

**ROADMAP PRACTITIONER TOOLS:**

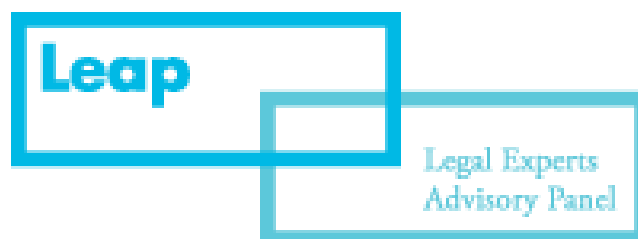
## **RIGHT TO INFORMATION DIRECTIVE**

**THE LETTER OF RIGHTS**

**RIGHT TO INFORMATION ON THE ACCUSATION**

**RIGHT OF ACCESS TO THE CASE FILE**

**WITNESSES & OTHER NON-SUSPECTS**



## About Fair Trials

Fair Trials Europe (“Fair Trials”) is a public utility foundation based in Brussels which works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Working with the Legal Experts Advisory Panel (‘LEAP’) – a network of over 140 criminal justice and human rights experts including defence practitioners, NGOs and academics from 28 EU Member States – Fair Trials has contributed to the negotiations surrounding the adoption of the first three directives under the Roadmap for strengthening procedural rights.

LEAP, supported by Fair Trials, is now working to ensure effective implementation of the Directives, further to its February 2015 strategy *Towards an EU Defence Rights Movement*, including through practitioner training, litigation before the national courts, awareness-raising.

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**C L I F F O R D  
C H A N C E**

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# INTRODUCTION

## A. INTRODUCTION

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### 1. Background & other Fair Trials / LEAP training materials

In the last decade, the EU Member States have been cooperating closely on cross-border issues, principally through the European Arrest Warrant. Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR').

However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Roadmap'.<sup>1</sup>

Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives binding national authorities in all cases, including those which have no cross-border element. These cover the right to interpretation and translation,<sup>2</sup> the right to information,<sup>3</sup> and the right of access to lawyer<sup>4</sup> (collectively, the 'Directives').

The measure discussed in this toolkit is Directive 2012/13/EU on the Right to information in criminal proceedings (the 'Directive'), which should have been transposed into domestic law by 2 June 2014. The measure governs the suspect's right to be informed about his procedural rights, to information about the charges he is being accused of and to access to the case file and materials in the case. This toolkit should be read together with the online training video produced by Fair Trials.<sup>5</sup>

The issue of the right to information, particularly in relation to the manner and timing of the notification of procedural rights to suspects, has received less attention in case-law and practitioner training than the right of access to a lawyer, and the Directive clarifies these important protections.

In order for the Directive to achieve its purpose, the Directive must be invoked by lawyers in individual cases to ensure courts uphold its standards. This Toolkit is designed to give you practical advice as to how to use the Directive in practice. It should be read together with the 'Using EU Law in Criminal Practice' Toolkit and the online training video on the Court of Justice of the EU.<sup>6</sup>

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

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

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

<sup>4</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ([OJ 2013 L 290, p. 1](#)).

<sup>5</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

<sup>6</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/>.

## 2. Scope of this Toolkit

This Toolkit is not exhaustive. It covers certain issues which have been highlighted to us by members of the LEAP network as posing a particular challenge to the conduct of criminal defence. These include: (I) Notification of procedural rights; (II) Notification of Accusations; (III) Access to the case file at specific stages; and (IV) the application of the Directive to witnesses and other non-suspects.

Many other issues may arise. For instance, at the time of writing, a reference<sup>7</sup> is pending before the CJEU asking whether the Directive precludes a rule of national law requiring a person to designate a person for service of documents when an appeal deadline runs from such service. There are myriad other potential questions so we encourage you to treat this Toolkit as a starting point only.

## 3. How to use this Toolkit

### a. How the content is organised

Much of the content of the Directive is derived from the case-law of the European Court of Human Rights ('ECtHR'), and there is no doubt that one of the major functions of the Directive is to articulate those standards as codified norms. Accordingly, for each thematic area the Toolkit reviews the ECtHR case-law to help you understand the issues that the Directive articulates.

