of the above examples, consultation of video surveillance footage, or an evaluation of the quantity of active substance in the drugs seized).

#### b. Failure to specify factual allegations sufficiently

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<sup>83</sup> ECtHR, [Shamayev and others v. Georgia and Russia](#), App. no 36378/02, Judgment of 12 April 2004, paragraph 413.

<sup>84</sup> ECtHR, [Fox and others v. United Kingdom](#), cited above note 84, paragraph 40.

<sup>85</sup> Implementation Report, cited above note 49, section 3.6.2.

Practitioners also report that, in some cases, little factual information will be given beyond the bare legal head of accusation (e.g. fraud committed against a person at a certain time, without details as to the alleged wrongdoing), perhaps in order not to reveal the detail of ongoing investigations. This makes it difficult for the suspect to cooperate and offer exculpatory evidence, which may be helpful to the police. In addition, it makes it difficult to offer a response to a request for detention.

### c. Under-classification at the point of questioning

In *Čierny v. Slovakia*,<sup>86</sup> a person arrested for a conspiracy to commit a traffic offence, carrying a penalty of four to ten years, made confessions, expressed remorse etc. Later, the offence was reclassified as an aggravated form of the same offence, carrying a penalty of ten to fifteen years and requiring mandatory representation. The ECtHR found a violation of Article 6(1) and Article 6(3)(c) – the rights to a fair trial and to access to a lawyer -, but this clearly shows the issue which is raised by the under-classification of an offence at the point of questioning. It may entail the non-application of procedural protections available under national law for more serious offences and/or induce cooperation by the suspect on the expectation of a lower charge etc. Fair Trials [intervened](#) in this case to emphasise the importance of effective notification of procedural rights and the accusation to ensure sensible decision-making by the accused.

We encourage you to see Article 6(1) of the Directive as holding the authorities to the provision of full information and as requiring that they avoid abuse of the possibility to re-classify the offence at a later stage

## 2. Seek information at the point of questioning and create a record

We encourage you to refer to the Directive at the point of questioning. Make your case to the relevant pre-trial institution (in most cases, the police):

### Litigation strategy:

#### → What happened?

- Your client was not informed of the accusations; or
- There was a notification of accusations, but the information that should have been given was not given: either the factual allegations or legal classification of the offence were not sufficiently conveyed; or
- The offence was under-classified at the point of questioning, leading to failure to apply other procedural protections, e.g., mandatory representation by a lawyer.

#### → What to do?

- Demand on the basis of the Directive that the suspect is informed in detail of the alleged crime, both in respect of its legal classification and its facts.
- In respect of the facts, explain how the failure to provide detail is (a) depriving the suspect of an opportunity to comment usefully on the lawfulness of the arrest or provide exculpatory evidence and (b) forcing the suspect to make decisions as to whether to exercise his right to silence on an ill-informed basis.

<sup>86</sup> ECtHR, [Zachar and Čierny v. Slovakia](#). 29384/12 and 29376/12, Judgment of 21 July 2015.

- Ask for the specific criminal offence which the police / prosecution intend to charge, and any other alternatives which they are contemplating. Make it clear that the advice you are giving to the client is based upon a certain understanding of which offence is going to be charged.
- Consider carefully if a statement by your client in the context of a less serious offence might later incriminate your client in relation to a more serious one. If in doubt, advise silence until the exact content of the accusation is known. Weigh this risk carefully against the risk of your client being detained.
- Seek access to the evidence which is available at this stage, in accordance with Article 7(2) as we interpret it (see Part III – ACCESS TO THE CASE FILE). If you get access, this will help you to evaluate the strength of the case at that point and the potential for a more serious accusation to be made subsequently. If you do not get access, this will strengthen your case when relying on the Directive later.
- Ensure that your requests, including your references to the Directive, are recorded in police protocols / records of proceedings. Ask for any refusal to provide such information to be recorded too, together with the reasons given.

### 3. Challenging the violation

#### a. Encourage pre-trial detention instances to take action

The likely immediate repercussion of a failure to specify detail in the allegations, in particular, is that you will be deprived of the opportunity to have a serious discussion about the strength of the case before a pre-trial detention instance. Fair Trials believes that it is clear from the text of the Directive that it is intended to provide an arrested person with the opportunity for an effective judicial review of detention (Article 6(1) requires the provision of the reasons for arrest, in detail, and Article 7(1) requires the provision of access to the documents necessary for challenging the lawfulness of detention).

#### **Litigation strategy:**

##### **→ What happened?**

- Your client was not informed of the reasons for arrest; or
- There was notification of reasons for arrest, but the information that should have been given was not given or was incomplete, preventing effective preparation of the defence for the judicial review.

