

Mapping CJEU Case Law on EU Criminal Justice Measures

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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 (LEAP) – 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>

Fair Trials, with the support of LEAP, were instrumental in the creation of the EU Procedural Rights Directives – a suite of Directives that protect fundamental rights of defendants, such as the rights to be presumed innocent or to access legal advice – and since adoption, implementation of the Directives, together with EU legislation on cross-border criminal justice, is increasingly putting national laws and practices to the test. The Court of Justice of the European Union (CJEU) is therefore increasingly being asked to interpret EU law and decide whether domestic norms and practices comply with the standards on fair trial rights protected by the Directives. In this context, the CJEU has the potential to play a really important role in the development and practical application of fair trial rights.



Contacts

Laure Baudrihaye-Gérard

Legal Director (Europe)

+32 (0)2 894 99 55

laure.baudrihaye@fairtrials.net

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Mapping CJEU Case Law on EU Criminal Justice Measures

Introduction

This document supports Fair Trials' toolkit on the preliminary reference procedure before the Court of Justice of the EU ("**CJEU**"). It maps out the jurisprudence of the CJEU in relation to:

1. Directive 2010/64/EU - Right to Interpretation and Translation in Criminal Proceedings (due to be transposed by EU Member States by 27 October 2013)
2. Directive 2012/13/EU - Right to Information in Criminal Proceedings (due to be transposed by EU Member States by 2 June 2014)
3. Directive 2013/48/EU - Right of Access to a Lawyer in Criminal Proceedings (due to be transposed by EU Member States by 27 November 2016)
4. Directive 2016/343/EU - The strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (due to be transposed by EU Member States by 1 April 2018)
5. Directive 2016/800/EU - Procedural safeguards for children who are suspects or accused persons in criminal proceedings (due to be transposed by EU Member States by 11 June 2019)
6. Council Framework Decision 2002/584/JHA - Framework Decision on the European Arrest Warrant ("**FDEAW**")
7. Directive 2016/1919 - legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

This document only includes the substantive articles of each instrument.

Highlighted in yellow are terms or provisions that the CJEU has interpreted in its judgments, with the relevant judgments named in *italics* and a brief explanation of the outcome below the provision.

We hope this will be useful to criminal practitioners both (1) to visualise the development of the jurisprudence of the CJEU around EU criminal procedural rights, and also (2) as a resource to find case law interpreting a certain right, provision, or term.

Directive 2010/64/EU – Right to Interpretation and Translation in Criminal Proceedings

Article 1 – Subject matter and scope

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

***Case C-25/15 – Balogh:** The right to interpretation and translation under Article 1(1) does **not** apply to a special procedure which recognises a conviction handed down in another member state.*

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.
3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.
4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

Article 2 – Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

***Case C-216/14 – Covaci:** Article 2 refers to the **oral interpretation of oral statements**. A suspect in criminal proceedings called upon to make oral statements (e.g. before the court or to his legal counsel) should be entitled to do so in his own language.*

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

Case C-216/14 – Covaci: A suspect can obtain the free assistance of an interpreter if the suspect himself orally lodges an appeal at the registry. If that a suspect lodges an appeal in writing he can obtain the assistance of legal counsel to draft the appeal in the language of the proceedings.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.
4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.
5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.
6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.
7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.
8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 3 – Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.
2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

Case C-278/16 – Sleutjes: A penal order imposing sanctions for minor offences (e.g. a traffic offence), delivered by a judge under a simplified unilateral procedure, constitutes both an 'indictment' and a 'judgment' within the meaning of Article 3(2).

Case C-216/14 – Covaci: Article 3(1) and 3(2) does not include the right to lodge an appeal in a language other than the language of the proceedings. (Note however that Article 2 provides the right to assistance in lodging an appeal in the language of the proceedings).

3. The competent authorities shall, in any given case, decide whether any other document is **essential**. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

Case C-216/14 – Covaci: Article 3(1) and 3(2) provide only the minimum standard for what are considered 'essential' documents requiring translation in writing. National courts may under Article 3(3) consider other documents to be 'essential'.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.
5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.
6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.
7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.
8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.
9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 4 – Costs of interpretation and translation

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Directive 2012/13/EU – Right to Information in Criminal Proceedings

Article 1 – Subject matter

This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.

Article 2 – Scope

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 **until the conclusion of the proceedings, which is understood to mean the final determination of the question** whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

***Case C-216/14 – Covaci:** Under Article 2(1) the Directive does apply where a penalty order has been issued by a court on the merits under a simplified unilateral procedure but which will not acquire the force of res judicata before the expiry of an appeals period (i.e. **final** determination not yet made).*

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

Article 3 – Right to information about rights

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;**

***Case C-216/14 – Covaci:** see Article 6.*

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

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.

Article 4 – Letter of Rights on arrest

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.
5. Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.

Article 5 – Letter of Rights in European Arrest Warrant 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 2002/584/JHA in the executing 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 II.

Article 6 – Right to information about the accusation

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.

Case C-615/18 PPU - UY: Article 6 must be interpreted as:

- not precluding national legislation according to which the period of two weeks to form opposition against an order having condemned a person to a driving prohibition begins to run from its service to the representative of this person, provided that, as soon as said person becomes aware of it, he/she actually has a period of two weeks to appeal against this order, if necessary following or within the framework of proceedings foreclosing statement, without having to demonstrate that he/she has taken the necessary steps to seek information as soon as possible by his/her representative of the existence of the said order, and that the effects of the latter are suspended during this time limit;
- precluding national legislation according to which a person residing in another Member State incurs a penal sanction if he/she does not respect, from the date when it acquired the authority of res judicata, an order having condemned him/her to a driving ban, even though this person was unaware of the existence of such an order on the date when he/she disregarded the driving ban which ensued.

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.

Case C-216/14 – Covaci: Under Articles 6(1) and 6(3) the service of a penalty order issued by a court under a simplified unilateral procedure is a form of communication of the “**accusation**”. National law can require that the accused appoint an agent to receive service but **must still ensure that the accused still has benefit of the full appeals period** upon become aware of the order.

Case C-612/15 – 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:

1. **Before the hearing of argument on the merits** commences in front of the court
2. **Subsequent amendments** may be provided after the hearing of argument commences, but must be provided:
 - a. **Before the deliberation stage** commences, and
 - b. Only if “**all necessary measures are taken by the court in order to ensure respect for the rights of the defence**”

Notwithstanding the requirements above, in accordance with the principle of equality of arms, the information must be provided at a time which allows the defence “sufficient time to become acquainted with that information”, and puts the defence in a position to prepare the defence effectively. **This provision may require that the case be stayed and postponed accordingly to allow the defence time.**

Case C-124/16 – Ianos Tranca: Article 6(1) and (3), and **Covaci**, does not preclude the clock for an appeals period starting to run upon delivery to a mandatory service agent, or the expiry of the period. However, **as soon as the accused becomes aware of the order, he should be placed in status quo ante and be allowed the full appeals period.** In effect, no practical finalisation of an order upon change from Covaci: national court must still allow the accused the full appeals period.