We then consider the provisions of the Directive itself. Most provisions of the Directives leave considerable room for interpretation, and at the time of writing<sup>8</sup> there are not yet any rulings of the Court of Justice of the EU ('CJEU') on any of the Directives. Accordingly, we try to make clear – by the use of bullet points in the body of the text – if we are making any assumptions about their meaning.

Based upon our understanding of the Directive, we then make concrete suggestions about how to use it in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court). In order to distinguish clearly between these different levels of analysis:

*Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border, to represent their nature as an irreducible minimum. They are presented in italics.*

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border, to represent their nature as complementary, possibly more extensive protection.

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

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<sup>7</sup> Request for a preliminary ruling from the Amtsgericht Laufen (Germany) lodged on 30 April 2014 — Criminal proceedings against Gavril Covaci ([OJ 2014 C 253, p. 22](#)).

<sup>8</sup> This Toolkit is published in March 2015.

## b. The ‘Using EU Law in Practice’ Toolkit

This Toolkit should be used alongside the ‘Using EU Law in Practice’ Toolkit which contains explanations of the assumptions made about the legal effects of the Directives. It also contains a general introduction to the concept of ‘invoking the Directive’ through reliance upon remedial mechanisms such as invalidity of procedural acts, exclusion / disregarding of evidence and so on.

When make a ‘Fair Trials’ advice’ suggestion in a triple-bordered blue-shaded box, we are relying upon this approach to the Directives in general so you are encouraged to cross-refer to the ‘Using EU Law in Practice’ Toolkit in that regard. There are, however, occasionally specific points to make about relying on this particular Directive, and these are covered in this Toolkit.

## c. A word of caution

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

The Toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in criminal procedure in the different EU Member States (though it does use occasional national-level examples to put matters in context). In addition, it cannot take account of existing professional traditions and deontological rules established by national or regional bars. So you will need to adapt our suggestions to work within your own local context.

## d. Keep in touch

With those qualifications, we encourage you to follow the steps in this Toolkit, try out the arguments we propose and to let us know how you get on by contacting us via the contacts in the preface. We expect there to be a learning process in the first year or two following the implementation deadlines of the Directives, and will be keen to hear from you about your experience and share lessons.

## B. BEFORE THE DIRECTIVE: OVERVIEW OF ECHR PRINCIPLES

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The Directive covers certain areas of defence rights which were – to some extent – covered by the case-law of the ECtHR. By way of introduction, we would draw your attention to the following key strands of case-law under Articles 5 and 6 ECtHR. Specific cases within each group are examined within the body of the Toolkit but we encourage you to conduct your own research too.

**Article 6 case-law on being ‘charged’:** *The cases confirm that a person becomes entitled to guarantees under Article 6 at the point when they are ‘charged’, which is interpreted as meaning the point at which they are made aware they are suspected or when the interests of the person are substantially affected, which can mean when there is evidence that they have committed an offence.*<sup>9</sup>

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<sup>9</sup> Case of [Bandeltov v. Ukraine](#), App. no. 23180/06 (Judgment of 31 October 2013), paragraph 56.

**Article 6 case-law on notification of rights:** *The principles established in these cases<sup>10</sup> point to the need for clear notification of the (separate) rights to silence and to legal assistance at the point of arrest,<sup>11</sup> in such a way as to enable the suspect to understand them and exercise their rights. There is suggestion that oral notification is insufficient in some cases, and the case-law points to a need to take account of the specific characteristics of the individual (e.g. youth).<sup>12</sup>*

**Article 5/6 case-law on notification of accusations:** *The cases suggest that the suspect must be aware of the accusations at the point of questioning at the pre-trial stage.<sup>13</sup> A separate strand of case-law concerns the requalification of offences at different stages of proceedings, e.g. on appeal; the principles require that the defence be notified of changes in qualification in such a way as to prepare a defence effectively; changes in qualification, even if operated by the court without inviting argument, are acceptable provided such requalification could be anticipated.<sup>14</sup>*