##### **→ What to do?**

- Encourage the pre-trial detention court to protect your client's rights under Article 6 of the Charter (right to liberty): demand that the pre-trial detention court compel the prosecution to provide more information if insufficient detail has been provided so far.
- **Argue:** the Directive specifically seeks to ensure respect for the right to liberty protected by Article 6 of the Charter by placing the suspect in possession of sufficient information and case materials to challenge his arrest / detention. It

necessarily falls to the pre-trial detention instance to ensure observance of these rights by compelling the investigative / prosecutorial authority to provide more detail or, in default, releasing the suspect.

## b. Invoke the Directive and seek a remedy for the inadequate notification

### Litigation strategy:

#### → What happened?

- The offence was under-classified at the point of arrest or questioning of your client;
- You are now before the forum for challenging pre-trial violations (e.g. trial-stage arguments about the validity of procedural acts);
- You are dealing with an offence which is now more serious than the one originally charged. The earlier statements made by the suspect are in the record and these may be objectionable to you as they were essentially obtained without full notice of the seriousness of the charge and possibly as a result of a deliberate tactic of the pre-trial instance to induce a confession.

#### → What to do?

- **Argue:** Article 6(1) requires the provision of information 'in such detail as is necessary to safeguard the fairness of proceedings and ensure the effective exercise of the rights of defence' and requires the provision of the most extensive information available at the time of questioning.
- The 'effective exercise of the rights of defence' at trial may be prejudiced by the failure to provide more detailed information earlier in the proceedings, e.g. by circumventing procedural protections available for more serious offences, inducing cooperation on the basis of a false idea as to the seriousness of the offence etc. It may also prevent the defence from carrying out or proposing investigative actions to obtain exculpatory evidence.
- Whilst Article 6(3) requires the provision of detailed information on the accusation and the nature and legal classification of the offence 'at the latest' upon submission of the merits of the accusation to the judgment of a court, this is simply recognising the fact that full information will always have to be provided then in order for a trial to take place. Preserving the fairness of the proceedings and ensuring effective exercise of the rights of defence at trial may require fuller information earlier on.
- Indeed, Article 6(4) requires that suspects and accused persons are notified 'promptly' of any changes in the accusation where this is necessary to safeguard the fairness of the proceedings. This recognises the fact that changes to the accusation may affect the conduct of the defence and that withholding such information may prejudice that fairness.
- Despite requests made earlier in the proceedings for fuller information, which it would have been possible to provide, this was not provided and the Directive was therefore breached. This caused prejudice to the suspect, e.g. he/she gave statements which were held against him/her subsequently.

- The fact that this may have been consistent with national law is not determinative. The court must ensure the effectiveness of the Directive and take action if the standards of the Directive are not respected.
- Accordingly, the court must take action to remedy the failure of the Directive (disregarding the evidence, invalidity of the act etc.).
- If the court is in doubt as to the meaning of the provisions, it should make a reference for a preliminary ruling to the CJEU. Refer to our [Preliminary reference Toolkit](#).

## III – ACCESS TO THE CASE FILE

### A. THE ISSUE

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One of the issues most commonly identified in Fair Trials’ research<sup>87</sup> is the problem arising from lack of or restricted access, at the pre-trial stage, to the material evidence which is uncovered by investigative authorities. There are several problems reported:

- At the point of initial questioning by police and/or judicial investigators, neither the suspect nor his counsel has access to the case file, with the result that the suspect cannot fully assess the state of the evidence; this compromises the effectiveness of the right to legal assistance provided by Article 6(3)(c) ECHR and the Access to a Lawyer Directive;
- In some jurisdictions, access to the case file may be restricted during the investigative phase of the proceedings, either as a rule or by application of exceptional powers available to prosecutors which are routinely used and insufficiently controlled by the courts;
- Both of the above issues have an adverse effect upon the possibility of challenging detention, as it is neither possible to contest the justification for arrest, nor to challenge detention effectively before a judicial authority;
- When access to the case file is provided, there are difficulties in relation to the manner in which access is provided. In some cases, only the lawyer can hold a copy of the file; in others, access can be provided to the client but the file must be photocopied, often at significant cost. In other cases, we have heard of restrictions on the ability even to take notes, making it impossible for the client and lawyer to discuss the content of the documents in question effectively.

### B. RELEVANT PROVISIONS OF THE DIRECTIVE

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The Directive covers the question of access to the case file through Article 7, which provides that:

‘1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the

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<sup>87</sup> Fair Trials, Where’s my lawyer?, see above note 44; Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision making in the EU](#), Report, 2016.

judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.'

As with Article 6, these provisions lead to several possible interpretations and the content of terms such as 'essential documents' or 'material evidence', which can vary from case to case, need to be clarified by the CJEU.

This section focuses on access to the case file in different stages of criminal proceedings according to Article 7 of the Directive. If your client is arrested and detained, access to the case file is regulated by Article 7(1) requiring access to "documents (..) which are essential to challenging effectively (..) the lawfulness of arrest or detention." In this section we will explain:

- the scope of the right and meaning of 'essential documents'; and
- prohibition to derogate from the right to have access to 'essential documents'.