Case 704/18 - Nikolay Kolev and Others: the Bulgarian court considered that national procedural rules prevented the implementation of the earlier Kolev ruling in relation to Article 6(3) because the trial phase of the criminal proceedings was already terminated. The referring court considered that it is necessary to interpret its national law so that that procedural impediment does not hinder the application of EU law. It asked the CJEU whether Article 267 TFEU (on the preliminary reference procedure) could be interpreted as authorising a national court not to apply a preliminary ruling in the main proceedings, with regard to which that ruling was issued, in reliance on the factual circumstances taken into account by the Court when it gave the preliminary ruling? The CJEU considered that Article 267 TFEU must be interpreted as not precluding a provision of national procedural law which obliges the referring court in the case giving rise to the earlier Kolev ruling to comply with an injunction, imposed on it by a higher court, to refer the case back to the prosecutor, after the termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied, to the extent that those provisions of EU law, as interpreted by the Court in the earlier Kolev judgment, are respected in the context of the pre-trial phase of the criminal proceedings or in that of the subsequent trial phase thereof.

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.

***Case C-646/17 – Gianluca Moro:** National legislation allowing the person prosecuted to request, in the course of the proceedings, a negotiated penalty when there is a change in the facts that are subject to the charges and not when there is a change in the charges, does not violate Art. 6(4) and Art. 48 of the Charter.*

Article 7 – Right of access to the materials of the case

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 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.

***Case C-612/15 – Kolev and others:** The national court must be satisfied that the defence has been granted a “**genuine opportunity to have access to the case materials**”. Access may be provided after the initiation of trial but must be **at least**:*

1. **Before the hearing of argument on the merits** commences in front of the court
2. Access to **new evidence placed in the file** during proceedings may be provided after the hearing of argument commences but:
 - a. Must be provided **before deliberation commences**; and
 - b. Only if “**all necessary measures are taken by the court in order to ensure respect for the rights of the defence**”

*Notwithstanding the requirements above, in accordance with the principle of equality of arms, access must be provided at a time which allows the defence “sufficient time to become acquainted with that information”, and puts the defence “in a position to prepare the defence effectively”. **This provision may require that the case be stayed and postponed accordingly to allow the defence time.***

Also, where a suspect for legitimate reasons has not been able to attend access to file on the day summoned, Article 7(2) and 7(3) requires the court or prosecutor to allow the suspect a further opportunity to become acquainted with the case file.

[Case 704/18 - Nikolay Kolev and Others](#): See above in relation to Article 6(3).

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.

Article 8 – 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.
2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.

Directive 2013/48/EU – Right of Access to a Lawyer in Criminal and European Arrest Warrant Proceedings

Article 1 – Subject matter

This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision 2002/584/JHA ('European arrest warrant proceedings') to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Article 2 – Scope

1. This Directive applies to **suspects** or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

***Case C-659/18 - VW:** A person who has been summoned to appear before an investigating judge, before whom criminal proceedings initiated for criminal offences which that person is alleged to have committed have been brought, falls within the concept of a 'suspect', within the meaning of Article 2(1) of Directive 2013/48. Moreover, the wording of that provision, in particular the words 'are made aware by the competent authorities of a Member State, by official notification or otherwise', indicates that, for the purposes of determining whether Directive 2013/48 is applicable, information received from the competent authorities of a Member State by the person concerned is sufficient, in whatever form that information is communicated. The adoption by those authorities of an official decision or of any other procedural step aimed at informing the person concerned that he is to be treated as a suspect or an accused person, as required by national law, must be considered sufficient. By contrast, the means by which such information reaches that person is irrelevant.*

2. This Directive applies to persons subject to European arrest warrant proceedings (requested persons) from the time of their arrest in the executing Member State in accordance with Article 10.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.
4. Without prejudice to the right to a fair trial, in respect of minor offences:
 - (a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or

(b) where deprivation of liberty cannot be imposed as a sanction;

this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

Article 3 – The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

***Case C-612/15 – Kolev and others:** CJEU considered that Article 3(1), and the Directive generally, should be read in conjunction with Article 47, and 48(2) of the Charter, and also in light of Article 6(3) ECHR. Citing **Croissant v Germany, ECtHR** and **Lagerblom v Sweden, ECtHR**, CJEU found that while it should be possible to use one's lawyer of choice, that right is not absolute.*

*A lawyer must have no conflict of interest if “the **effectiveness** of the rights of the defence is to be protected”. Accordingly, where a lawyer is representing co-defendants with conflicting interests, the court can dismiss the conflicted lawyer and allow the selection of new lawyers for each party, or appoint new lawyers itself.*

***Case C-659/18 - VW:** Article 3(1) requires the Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.*

2. Suspects or accused persons shall have access to a lawyer **without undue delay**. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
 - (a) before they are questioned by the police or by another law enforcement or judicial authority;
 - (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
 - (c) without undue delay after deprivation of liberty;
 - (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

***Case C-659/18 - VW:** Suspects and accused persons must have access to a lawyer without undue delay and, in any event, from whichever of the four specific points in time listed in (a) to (d) of that provision is the earliest. Article 3(2) provides that suspects or accused persons are to have access to a lawyer *inter alia* ‘before they are questioned by the police or by another law enforcement or judicial authority’, in accordance with Article 3(2)(a) and ‘where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court’, in accordance with Article 3(2)(d).*

3. The right of access to a lawyer shall entail the following:
- (a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
 - (b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;
 - (c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.
4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily **derogate** from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

***Case C-659/18 - VW:** The temporary derogations from the right of access to a lawyer which Member States may provide for are set out exhaustively in Article 3(5) and (6) and must be interpreted strictly. Furthermore, Article 8 of that directive, entitled 'General conditions for applying temporary derogations', refers only, as regards the right of access to a lawyer, to the derogations provided for in Article 3(5) or (6) thereof. Recitals 30 to 32 of Directive 2013/48 also refer to those derogations only. To interpret Article 3 of Directive 2013/48 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 would render that right redundant. The exercise by a suspect or accused person of the right of access to a lawyer laid down by Directive 2013/48, arising, in any event, from whichever of the four points in time referred to in Article 3(2)(a) to (d) of that directive is the earliest, does not depend on the person concerned appearing. Moreover, the fact that a suspect or accused person has failed to appear is not one of the reasons for derogating from the right of access to a lawyer set out*

exhaustively in that directive, so that the fact that a suspect has failed to appear, despite summonses having been issued to appear before an investigating judge, cannot justify that person being deprived of the exercise of that right.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:
 - (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Article 4 – Confidentiality

Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

Article 5 – The right to have a third person informed of the deprivation of liberty

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish.
2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons:
 - (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.
4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

Article 6 – The right to communicate, while deprived of liberty, with third persons

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.
2. Member States may limit or defer the exercise of the right referred to in paragraph 1 in view of imperative requirements or proportionate operational requirements.