In all cases, the suspect or accused person or their lawyer has a right to access the "material evidence" necessary to safeguard the fairness of the proceedings and to prepare the defence. This right is regulated by Articles 7(2) to (4) of the Directive. In this section we will focus on:

- the right to access case file before questioning;
- the scope of the right to access 'material evidence';
- the timing of that access; and
- derogations from the obligation to provide access to 'material evidence'.

## **1. Access to the 'essential documents' for effective judicial review of arrest/detention: Article 7(1)**

### **a. The principle**

Article 7(1) of the Directive provides that the arrested or detained persons and their lawyers should be granted access to 'documents related to the specific case in the possession of the competent authorities, which are essential to challenging effectively (..) the lawfulness to the arrest or detention'. The exact content of the 'essential documents' is not defined and will differ from case to

case. We argue that these documents should include at least all evidence supporting and also disproving the essential elements under consideration in detention proceedings<sup>88</sup> – a reasonable suspicion that a person has committed a crime, a public interest supporting the need to detain (e.g. risk of absconding, risk of obstructing the investigation, risk of committing a further offence) and the proportionality of detention, including reasons why alternative measures would not be effective in preventing the risks. Recital 30 of the Directive attempts to provide further guidance as to the content and timing of disclosure:

Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.

The main guiding principle of interpreting the obligation to disclose ‘essential documents’ before the judicial review of arrest or detention should be equality of arms in the review process. The CJEU has held that:

[Equality of arms] is an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law, such as that guaranteed by Article 47 of the Charter. [It is] a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent.<sup>89</sup>

Lawyers should have access to information on the case file as early as possible to start developing a defence strategy. To challenge detention, this means, for example, being in a position to show that detention is not justified because the necessary evidence has already been gathered and there is no possibility to tamper with it, or more generally, to question the reasonableness of suspicion.<sup>90</sup>

In a well-established line of case-law, the ECtHR has repeatedly stated that:

*Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness, in the sense of the Convention, of his client's detention. The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the*

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<sup>88</sup> According to the jurisprudence of the European Court of Human Rights see e.g., ECtHR, [Merabishvili v. Georgia](#), App. No. 72508/13, Judgment of 28 November 2017, paragraph 222.

<sup>89</sup> CJEU, Case C-169/14 *Morcillo and Garcia v. Banco Bilbao*, [ECLI:EU:C:2014:2099](#), paragraphs 48-49.

<sup>90</sup> Fair Trials, *Where's my lawyer?*, cited above note 44, p.21.

*arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention.*<sup>91</sup>

Despite the relatively clear nature of the case-law on Article 5(4) ECHR, respect for this standard has not always been very good, with some laws and practices enabling restrictions on access to the file even when the person is detained. In **Romania**, for example, broad and vague legal provisions allow prosecutors to restrict defence access to the case file. Also, legal provisions guaranteeing access to the case file for an unrepresented defendant in pre-trial detention are lacking, which leaves these defendants without access to the file at all. Even for represented defendants, access to the case file will depend on the assertiveness of the defence.<sup>92</sup> Even where the defence lawyer has access to the case file and relevant case materials in advance of the pre-trial detention hearing, the scope of access may be limited to certain documents, or access may only have been granted too late in the proceedings to enable the lawyer to effectively challenge the legality of detention.<sup>93</sup>

According to the Implementation Report, the understanding of ‘essential documents’, as well as the overall scope of access, differs across Member States. Only some Member States specify the criterion of ‘essential documents’. One Member State lists essential documents while another Member State explicitly defines and names them. Two other jurisdictions also provide a definition, but the decision on this matter remains with the custody officer or the court. The remaining Member States do not define what constitute ‘essential documents’.<sup>94</sup>

For litigation strategies on denial of access to ‘essential documents’ refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

## **b. Article 7(1) is subject to no derogation**

It is clear from the Directive that Article 7(1) is subject to no derogation. Article 7(4) provides grounds for restricting access to material evidence, but states specifically that this applies only as a derogation to the disclosure of material evidence under Articles 7(2) and (3). Derogations under Article 7(4) relate to the disclosure of material evidence beyond that which is necessary for challenging detention and are themselves expressed as being ‘without prejudice to [Article 7(1)]’.

This is consistent with ECtHR case-law on Article 5(4), which has recognised that even if evidence is confidential for reasons such as national security, the protection of that material cannot come at the expense of substantial restrictions on the rights of defence. The relevant evidence will have to be disclosed, perhaps with allowances made for its confidential nature:<sup>95</sup>

*‘The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at*

<sup>91</sup> ECtHR, [Turcan and Turcan v. Moldova](#), App. No. 39835/05, Judgment of 23 October 2007.

<sup>92</sup> Fair Trials, *Where’s my lawyer?*, cited above note 44, p.21.

<sup>93</sup> Fair Trials, *Where’s my lawyer?*, cited above note 44, p.22.