Article 7 – The right to communicate with consular authorities

1. Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. However, where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.
2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned.
3. The exercise of the rights laid down in this Article may be regulated by national law or procedures, provided that such law or procedures enable full effect to be given to the purposes for which these rights are intended.

Article 8 – General conditions for applying temporary derogations

1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall
 - (a) be proportionate and not go beyond what is necessary;
 - (b) be strictly limited in time;
 - (c) not be based exclusively on the type or the seriousness of the alleged offence; and
 - (d) not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.
3. Temporary derogations under Article 5(3) may be authorised only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 9 – Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:

- (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
 - (b) the waiver is given voluntarily and unequivocally.
- 2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
- 3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

Article 10 – The right of access to a lawyer in European arrest warrant proceedings

- 1. Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.
- 2. With regard to the content of the right of access to a lawyer in the executing Member State, requested persons shall have the following rights in that Member State:
 - (a) the right of access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;
 - (b) the right to meet and communicate with the lawyer representing them;
 - (c) the right for their lawyer to be present and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted using the recording procedure in accordance with the law of the Member State concerned.
- 3. The rights provided for in Articles 4, 5, 6, 7, 9, and, where a temporary derogation under Article 5(3) is applied, in Article 8, shall apply, mutatis mutandis, to European arrest warrant proceedings in the executing Member State.
- 4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.
- 5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.
- 6. The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation

on the executing judicial authority to decide, within those time-limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

Article 11 – Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Article 12 – Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.
2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

Article 13 – Vulnerable persons

Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.

Directive 2016/343/EU – The strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

Article 1 – Subject matter

This Directive lays down common minimum rules concerning:

- (a) certain aspects of the presumption of innocence in criminal proceedings;
- (b) the right to be present at the trial in criminal proceedings.

Article 2 – Scope

This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

Article 3 – Presumption of innocence

Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.

Article 4 – Public references to guilt

1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.

C-310/18 PPU – Milev: The directive **does not** govern the circumstances in which **pre-trial detention** can be adopted.

Articles 3 and 4(1) therefore allow for judicial decisions on the continuation of pre-trial detention, based on suspicion or on incriminating evidence, **provided that such decisions do not refer to the person in custody as being guilty.**

Case C-8/19 PPU – RH: Articles 4 and 6 of Directive do not preclude a court ruling on the legality of a pre-trial detention measure, and assessing the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, to (i) compare incriminating and exculpatory evidence; (ii) give reasons for its decision stating the evidence relied on, and (iii) rule on the objections of defence

*counsel -- **provided that that decision does not present the person detained as being guilty.***

***C-377/18 – AH and others:** Article 4(1) does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.*

***Case C-709/18, UL and VM:** Articles 3 and 4 (1) of Directive 2016/343, read in conjunction with Recital 16 of the directive, as well as Article 47(2) and Article 48 of the Charter of Fundamental Rights of the European Union, must be interpreted in the sense that they do not prevent that, in the context of criminal proceedings brought against two persons, a national court accepts, first, by way of an order, the guilty plea of the first person for the offences mentioned in the indictment allegedly committed in association with the second person who did not plead guilty and then rules, after producing evidence relating to the charges alleged against this second person, on the culpability of this person, on the condition that:*

- on the one hand, the mention of the second person as a co-perpetrator of the alleged offences is necessary for the qualification of the legal responsibility of the person who pleaded guilty and,*
- on the other hand, that this same order and/or indictment to which it refers clearly indicates that the guilt of this second person has not been legally established and will be subject to separate evidence and judgment.*

2. Member States shall ensure that appropriate measures are available in the event of a breach of the obligation laid down in paragraph 1 of this Article not to refer to suspects or accused persons as being guilty, in accordance with this Directive and, in particular, with Article 10.
3. The obligation laid down in paragraph 1 not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.

Article 5 – Presentation of suspects and accused persons

1. Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.

2. Paragraph 1 shall not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.

Article 6 – Burden of proof

1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.
2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

Case C-8/19 PPU – RH:** Articles 4 and 6 of Directive do not preclude a court ruling on the legality of a pre-trial detention measure, and assessing the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, to (i) compare incriminating and exculpatory evidence; (ii) give reasons for its decision stating the evidence relied on, and (iii) rule on the objections of defence counsel – **provided that that decision does not present the person detained as being guilty.

***Case C-653/19 PPU – DK:** Article 6 does not apply to a national law that makes the release of a person held in detention on remand pending trial conditional on that person establishing the existence of new circumstances justifying that release. The allocation of the burden of proof in the context of that procedure is solely within the remit of national law.*

Article 7 – Right to remain silent and right not to incriminate oneself

1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.
2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.
3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.
4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.

5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.
6. This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.

Article 8 – Right to be present at the trial

1. Member States shall ensure that suspects and accused persons have the right to be present at their trial.

*Case 688/18, TX and UW – Article 8(1) and (2): national legislation which provides, in a situation where the accused person has been informed, in due time, of his trial and of the consequences of not appearing at that trial, and where that person was represented by a mandated lawyer appointed by him, that his right to be present at trial in accordance with Article 8(1) and (2) is **not** infringed where:*

- he decided unequivocally not to appear at one of the hearings held in connection with his trial; or
- he did not appear at one of those hearings for a reason beyond his control if, following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully.

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:
 - (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or
 - (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.
4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are

apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.

5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with.
6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.

Article 9 – Right to a new trial

Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence.

Article 10 – Remedies

1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.

Directive 2016/800/EU – Procedural safeguards for children who are suspects or accused persons in criminal proceedings

Article 1 – Subject Matter

This Directive lays down common minimum rules concerning certain rights of children who are:

- (a) suspects or accused persons in criminal proceedings; or
- (b) subject to European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (requested persons).