<sup>94</sup> Implementation Report, see above note 48, Section 3.7.1.

<sup>95</sup> ECtHR, [Dochnal v. Poland](#), App. no. 31622/07, Judgment of 18 September 2012, paragraph 87.

*the expense of substantial restrictions of the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer'.<sup>96</sup>*

However, according to the Implementation Report, transposition of this aspect remains problematic because some Member States continue to allow access to essential documents to be denied. In several Member States, including **Lithuania** and **Latvia** according to the FRA Report, the existing restrictions regarding access to the materials of the case under Articles 7(2) (material evidence) and Article 7(3) (access in due time) also extend to documents which are essential to challenge the lawfulness of the arrest or detention. Contrary to well-established case-law of the ECtHR,<sup>97</sup> access to the documents essential for challenging the lawfulness of detention can be denied by the authorities in charge of the case if the fundamental rights or interests of other persons may be infringed or if another investigation could be seriously jeopardised.

According to the Implementation Report, in one Member State, which according to Fair Trials' findings is **Romania**,<sup>98</sup> only the lawyer has full access to the case file, which poses problems for an unrepresented defendant to gain access to all 'material evidence'.<sup>99</sup>

## 2. Access to “material evidence”: Article 7(2) and (3)

### a. Access to “material evidence”: scope

To recapitulate, Articles 7(2) and (3) of the Directive state with regard to 'material evidence' that:

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

Recital 31 provides a further clarification regarding the content of the obligation to provide access to 'material evidence', listing (non-exhaustively) the types of evidence that should be disclosed to the suspected or accused person:

For the purpose of this Directive, access to the material evidence, as defined by national law, whether for or against the suspect or the accused person, which is in the possession of the competent authorities in relation to the specific criminal case,

<sup>96</sup> ECtHR, [Chruściński v. Poland](#), App. no. 22755/04, Judgment of 6 November 2007, paragraph 56.

<sup>97</sup> ECtHR, [Shishkov v. Bulgaria](#), Application no. 38822/97, Judgement of 9 January 2003, paragraph 77.

<sup>98</sup> Fair Trials, Where's my lawyer?, see above note 44, p.22.

<sup>99</sup> Implementation Report, see above note 48, section 3.7.2.

should include access to materials such as documents, and where appropriate photographs and audio and video recordings. Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law.

Given this clarification, we conclude that ‘material evidence’ includes all types of incriminatory and exculpatory evidence gathered by the law enforcement authorities. All evidence that is material to the case, whether in the form of a document, photograph, AV recording or, we would argue, any other form of digital evidence must be disclosed to the suspected or accused person. It is important to note that this evidence is not limited to information physically contained in the case file. Recital 31 expressly states:

Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law.

According to the Implementation Report, issues arise in several Member States where access to the case file is granted but the case file does not contain all material evidence. In some cases, evidence that is kept outside the file is not made accessible at all or is presented only at the trial.<sup>100</sup>

For litigation strategies on failure to provide access to ‘essential documents’, refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

#### **b. Access to “material evidence”: timing**

Access to the material evidence must be provided free of charge and in due time to allow effective exercise of defence rights. According to the Directive, at the latest this means disclosure of evidence at the point when the case is sent to a court. However, in light of the observations we made in Section 2 above on the access to the case file at the point of questioning, we consider that “material evidence” should be disclosed as early as possible, starting from before the first questioning.

The CJEU in *Kolev* clarified the interpretation of the Directive regarding the latest permissible point of disclosure:

Article 7(3) of that Directive must be interpreted as meaning that it is for the national court to be satisfied that the defence has been granted a genuine opportunity to have access to the case materials, such access being possible, in some cases, after the lodging before the court of the indictment that indicates the trial stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file in the course of proceedings, provided that all necessary

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<sup>100</sup> Implementation Report, see above note 48, section 3.7.2.

measures are taken by the court in order to ensure respect for the rights of defence and the fairness of the proceedings.<sup>101</sup>

This clarification, however, does not change the obligation to disclose evidence at an earlier stage. ECtHR has also given a number of judgments under Article 6(3)(b) in relation to complaints that the failure to provide access to the case file in a timely manner before trial has deprived the applicants of the ‘time and facilities to prepare a defence’. The ECtHR states:

*‘[T]he “facilities” to be provided to everyone charged with an offence include the possibility of being informed, for the purposes of preparing his defence, of the result of the investigations carried out throughout the proceedings. The Court reiterates that it has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court’s assessment, in favour of the finding that the principle of equality of arms had been breached’.*<sup>102</sup>

#### i. Access to the case file before questioning

Whether Articles 7(1) and 7(2) require access to the case file at the police station is unclear from the text of the provisions themselves. It is clear from Article 7(1) that the defence should have access to ‘essential documents’ for effective challenge of the lawfulness of the arrest or detention. Article 7(2) is clear on the requirement to disclose ‘material evidence’ necessary to prepare defence, but does not expressly refer to the timing of that obligation. Article 7(3) also leaves the timing of the disclosure relatively vague:

(..) access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of defence and at latest upon submission of the merits of the accusation to the judgment of a court.