Case C-367/16 – Piotrowski: The Directive does not prohibit the surrender, pursuant to Framework Decision 2002/584, of minors who have reached the age of criminal responsibility. The Directive requires that the court ensure that minors have the benefit of certain procedural rights guaranteed in national criminal proceedings, to ensure that the best interests of a child, in accordance with Article 24(2) of the Charter.

Article 2 – Scope

1. This Directive applies to children who are suspects or accused persons in criminal proceedings. It applies until the final determination of the question whether the suspect or accused person has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to children who are requested persons from the time of their arrest in the executing Member State, in accordance with Article 17.
3. With the exception of Article 5, point (b) of Article 8(3), and Article 15, insofar as those provisions refer to a holder of parental responsibility, this Directive, or certain provisions thereof, applies to persons as referred to in paragraphs 1 and 2 of this Article, where such persons were children when they became subject to the proceedings but have subsequently reached the age of 18, and the application of this Directive, or certain provisions thereof, is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. Member States may decide not to apply this Directive when the person concerned has reached the age of 21.
4. This Directive applies to children who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
5. This Directive does not affect national rules determining the age of criminal responsibility.
6. Without prejudice to the right to a fair trial, in respect of minor offences:

- (a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
- (b) where deprivation of liberty cannot be imposed as a sanction,

this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

In any event, this Directive shall fully apply where the child is deprived of liberty, irrespective of the stage of the criminal proceedings.

Article 3 – Definitions

For the purposes of this Directive the following definitions apply:

- (a) ‘child’ means a person below the age of 18;

[Case C-367/16 – Piotrowski](#): See explanation at Article 1.

- (b) ‘holder of parental responsibility’ means any person having parental responsibility over a child;
- (c) ‘parental responsibility’ means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effects, including rights of custody and rights of access.

With regard to point (1) of the first paragraph, where it is uncertain whether a person has reached the age of 18, that person shall be presumed to be a child.

Article 4 - Right to information

1. Member States shall ensure that when children are made aware that they are suspects or accused persons in criminal proceedings, they are informed promptly about their rights in accordance with Directive 2012/13/EU and about general aspects of the conduct of the proceedings.

Member States shall also ensure that children are informed about the rights set out in this Directive. That information shall be provided as follows:

- (a) promptly when children are made aware that they are suspects or accused persons, in respect of:
 - (i) the right to have the holder of parental responsibility informed, as provided for in Article 5;
 - (ii) the right to be assisted by a lawyer, as provided for in Article 6;
 - (iii) the right to protection of privacy, as provided for in Article 14;
 - (iv) the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings, as provided for in Article 15(4);

- (v) the right to legal aid, as provided for in Article 18;
- (b) at the earliest appropriate stage in the proceedings, in respect of:
- (i) the right to an individual assessment, as provided for in Article 7;
 - (ii) the right to a medical examination, including the right to medical assistance, as provided for in Article 8;
 - (iii) the right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention, as provided for in Articles 10 and 11;
 - (iv) the right to be accompanied by the holder of parental responsibility during court hearings, as provided for in Article 15(1);
 - (v) the right to appear in person at trial, as provided for in Article 16;
 - (vi) the right to effective remedies, as provided for in Article 19;
- (c) upon deprivation of liberty in respect of the right to specific treatment during deprivation of liberty, as provided for in Article 12.
2. Member States shall ensure that the information referred to in paragraph 1 is given in writing, orally, or both, in simple and accessible language, and that the information given is noted, using the recording procedure in accordance with national law.
 3. Where children are provided with a Letter of Rights pursuant to Directive 2012/13/EU, Member States shall ensure that such a Letter includes a reference to their rights under this Directive.

Article 5 - Right of the child to have the holder of parental responsibility informed

1. Member States shall ensure that the holder of parental responsibility is provided, as soon as possible, with the information that the child has a right to receive in accordance with Article 4.
2. The information referred to in paragraph 1 shall be provided to another appropriate adult who is nominated by the child and accepted as such by the competent authority where providing that information to the holder of parental responsibility:
 - (a) would be contrary to the child's best interests;
 - (b) is not possible because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown;
 - (c) could, on the basis of objective and factual circumstances, substantially jeopardise the criminal proceedings.

Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate, and provide the information to, another person. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.

3. Where the circumstances which led to the application of point (a), (b) or (c) of paragraph 2 cease to exist, any information that the child receives in accordance with Article 4, and

which remains relevant in the course of the proceedings, shall be provided to the holder of parental responsibility.

Article 6 - Assistance by a lawyer

1. Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with Directive 2013/48/EU. Nothing in this Directive, in particular in this Article, shall affect that right.
2. Member States shall ensure that children are assisted by a lawyer in accordance with this Article in order to allow them to exercise the rights of the defence effectively.
3. Member States shall ensure that children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:
 - (a) before they are questioned by the police or by another law enforcement or judicial authority;
 - (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4;
 - (c) without undue delay after deprivation of liberty;
 - (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.
4. Assistance by a lawyer shall include the following:
 - (a) Member States shall ensure that children have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
 - (b) Member States shall ensure that children are assisted by a lawyer when they are questioned, and that the lawyer is able to participate effectively during questioning. Such participation shall be conducted in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise or essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure under national law;
 - (c) Member States shall ensure that children are, as a minimum, assisted by a lawyer during the following investigative or evidence-gathering acts, where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.
5. Member States shall respect the confidentiality of communication between children and their lawyer in the exercise of the right to be assisted by a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

6. Provided that this complies with the right to a fair trial, Member States may derogate from paragraph 3 where assistance by a lawyer is not proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence, it being understood that the child's best interests shall always be a primary consideration.

In any event, Member States shall ensure that children are assisted by a lawyer:

- (a) when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
- (b) during detention.

Member States shall also ensure that deprivation of liberty is not imposed as a criminal sentence, unless the child has been assisted by a lawyer in such a way as to allow the child to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court.

7. Where the child is to be assisted by a lawyer in accordance with this Article but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts provided for in point (c) of paragraph 4, for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child.
8. In exceptional circumstances, and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:
 - (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.

Member States shall ensure that the competent authorities, when applying this paragraph, shall take the child's best interests into account.

A decision to proceed to questioning in the absence of the lawyer under this paragraph may be taken only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 7 - Right to an individual assessment

1. Member States shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account.
2. For that purpose children who are suspects or accused persons in criminal proceedings shall be individually assessed. The individual assessment shall, in particular, take into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have.