The main objective of disclosure of material evidence under Article 7(2) of the Directive – safeguarding of fairness of the proceedings and preparation of defence – would require that material evidence necessary to prepare the defence position for the suspect or accused person’s interview is disclosed before the questioning. Defence rights protected by Article 6(3) ECHR should also entitle the suspect/ their lawyer to access the police file prior to initial questioning. There is no particularly clear support for this in the case-law; however, such conclusion would logically follow from the adverse effects on the position<sup>103</sup> of a defendant in criminal proceedings. The General Court of the EU has stated in this regard:

‘The principle of respect for the rights of the defence requires, first, that the entity concerned must be informed of the evidence adduced against it to justify the measure adversely affecting it. Secondly, it must be afforded the opportunity effectively to make known its view on that evidence (...) Consequently (...) the evidence adduced

<sup>101</sup> CJEU, Case C-612/14 *Kolev and others*, [ECLI:EU:C:2018:392](#), para. 100.

<sup>102</sup> ECtHR, *Beraru v. Romania*, App. no. 40107/04, Judgement of 18 March 2014, paragraphs 69-70.

<sup>103</sup> The Directive applies not only to suspects or accused persons who have been given an official status, but also to persons whose ‘situation is substantially affected’ during the questioning. See [Part I](#) above.

against that entity should be disclosed to it either concomitantly with or as soon as possible after the adoption of the measure concerned'.<sup>104</sup>

Another statement frequently referred to is that relating to the role of the lawyer at the police station. Following its landmark ruling in [Salduz v. Turkey](#) establishing the right of access to a lawyer as from the first questioning by police, the ECtHR discussed the role of the lawyer in that context:

*'Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention'.<sup>105</sup>*

Lawyers have seen in this a suggestion that in order to perform this role effectively, the lawyer needs access to the case file. It is not possible to discharge the broad role of the lawyer without access to the case file. Finding a violation of the right of access to a lawyer at the pre-trial stage, the ECtHR has stated:

*'What is, however, clear to the Court is that the applicant's lawyer had not been allowed to examine the investigation file at that point (...), which would seriously hamper her ability to provide any sort of meaningful legal advice to the applicant'.<sup>106</sup>*

Articles 5(3) and (4) ECHR are limited to the judicial review of initial arrest and continued detention, and can require equality of arms only at that stage. As a result, a general view has arisen that equality of arms is essentially a characteristic of judicial procedure, and that police are essentially free to withhold evidence and use the questioning phase as a purely investigative opportunity.

Fair Trials encourages you to take the expansive view of Article 7(2) and Article 7(1) to the extent that it is relevant at the point of questioning. We believe that, fundamentally, the question of the provision of documents should be covered by the principle of equality of arms under Article 47 of the Charter and Article 6 ECHR, regardless of whether the suspect or accused person is detained at the point of initial questioning. Article 6 exists to protect the fairness of the criminal proceedings as a whole, and the 'equality of arms' requirement should apply to pre-trial stage as well as trial proceedings. The ECtHR has stated with regard to defence rights found in Article 6(3) ECHR, which clearly apply from the very start of pre-trial proceedings that:

*In criminal cases Article 6 § 1 overlaps with the specific guarantees of Article 6 § 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1.<sup>107</sup>*

<sup>104</sup> CJEU, Case T-496/10 *Bank Mellat v Council* [ECLI:EU:T:2013:39](#), paragraph 53.

<sup>105</sup> ECtHR, [Dayanan v. Turkey](#), Application no. 7377/03, Judgment of 13 October 2009, paragraph 32.

<sup>106</sup> ECtHR, *Sapan v. Turkey*, cited above note 38, paragraph 21.

<sup>107</sup> ECtHR, [Ibrahim and others v. the United Kingdom](#), Applications nos. 50541/08 50571/08 50573/08 40351/09, Judgment of 13 September 2016, paragraph. 251.

According to the FRA report, Member States regulate access to case materials during pre-trial stage differently. In **Luxembourg** and **Belgium**, the law foresees access to elements of the case file only after the person has been questioned by the police. In practice, access to the case file at the point of initial police questioning is generally low. In **Italy** and **Bulgaria** access to the case file is granted only after pre-trial investigation is completed, while in other Member States, e.g., **Cyprus**, only partial access to the case file is possible during the pre-trial stage.<sup>108</sup>

These are just some ideas, and you are obviously free to fashion your own arguments. Once you are happy that you have your basis for claiming a right of access to the case file at the police station, the process of invoking the right is fairly straightforward:

**Litigation strategy:**

➔ **What happened?**

- Access to the case file ('material evidence') was denied before questioning at the police station.

➔ **What to do?**

- **Take action at the pre-trial stage, if you are there:** Insist upon being given access to the case file prior to questioning by the police, prosecutor or investigating judge, mentioning that you rely on the Directive;
  - Explain that this access is necessary in order to enable you to prepare for the questioning as part of the defence. It is also necessary for your client to make his views known on the substance of the allegation, subject to his right to silence;
  - Ensure your request is recorded in any police protocols, mentioning the Directive. If access is not provided, consider advising silence until the contents of the file have been supplied, and ensure the reasons for the refusal of access are recorded. Explain how this refusal is undermining your ability to advise the client usefully and is forcing the client to make decisions without sufficient knowledge as to their potential consequences.
- ➔ **Take action to challenge a violation before a court** if access was not provided, in accordance with the general approach set out in the ['Using EU Law Toolkit'](#).
- Explain to the court why you believe Article 7(2) together with Article 47 of the Charter (principle of equality of arms) provides a right of access to the police case file prior to questioning;
  - Establish that the right of access has not been granted in accordance with that requirement (this should be simple if the national procedure rules do not allow access to the case file at this point, such that the denial of access is simply the application of the ordinary procedure).
  - Establish why this has damaged your client's interests, e.g. a confession was made or the right to silence was not exercised;

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<sup>108</sup> FRA Report, see above note 48, p.78.

- **Seek a remedy:** on the basis of the violation of the Directive, seek a remedy in accordance with Article 8(2) of the Directive, e.g., invalidity of the act, exclusion of the evidence etc.
- Show the court information about the discussion of Article 7(2) in different jurisdictions, demonstrating that it is an issue in need of clarification and suggest that the court should seek a reference for preliminary ruling to the CJEU using the "[CJEU Preliminary Reference Toolkit](#)".

### c. Access to “material evidence”: derogations

Article 7(4) of the Directive provides for a limited number of derogations applicable to certain materials in the case file:

‘4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain material in accordance with this paragraph is taken by judicial authority or is at least subject to judicial review.

Recital 32 provides a further clarification on the permissibility of derogations:

‘(32) (...) Any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the ECHR and as interpreted by the European Court of Human Rights.

Although some of the reasons for derogations are vaguely defined, it is important to refer to the limitations and safeguards accompanying this possibility. It will not be sufficient for the authorities to refer to one of the risks listed in Article 7(4); the use of words ‘serious’, ‘important’ and ‘strictly necessary’ points to certain degree of seriousness of these risks. In addition, where the decision is made by investigating authorities, in order to enable effective judicial review, they will need to provide reasons for the ‘strict necessity’ of limiting access. Finally, derogations are only permissible if they do not prejudice the right to a fair trial. The CJEU has stated that, regarding derogations from the right to access a lawyer in pre-trial stage:

To interpret Article 3 of Directive 2013/48 [Access to Lawyer Directive - FT] as allowing Member States to provide for derogations from the right of access to a lawyer other than those which are exhaustively set out in that article would run counter to those objectives and the scheme of that directive and to the very wording of that provision

and, as the Advocate General observed in point 51 of his Opinion, would render that right redundant.<sup>109</sup>

The same restrictive approach should be taken with regard to derogations under Article 7(4) of the Directive.

According to the Implementation Report, Member States apply broad derogations from the right to access to the case file. Grounds for refusal in some Member States, in addition to threat to life and physical integrity, include ‘freedom of a person’, ‘right to privacy’, ‘risks of pressure on or threat to victims, witnesses, investigators, experts or any other persons involved in the proceedings’. Only a few Member States mention the necessity to safeguard ‘important’ public interests, generally referring to ‘public interest’ or ‘interests of society’. Many Member States deny access to material evidence, invoking general prejudice, danger or damage to the investigation itself as the justification for the derogation, with some allowing derogations for undefined ‘serious reasons’.<sup>110</sup> In **Romania**, for example, broad and vague legal provisions allow prosecutors to restrict defence access to the case file.<sup>111</sup> In **Lithuania** the application of national law in combination with the Prosecutor General’s guidelines on access to case material in the pre-trial stage has resulted in high refusal rate. Negative effect on ongoing investigations, however, is the most common reason for refusing access to the case file in the pre-trial stage.<sup>112</sup> In addition to broad grounds for derogation, in a few jurisdictions no judicial review is provided for refusal at the police investigation stage. In those cases, the decision to restrict access to the case file is reviewed by the prosecutor or superior prosecutor.<sup>113</sup>

For litigation strategies on failure to provide access to ‘essential documents’, refer to [Section C](#). Contact us if you are considering litigation on this point as we may be able to help or support your work!

## C. USING THE DIRECTIVE IN PRACTICE

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### 1. Challenging a legal restriction on access to ‘essential evidence’

Suppose you are dealing with a legislative measure which enables the prosecutor to restrict access to the evidence essential to challenge the arrest or detention. Previous domestic case-law recognises this as permissible if there are sufficient grounds. What to do?

#### **Litigation strategy:**

##### **→ What happened?**

- Your client (/you) has been denied access to ‘essential evidence’ to challenge the arrest or detention based on a provision of procedural law.