3. The extent and detail of the individual assessment may vary depending on the circumstances of the case, the measures that can be taken if the child is found guilty of the alleged criminal offence, and whether the child has, in the recent past, been the subject of an individual assessment.
4. The individual assessment shall serve to establish and to note, in accordance with the recording procedure in the Member State concerned, such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when:
 - (a) determining whether any specific measure to the benefit of the child is to be taken;
 - (b) assessing the appropriateness and effectiveness of any precautionary measures in respect of the child;
 - (c) taking any decision or course of action in the criminal proceedings, including when sentencing.
5. The individual assessment shall be carried out at the earliest appropriate stage of the proceedings and, subject to paragraph 6, before indictment.
6. In the absence of an individual assessment, an indictment may nevertheless be presented provided that this is in the child's best interests and that the individual assessment is in any event available at the beginning of the trial hearings before a court.
7. Individual assessments shall be carried out with the close involvement of the child. They shall be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach and involving, where appropriate, the holder of parental responsibility, or another appropriate adult as referred to in Articles 5 and 15, and/or a specialised professional.
8. If the elements that form the basis of the individual assessment change significantly, Member States shall ensure that the individual assessment is updated throughout the criminal proceedings.
9. Member States may derogate from the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, provided that it is compatible with the child's best interests.

Article 8 – Right to a medical examination

1. Member States shall ensure that children who are deprived of liberty have the right to a medical examination without undue delay with a view, in particular, to assessing their general mental and physical condition. The medical examination shall be as non-invasive as possible and shall be carried out by a physician or another qualified professional.
2. The results of the medical examination shall be taken into account when determining the capacity of the child to be subject to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against the child.
3. The medical examination shall be carried out either on the initiative of the competent authorities, in particular where specific health indications call for such an examination, or on a request by any of the following:

- (a) the child;
 - (b) the holder of parental responsibility, or another appropriate adult as referred to in Articles 5 and 15;
 - (c) the child's lawyer.
4. The conclusion of the medical examination shall be recorded in writing. Where required, medical assistance shall be provided.
 5. Member States shall ensure that another medical examination is carried out where the circumstances so require.

Article 9 – Audiovisual recording of questioning

1. Member States shall ensure that questioning of children by police or other law enforcement authorities during the criminal proceedings is audio-visually recorded where this is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child's best interests are always a primary consideration.
2. In the absence of audiovisual recording, questioning shall be recorded in another appropriate manner, such as by written minutes which are duly verified.
3. This Article shall be without prejudice to the possibility to ask questions for the sole purpose of the identification of the child without audiovisual recording.

Article 10 – Limitation of deprivation of liberty

1. Member States shall ensure that deprivation of liberty of a child at any stage of the proceedings is limited to the shortest appropriate period of time. Due account shall be taken of the age and individual situation of the child, and of the particular circumstances of the case.
2. Member States shall ensure that deprivation of liberty, in particular detention, shall be imposed on children only as a measure of last resort. Member States shall ensure that any detention is based on a reasoned decision, subject to judicial review by a court. Such a decision shall also be subject to periodic review, at reasonable intervals of time, by a court, either *ex officio* or at the request of the child, of the child's lawyer, or of a judicial authority which is not a court. Without prejudice to judicial independence, Member States shall ensure that decisions to be taken pursuant to this paragraph are taken without undue delay.

Article 11 – Alternative measures

Member States shall ensure that, where possible, the competent authorities have recourse to measures alternative to detention (alternative measures).

Article 12 – Specific treatment in the case of deprivation of liberty

1. Member States shall ensure that children who are detained are held separately from adults, unless it is considered to be in the child's best interests not to do so.

2. Member States shall also ensure that children who are kept in police custody are held separately from adults, unless:
 - (a) it is considered to be in the child's best interests not to do so; or
 - (b) in exceptional circumstances, it is not possible in practice to do so, provided that children are held together with adults in a manner that is compatible with the child's best interests.
3. Without prejudice to paragraph 1, when a detained child reaches the age of 18, Member States shall provide for the possibility to continue to hold that person separately from other detained adults where warranted, taking into account the circumstances of the person concerned, provided that this is compatible with the best interests of children who are detained with that person.
4. Without prejudice to paragraph 1, and taking into account paragraph 3, children may be detained with young adults, unless this is contrary to the child's best interests.
5. When children are detained, Member States shall take appropriate measures to:
 - (a) ensure and preserve their health and their physical and mental development;
 - (b) ensure their right to education and training, including where the children have physical, sensory or learning disabilities;
 - (c) ensure the effective and regular exercise of their right to family life;
 - (d) ensure access to programmes that foster their development and their reintegration into society; and
 - (e) ensure respect for their freedom of religion or belief.

The measures taken pursuant to this paragraph shall be proportionate and appropriate to the duration of the detention.

Points (a) and (e) of the first subparagraph shall also apply to situations of deprivation of liberty other than detention. The measures taken shall be proportionate and appropriate to such situations of deprivation of liberty.

Points (b), (c), and (d) of the first subparagraph shall apply to situations of deprivation of liberty other than detention only to the extent that is appropriate and proportionate in the light of the nature and duration of such situations.

6. Member States shall endeavour to ensure that children who are deprived of liberty can meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements. This paragraph shall be without prejudice to the nomination or designation of another appropriate adult pursuant to Article 5 or 15.

Article 13 – Timely and diligent treatment of cases

1. Member States shall take all appropriate measures to ensure that criminal proceedings involving children are treated as a matter of urgency and with due diligence.
2. Member States shall take appropriate measures to ensure that children are always treated in a manner which protects their dignity and which is appropriate to their age, maturity and

level of understanding, and which takes into account any special needs, including any communication difficulties, that they may have.

Article 14 – Right to protection of privacy

1. Member States shall ensure that the privacy of children during criminal proceedings is protected.
2. To that end, Member States shall either provide that court hearings involving children are usually held in the absence of the public, or allow courts or judges to decide to hold such hearings in the absence of the public.
3. Member States shall take appropriate measures to ensure that the records referred to in Article 9 are not publicly disseminated.
4. Member States shall, while respecting freedom of expression and information, and freedom and pluralism of the media, encourage the media to take self-regulatory measures in order to achieve the objectives set out in this Article.

Article 15 – Right of the child to be accompanied by the holder of parental responsibility during the proceedings

1. Member States shall ensure that children have the right to be accompanied by the holder of parental responsibility during court hearings in which they are involved.
2. A child shall have the right to be accompanied by another appropriate adult who is nominated by the child and accepted as such by the competent authority where the presence of the holder of parental responsibility accompanying the child during court hearings:
 - (a) would be contrary to the child's best interests;
 - (b) is not possible because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown; or
 - (c) would, on the basis of objective and factual circumstances, substantially jeopardise the criminal proceedings.

Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate another person to accompany the child. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.

3. Where the circumstances which led to an application of point (a), (b) or (c) of paragraph 2 cease to exist, the child shall have the right to be accompanied by the holder of parental responsibility during any remaining court hearings.
4. In addition to the right provided for under paragraph 1, Member States shall ensure that children have the right to be accompanied by the holder of parental responsibility, or by another appropriate adult as referred to in paragraph 2, during stages of the proceedings other than court hearings at which the child is present where the competent authority considers that:

- (a) it is in the child's best interests to be accompanied by that person; and
- (b) the presence of that person will not prejudice the criminal proceedings.

Article 16 – Right of children to appear in person at, and participate in, their trial

1. Member States shall ensure that children have the right to be present at their trial and shall take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views.
2. Member States shall ensure that children who were not present at their trial have the right to a new trial or to another legal remedy, in accordance with, and under the conditions set out in, Directive (EU) 2016/343.

Article 17 – European arrest warrant proceedings

Member States shall ensure that the rights referred to in Articles 4, 5, 6 and 8, Articles 10 to 15 and Article 18 apply *mutatis mutandis*, in respect of children who are requested persons, upon their arrest pursuant to European arrest warrant proceedings in the executing Member State.

[Case C-367/16 – Piotrowski](#): See explanation at Article 1.

Article 18 – Right to legal aid

Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer pursuant to Article 6.

Article 19 – Remedies

Member States shall ensure that children who are suspects or accused persons in criminal proceedings and children who are requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Article 23 – Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law, in particular the UN Convention on the Rights of the Child, or the law of any Member State which provides a higher level of protection.

Directive 2016/1919 - legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Article 1 – Subject Matter

1. This Directive lays down common minimum rules concerning the right to legal aid for:
 - (a) suspects and accused persons in criminal proceedings; and
 - (b) persons who are the subject of European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (requested persons).
2. This Directive complements Directives 2013/48/EU and (EU) 2016/800. Nothing in this Directive shall be interpreted as limiting the rights provided for in those Directives.

Article 2 – Scope

1. This Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:
 - (a) deprived of liberty;
 - (b) required to be assisted by a lawyer in accordance with Union or national law; or
 - (c) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.
2. This Directive also applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
4. Without prejudice to the right to a fair trial, in respect of minor offences:
 - (a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
 - (b) where deprivation of liberty cannot be imposed as a sanction;

this Directive applies only to the proceedings before a court having jurisdiction in criminal matters.

In any event, this Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.

Article 3 – Definition

For the purposes of this Directive, ‘legal aid’ means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.

Article 4 – Legal aid in criminal proceedings

1. Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.
2. Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.
3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.
4. Where a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:
 - (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
 - (b) during detention.
5. Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence gathering acts referred to in point (c) of Article 2(1) are carried out.
6. Legal aid shall be granted only for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.

Article 5 – Legal aid in European arrest warrant proceedings

1. The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.
2. The issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such

proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice.

3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply *mutatis mutandis*.

Article 6 – Decisions regarding the granting of legal aid

1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.
2. Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Article 7 – Quality of legal aid services and training

1. Member States shall take necessary measures, including with regard to funding, to ensure that:
 - (a) there is an effective legal aid system that is of an adequate quality; and
 - (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.
2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.
3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.
4. Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.

Article 8 – Remedies

Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Article 9 – Vulnerable persons

Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

Council Framework Decision 2002/584/JHA – Framework Decision on the European Arrest Warrant (“FDEAW”)

NB: This section is limited to a selection of substantive provisions that have been interpreted by the CJEU.

Article 1 – Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a **judicial decision**, issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

***C-477/16 PPU – Kovalkovas:** An arrest warrant issued by the Ministry of Justice cannot be a “judicial decision”.*

***Note: 453/16PPU, Özçelik (on Art 8(1)(c)):** Since the public prosecutor’s office constitutes an authority responsible for administering criminal justice, a confirmation by the public prosecutor’s office of a police-issued national arrest warrant constitutes a ‘judicial decision’ under Article 8(1)(c).*

***C-452/16 PPU, Poltorak:** An arrest warrant issued by a police service cannot be a “judicial decision”.*

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

***C-268/17 – AY (Arrest Warrant – Witness):** Must adopt decision on **any** EAW issued, even when, a ruling was already made on previous EAW for the same person and the same acts.*

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

***C-404/15 and C-659/15 – Aranyosi and Căldăraru:** Execution of EAW can be refused based on **two step test**, whether there is a “**real risk of inhuman or degrading treatment**”.*

- (1) The executing judicial authority must assess based on objective reliable information **whether there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention.**
- (2) If a real risk exists according to the first criteria, the executing judicial

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| <p>authority must make a further specific assessment of whether the individual will be exposed to that risk because of the conditions for his detention envisaged. In making the assessment, the executing judicial authority must request of the issuing judicial authority all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained.</p> |
| <p><u>C-220/18 PPU, Generalstaatsanwaltschaft (Conditions of detention in Hungary)</u>: On step two of Aranyosi test national court must assess risk based only on prisons that it is actually intended the individual be detained, not based on all the prisons that the individual might be held in.</p> |
| <p><u>C-216/18 PPU, LM</u>: Execution of EAW can be refused based on two step test, whether there is “real risk of breach of the fundamental right to a fair trial”.</p> <ol style="list-style-type: none"> (1) The executing judicial authority must assess based on objective, reliable information whether there is a real risk, connected with a lack of independence of the courts in view of systemic or generalised deficiencies, of the fundamental right to a fair trial being breached. (2) If a real risk exists according to the first criteria, the executing judicial authority must make a further specific assessment of whether, in the particular circumstances of the case, the requested person will run the risk of a breach of the essence of the fundamental right to a fair trial. In making the assessment, the executing judicial authority must request of the issuing judicial authority all necessary supplementary information on the risk to the individual. |
| <p><u>Case C-327/18 PPU, RO</u>: Execution of EAW to UK cannot be refused solely on the grounds that UK triggered Art 50. The executing judicial authority must still examine the specific risk that the individual will be deprived of his fundamental rights.</p> <p>The executing judicial authority must presume that post-Brexit UK will not deprive the rights derived from the FDEAW, as UK has analogous rights in national law, and is a signatory to the ECHR and other conventions guaranteeing analogous rights. The national court can refuse to execute the EAW only if there is “concrete evidence to the contrary”.</p> |
| <p><u>Case-C128/18 Doronbatu</u>: Article 1(3), read in conjunction with Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman</p> |

or degrading treatment within the meaning of Article 4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell.

The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions.