##### **→ What to do?**

<sup>109</sup> CJEU, Case C-659/18 VW, [ECLI:EU:C:2020:201](#), paragraph 45.

<sup>110</sup> Implementation Report, see above note 48, section 3.7.4.

<sup>111</sup> Fair Trials, Where’s my lawyer?, see above note 44, p.21.

<sup>112</sup> FRA report, see above note 49, p. 80.

<sup>113</sup> Implementation Report, see above note 48, section 3.7.4.

- Select your forum (this might be: (i) a judicial challenge / appeal against a refused request to the prosecutor for disclosure; (ii) a request to / recourse before a pre-trial judge; or (iii) simply a request made to the pre-trial detention judge).
- **Argue:** Article 7(1) undoubtedly reproduces the standard of Article 5(4) ECHR, which has been interpreted by a clear line of case-law as requiring access to documents necessary for challenging detention. Article 7(1) has direct effect and is not subject to any derogation. There cannot, accordingly, be any question of restricting access to the key documents which are material to the detention decision. To the extent that the prosecution seeks to rely upon powers available under national law, the application of which would lead to a restriction of Article 7(1) rights, the relevant provisions of national law must be set aside and access must be provided. If the provisions are discretionary under national law, Article 7(1) reduces that discretion to zero and requires that access is provided.

#### a. Challenging a ‘prosecutor decides’ restriction

Consider a problem of a more practical nature, e.g. some evidence is disclosed to you by the prosecutor to substantiate points made in the request for pre-trial detention, but there may be other information in the file which is relevant.

##### **Litigation strategy:**

##### **→ What happened?**

- Some materials which would constitute ‘essential documents’ necessary to challenge the lawfulness of arrest or detention are disclosed, but there may be other information that you consider relevant and that the court may take into consideration, but the prosecutor has not deemed it ‘essential’ and has kept it undisclosed.

##### **→ What to do?**

- Select your forum (this might be: (i) a judicial challenge / appeal against a refused request to the prosecutor for disclosure; (ii) a request to / recourse before a pre-trial judge; or (iii) simply a request made to the pre-trial detention judge).
- **Argue:** Article 7(1) has direct effect and requires access to documents which are necessary for challenging detention effectively. The purposes of the provision are to ensure that the detention decision is not taken on the basis of evidence which is not seen by the detained person and to ensure that evidence tending against detention is not overlooked due to the suspect’s inability to base arguments upon it. Access should therefore be provided not just to documents mentioned by the prosecutor, but also to other documents which the court considers to have a bearing upon its decision. This means the court should consider of its own motion whether there are other parts of the file which are relevant to its decision and ensure that these are supplied to the defence.

- It follows from the above that, in order to ensure observance of the Charter right to liberty (Article 5), which incorporates the judicial review obligations in the ECtHR case-law, the court should not allow the prosecution to rely upon evidence which has not been disclosed and should order the disclosure of other evidence it considers material.

## 2. Restrictions on access to the case file at the pre-trial stage

If you are dealing with a legislative measure which enables the prosecutor to restrict access to the evidence during the pre-trial stage based on the broadly determined ground of 'threat to investigation', previous domestic case-law may recognise this as permissible if there are sufficient grounds.

On that basis we would offer the following advice:

### **Litigation strategy:**

#### **→ What happened?**

- The prosecutor has restricted access to the evidence during the pre-trial stage based on broadly the determined ground of 'threat to investigation' and domestic case law supports this as a valid ground for denial of access.

#### **→ What to do?**

- Select your forum (this might be: (i) a judicial challenge / appeal against a refused request to the prosecutor for disclosure; (ii) a request to / recourse before a pre-trial judge; or (iii) simply a request made to the pre-trial detention judge). Make an application to the court which has jurisdiction over the pre-trial phase (e.g. investigating judge, court which has jurisdiction over the prosecution) seeking access to the file or challenging a refusal to provide access to the case file.
- **Argue:** Article 7(2) provides you with a right of access to all material evidence, in principle. In accordance with Article 7(3) this must be provided in due time to exercise defence rights. The exercise of defence rights includes responding to steps taken by investigative authorities at the pre-trial stage, including by supplying exculpatory evidence, adapting the defence strategy or even seeking the dismissal of the case if this is available under national law. Articles 7(2) and (3) have direct effect and, preferably together with Article 47 of the Charter which includes the principle of equality of arms in its scope, can be relied on in national courts.
- The right of access to the case file can be restricted on the grounds provided for by Article 7(4), in particular grounds relating to the needs of an ongoing investigation. However, there must be a genuine need of the investigation justifying the non-disclosure of information and the restriction on access to the case file must be kept to the minimum necessary to meet that need.
- This implies a requirement upon the authority to justify the refusal of access by reference to concrete and substantiated elements justifying the application of this

restriction, so as to enable effective judicial review or, if the authority is a judge, for it to motivate its decision by reference to such matters.