A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

Article 2 – Scope of the European Arrest Warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.
2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework

Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation, - terrorism, - trafficking in human beings, - sexual exploitation of children and child pornography, - illicit trafficking in narcotic drugs and psychotropic substances, - illicit trafficking in weapons, munitions and explosives, - corruption, - fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, - laundering of the proceeds of crime, - counterfeiting currency, including of the euro, - computer-related crime, - environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, - facilitation of unauthorised entry and residence, - murder, grievous bodily injury, - illicit trade in human organs and tissue, - kidnapping, illegal restraint and hostage-taking, - racism and xenophobia, - organised or armed robbery, - illicit trafficking in cultural goods, including antiques and works of art, - swindling, - racketeering and extortion, - counterfeiting and piracy of products, - forgery of administrative documents and trafficking therein, - forgery of means of payment, - illicit trafficking in hormonal substances and other growth promoters, - illicit trafficking in nuclear or radioactive materials, - trafficking in stolen vehicles, - rape, - arson, - crimes within the jurisdiction of the International Criminal Court, - unlawful seizure of aircraft/ships, - sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

[Case C-463/15 PPU – A:](#) See explanation under Article 4(1).

Article 3 – Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

C-261/09 – Mantello: The concept of the ‘**same acts**’ also appears in Article 54 of the CISA and Art 3(2) follows the same interpretation. It refers **only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together**, irrespective of the legal classification given to them or the legal interest protected.

A person is considered ‘**finally judged**’ for the same acts where, under the law of the Member State in which the judgment was delivered, **further prosecution is definitively barred, or judicial authorities have adopted a decision by which the accused is finally acquitted in respect of the alleged acts.**

Therefore, where the issuing authority expressly states that the earlier judgment delivered under its legal system does not constitute a final judgment and does not preclude the criminal proceedings for the acts described in the EAW, the executing judicial authority should not apply Art 3(2).

C-268/17 – AY (Arrest Warrant – Witness): Requested person is not “finally judged” where he was only a witness in a closed investigation and where criminal proceedings were not instituted against him.

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

C-367/16 – Piotrowsi: not a ground to refuse surrender of a minor who has reached minimum age of criminal responsibility for his acts under the law of executing State.

Article 4 – Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

Case C-463/15 PPU – A: The exception under Article 4(1) does **not** allow the executing judicial authority to impose **an additional requirement for surrender**, in addition to the double criminality test under Article 2(4), of

requiring that the offence be punishable, in the executing Member State, by a maximum of at least twelve months.

*(Note: Art 2(1) only requires that the offence be punishable in the **issuing** Member State by at least 12 months)*

Case C-377/18: *Article 4(1) does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.*

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

C-268/17 – AY (Arrest Warrant – Witness): *Requested person is not “finally judged” where he was only a witness in a closed investigation and where criminal proceedings were not instituted against him.*

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

C-467/04 – Gasparini and others: *In order the Article 4(4) ground of refusal to be exercised, **a judgment** whose basis is that a prosecution is time-barred **does not have to exist.***

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

C-66/08 – Kozłowski: Article 4(6) has the objective of enabling the executing judicial authority to give weight to the individual's chances of reintegrating into society.

A requested person is '**resident**' in the executing Member State when he has established his actual place of residence there.

A requested person is '**staying**' where, following **a stable period of presence**, he has acquired **certain connections with the State of a similar degree to those resulting from residence**.

To determine whether a requested person is '**staying**' in the executing State, the executing judicial authority should make an **overall assessment of various objective factors characterising the situation of that person**, including, in particular, the length, nature and conditions of his presence, and the family and economic connections with the State.

C-123/08 – Wolzenburg: The Member State of execution cannot, in addition to a condition as to the duration of residence in that State (see Directive 2004/38), make Article 4(6) subject to supplementary administrative requirements, such as possession of a residence permit of **indefinite** duration.

(Note: Under Directive 2004/38, Union citizens have a right of permanent residence after having resided legally for a continuous period of 5 years in the host state, and are not required to hold a residence permit of indefinite duration.)

C-306/09 – I.B.: Underscores the goal of Article 4(6) in enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society. Otherwise, reference is principally concerned with the now defunct Article 5 (deleted by 2009/299/JHA).

C-42/11 – Lopes da Silva Jorge: A Member State may limit the situations in which an executing judicial authority may refuse to surrender a person under Article 4(6), **but it cannot automatically and absolutely exclude other Member States nationals from its scope irrespective of their connections with the State**.

C-579/15 – Popławski: National legislation which **obliges** judicial authorities

*to refuse to execute an EAW in the event that the requested person resides in that Member State, **without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence**, is not compatible with Article 4(6).*

*Moreover, Article 4(6) does **not** authorise the refusal to execute an EAW on the sole ground that that Member State **intends to prosecute that person in relation to the same acts**.*

Case C-514/17 - Ministère public v Marin-Simion Sut: *Where a person who is the subject of a European arrest warrant issued for the purposes of enforcing a custodial sentence resides in the executing Member State and has family, social and working ties in that Member State, the executing judicial authority may, for reasons related to the social rehabilitation of that person, refuse to execute that warrant, despite the fact that the offence which provides the basis for that warrant is, under that national law of the executing Member State, punishable by fine only, provided that, in accordance with its national law, that fact does not prevent the custodial sentence imposed on the person requested from actually being enforced in that Member State, which is for the referring court to ascertain.*

Case C-573/17: *The principle of primacy of EU law must be interpreted as meaning that it does not require a national court to disapply a provision of national law which is incompatible with the provisions of a framework decision, the legal effects of which are preserved in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties, since those provisions do not have direct effect. The authorities of the Member States, including the courts, are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned.*

7. Where the European arrest warrant relates to offences which:

- (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
- (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 4a – Decisions rendered following a trial at which the person did not appear in person (as introduced in amendment to FDEAW - 2009/299/JHA)

1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order **if the person did not appear in person at the trial resulting in the decision, unless the European arrest**

warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

Case C-396/11, Radu: The exceptions in Article 4a do **not** apply to an EAW issued for the purposes of **conducting a criminal prosecution** without the requested person having been heard by the issuing judicial authorities.

Case C-399/11, Melloni: Article 4(1) provides an **exhaustive** list [i.e. (a)-(d)] of the circumstances in which the execution of an EAW to enforce an in absentia decision must be regarded as not infringing the rights of the defence. The executing judicial authority (cannot therefore make execution conditional on the in absentia conviction being open to review (as required by the Spanish Constitution). Moreover, Article 53 of the Charter does not allow MS to impose their own (higher) standard of procedural fundamental rights over EU law, such as the FDEAW, where the EU law provides an **exhaustive** and uniform standard of protection of fundamental rights.

C-270/17 PPU, Tupikas: The concept of a “**trial resulting in the decision**” must be interpreted as relating **only to the instance at which a decision finally rules on the guilt** of the person concerned and imposes a penalty, **following a re-examination, in fact and in law, of the merits of the case.**

C-271/17 PPU, Zdziasek: A trial which hands down a cumulative sentence consolidating multiple previous sentences, in which the court has “a margin of discretion in the determination of the level of the sentence”, falls within the concept of a “**trial resulting in the decision**”.

Case C-571/17 PPU, Ardic: the concept of “**trial resulting in the decision**” does not include subsequent proceedings in which the suspension of a sentence is based on a violation of probation conditions, provided that the nature or the level of the initial sentence is not changed.

(a) in due time:

- (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and

C-108/16 PPU – Dworzecki: The conditions set out in Article 4a(1)(a)(i) are **not** satisfied where **the summons was handed over to a third party** who undertook to pass it on to the person concerned, in the absence of evidence that the person concerned ‘**actually**’ received the information relating to the date and place of his trial.

- (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or
 - (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or
 - (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:
 - (i) expressly stated that he or she does not contest the decision; or
 - (ii) did not request a retrial or appeal within the applicable time frame; or
 - (d) was not personally served with the decision but:
 - (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and
 - (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.
2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.
 3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.

Article 6 – Determination of the competent judicial authorities

1. The **issuing judicial authority** shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

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C-489/19 “NJ” (Austria)

In the present case, the decision to issue a national arrest warrant and that to issue a European arrest warrant must, respectively, be endorsed by a court before their transmission. Thus, in the absence of endorsement of the decisions of the public prosecutor’s office, arrest warrants do not produce legal effects and cannot be transmitted.

The court responsible for the endorsement of a European arrest warrant is required to take into account, in particular, the effects of the surrender procedure and the transfer of the person concerned residing in a Member State other than Austria on that person’s social and family relationships. However, in that it systematically takes place ex officio before the arrest warrant produces legal effects and can be transmitted, such a review is distinct from a right to a remedy.

Joined Cases “OG” C-508/18 and “PI” C-82/19 PPU (Germany):

*A public prosecutor who is subject to a possible direction by the Ministry of Justice is not sufficiently independent of the executive to be considered a ‘**judicial authority**’.*

The issuing authority must show that there are statutory rules and an institutional framework in place capable of guaranteeing that it is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction from the executive on a specific case.

Case “PF” C-509/18 (Lithuania):

*A **public prosecutor’s** office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as **participating in the administration of justice** of the relevant Member State.*

*The **issuing judicial authority** must be in a position to give assurances to the executing judicial authority that, as regards the **guarantees provided by the legal order** of the issuing Member State, it acts **independently** in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant.*

*In addition, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision **must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.***

Case C-625/19 PPU (Luxembourg):

*Where the EAW is issued by a **public prosecutor**, the requirement of effective judicial protection will be fulfilled if in accordance with the national law a court verifies if the conditions for issuing the European Arrest Warrant, including the proportionality, are fulfilled.*

Case C-627/19 PPU (the Netherlands):

*To be considered an ‘**issuing judicial authority**’ the authority in question must fulfil two criteria. Firstly, it must participate in the administration of justice and secondly, in carrying out obligations closely connected with issuing the European arrest warrant, it must be able to act independently.*

*Where the European arrest warrant is issued by a **public prosecutor** to enforce a custodial sentence the requirement of effective judicial protection is fulfilled though the judgment in the criminal case which is sought to be enforced. Therefore in such case national legal framework even if it does not provide for a review of the decision to issue European arrest warrant before a court, is compatible with the requirement of effective judicial protection.*

Joined cases C-566/19 and C-626/19 PPU (Luxembourg and the Netherlands):

*The understanding of ‘**judicial authority**’ is not limited to judges or courts of a Member State only, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive.*

*The term “**issuing judicial authority**” within the meaning of Article 6(1) includes public prosecutors of the Member state, who are competent to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, and who are lead and controlled by their direct superiors, if their status gives them guarantees of independence (including from the executive) in functions connected closely with issuing of particular European arrest warrant.*

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.
3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 8 - Content and form of the European arrest warrant

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:
 - (a) the identity and nationality of the requested person;
 - (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
 - (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

***Case C-241/15 – Bob-Dogi:** The term ‘arrest warrant’ must be understood as referring to a national arrest warrant that is **distinct from the European arrest warrant**.*

The executing judicial authority must refuse to give effect to a European

arrest warrant, based on the existence of an ‘arrest warrant’, which does not contain any reference to the existence of a national arrest warrant.

- (d) the nature and legal classification of the offence, particularly in respect of Article 2;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

***Case C-551/18 PPU – IK:** Article 8(1)(f) must be interpreted as meaning that failure to indicate, in the European arrest warrant pursuant to which the person concerned has been surrendered, an additional sentence of conditional release which was imposed on that person for the same offence in the same judicial decision as that relating to the main custodial sentence does not, on the facts of the case in the main proceedings, preclude the enforcement of that additional sentence, on the expiry of the main sentence after an express decision to that effect is taken by the national court with jurisdiction for the enforcement of sentences, from resulting in deprivation of liberty.*

- (g) if possible, other consequences of the offence.
2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

Article 12 - Keeping the person in detention

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

***Case C-237/15 PPU – Lanigan:** Article 12, in light of Article 6 of the Charter, permits the holding of a person in custody, even if the total duration exceeds the Article 17 time-limits, provided that that duration is not excessive.*

If the executing judicial authority decides to end the detention, it is required to attach to the provisional release measures necessary to prevent absconding as long as no final decision on the execution of the EAW has been taken.

[Case C-492/18 PPU - TC](#): The FDEAW must be interpreted as precluding a national provision which lays down a general and unconditional obligation to release a requested person arrested pursuant to a European arrest warrant as soon as a period of 90 days from that person's arrest has elapsed, where there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures.

Article 6 of the Charter must be interpreted as precluding national case-law which allows the requested person to be kept in detention beyond that 90-day period, on the basis of an interpretation of that national provision according to which that period is suspended when the executing judicial authority decides to refer a question to the Court of Justice of the European Union for a preliminary ruling, or to await the reply to a request for a preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the ground that there could be, in the issuing Member State, a real risk of inhuman or degrading detention conditions, in so far as that case-law does not ensure that that national provision is interpreted in conformity with Framework Decision 2002/584 and entails variations that could result in different periods of continued detention.