- Powers available under national law for prosecutors / the court to restrict access to the case file on certain grounds linked to the needs of the investigation must be interpreted in light of this obligation.
- Identify and enumerate in the request, to the extent possible, the possible documents or materials which may be of interest. Explain how the non-provision of these documents undermines the exercise of rights of defence, e.g. challenging the lawfulness of investigative steps.
- Point out to the judge / the court when challenging a prosecutor's decision that the court is able to make a reference to the CJEU concerning the requirements of Article 7 of the Directive. See the [Using EU Law Toolkit](#) for more information on the process.

### 3. Restrictions on access to the 'material evidence' to prepare for trial

Article 7(3) of the Directive requires that access be provided to material evidence upon the submission of the merits of the accusation to a court, and in due time to ensure the effective exercise of defence rights at the trial stage. We would suggest that the objective here is to *avoid* situations which are subsequently recognised as entailing violations of Article 6(3)(b) ECHR – the right to adequate time and facilities to prepare a defence – due to the failure to provide the required time and facilities.

This requirement can be invoked on the basis of Article 8(2), requiring that there be a right of challenge. Clearly, this requirement only makes sense if read against the general obligation of Member States to ensure effective remedies in respect of violations of EU law rights, a general principle of EU law articulated in Article 47 of the Charter. Relying on this principle, you would seek a remedy in order to *prevent* a violation of the Directive (e.g. by providing an adjournment) or to seek a retroactive remedy (e.g. a retrial, providing an opportunity effectively to comment upon the evidence at the appeal stage, or quashing a conviction obtained without the evidence having been provided in good time).

Based on these inferences as to the meaning of the text – which are our own, pending interpretation of the provision by the CJEU – we would suggest the following steps for relying on the Directive in this context.

#### **Litigation strategy:**

##### **→ What happened?**

- You have been denied access to some of the evidence in the case file based on general reference to 'public interests' or 'freedom of another person' without providing more detailed reasons; or
- New evidence has been introduced after submitting the case to the court and this evidence has not been disclosed in advance and there has therefore not been sufficient time to prepare a defence, or it has not been disclosed at all before being examined in a hearing.

→ **What to do?**

- **Argue:** Article 7(2) requires that access to 'material evidence' must be ensured to safeguard the fairness of the proceedings and to enable the preparation of the defence.
- Identify the restriction you wish to complain of and establish, practically, how this is restricting your ability to prepare for trial.
- Article 7(4) implies a requirement upon the authority to justify the refusal of access by reference to concrete and substantiated elements justifying the application of this restriction such as to enable effective judicial review or, if the authority is a judge, for it to motivate its decision by reference to such matters.
- Link this to Article 47 of the Charter, both in terms of the right to an effective remedy and the principle of equality of arms. You may also link it with examples of violations of Article 6(3)(b) ECHR, as this will show that you have a firm grounding for your request.
- **Seek a remedy:** if this is available, ask for a preventive remedy (e.g. adjournment), or a corrective remedy (appeal etc.) on the basis of Article 8(2) of the Directive.

## FINAL REMARKS

The right to information is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights. Clear information about rights such as the right to access to a lawyer or the right to interpretation and translation serves as a starting point for securing those rights in practice and thus having a chance at effective defence. Equally, reasons for arrest and information on accusation, including access to the evidence on which the arrest or accusation is based, is a precondition for a meaningful defence at any stage of the criminal proceedings, whether at the first interview or at the trial on merits. The Directive establishes the right of the defendant to receive simple and understandable information about his/her position in the proceedings, the evidentiary basis for taking measures which have adverse effects on the defendant's situation and about rights that are instrumental in mounting a meaningful defence against those measures. In many respects, the Directive sets a higher standard than that currently established by the ECtHR jurisprudence.

The transposition of the Directive in the law of Member States has broadly been completed. However, as shown by [Fair Trials' research](#), the [Implementation report](#) and [FRA's report on rights in practice](#), there are still many outstanding issues that undermine the effectiveness of the rights guaranteed by the Directive. Some of these issues relate to the very core of the right to information, such as the accessibility of language used to convey information about rights, broad use of derogations from the right to access the case file (especially in pre-trial stage), the timing of notification about charges and reasons for arrest.

It is the role of practitioners to use the Directive and make sure it is enforced by domestic courts across the EU. We hope that this toolkit will support the efforts of lawyers across Europe, all of whom are invited to:

- [Contact us](#) for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the [Using EU law Toolkit](#), our [Preliminary reference Toolkit](#) and our online training [video on the preliminary ruling procedure in criminal practice](#).
- Visit our website [www.fairtrials.org](http://www.fairtrials.org) regularly for updates on key developments relating to the Directives, and news about in-person trainings and [updates on relevant case-law](#).
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper "[Towards an EU Defence Rights Movement](#)" for concrete ideas on articles, litigation, conferences etc.