**Article 6 case-law on access to the case file:** *At the trial stage, the case-law usually concerns the withholding of information on public order grounds, and the case-law envisages a balancing of the interests at stake.<sup>15</sup> At the pre-trial stage, there are a number of cases concerning the alleged prejudice caused to the defence by practical restrictions on access to the case file prior to trial, inhibiting trial preparation.<sup>16</sup> At the stage of initial police interrogations, there is an open question as to whether Article 6 requires a certain amount of case material to be provided; one judgment suggests it might<sup>17</sup> but, in general, this area is not sufficiently explored.*

**Article 5 case-law on access to the case file:** *Case-law relating to Article 5(4) ECHR applies the ‘equality of arms’ principle drawn from Article 6 fair trial requirements to pre-trial detention decision-making, due to the serious nature of the decision at issue. Not all documents have to be disclosed, but those which are needed in order to challenge the lawfulness of detention must be provided.<sup>18</sup>*

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<sup>10</sup> [Zaichenko v. Russia](#), App. no. 39660/02 (Judgment of 18 February 2010), paragraph 38; [Pishchalnikov v. Russia](#), App. no. 7025/04 (Judgment of 24 September 2009), paragraph 71. [Stojkovic v. France and Belgium](#), App. no. 25303/08 (Judgment of 27 October 2011) (French only), paragraph 54; [Panovits v. Cyprus](#), App. no. 4268/04 (Judgment of 11 December 2008), paragraph 65.

<sup>11</sup> Case of [Salduz v. Turkey](#), App. no. 36391/02 (Judgment of 27 November 2008), paragraphs 50-55.

<sup>12</sup> [Panovits v. Cyprus](#), cited above note 10, paragraphs 67, 73.

<sup>13</sup> Case of [Mattoccia v. Italy](#), App. no. 23969/94 (Judgment of 25 July 2000), paragraphs 63-64.

<sup>14</sup> Case of [I.H. and others v. Austria](#), App. no. 42780/98 (Judgment of 20 April 2006), paragraphs 36-38.

<sup>15</sup> Case of [Jasper v. The United Kingdom](#), App. no. 27052/95 (Judgment of 16 February 2000), paragraph 52.

<sup>16</sup> Case of [Iqin v. Ukraine](#), App. no. 39908/05 (Judgment of 12 January 2012), paragraph 60; Case of [Vyerentsov v. Ukraine](#), App. no. 20372/11, (Judgment of 11 April 2013), paragraphs 73-76; Case of [Öcalan v. Turkey](#), App. no. 46221/99, (Judgment of 12 May 2005), paragraph 142.

<sup>17</sup> Case of [Sapan v. Turkey](#), App. no. 17252/09 (Judgment of 20 September 2011), paragraph 21

<sup>18</sup> Case of [Lamy v. Belgium](#), App. no. 10444/83, (Judgment of 30 March 1989), paragraph 29; Case of [Schops v. Germany](#), App. no. 25116/94 (Judgment of 13 February 2001), paragraph 44.



## C. OVERVIEW OF THE DIRECTIVE

### 1. At a glance

Provision	What it covers	Particular aspects
Article 1	Subject matter	<ul style="list-style-type: none"> <li>Lays down rules concerning the right to information of suspects and accused persons in relation to their rights in criminal proceedings and to the accusation against them.</li> <li>Applies also to European Arrest Warrant cases.</li> </ul>
Article 2	Scope	<ul style="list-style-type: none"> <li>Applies from the time persons are 'made aware by the competent authorities ... that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings'.</li> <li>Where minor offences sanctioned administratively and only the appeal is before a court, the Directive applies only to proceedings before the court.</li> </ul>
Article 3	Right to information about rights	<ul style="list-style-type: none"> <li>Right for suspects or accused persons to be provided promptly with information relating to procedural rights, including: <ul style="list-style-type: none"> <li>Access to a lawyer;</li> <li>Entitlement to free legal advice and the conditions for obtaining such legal advice;</li> <li>To be informed of the accusation;</li> <li>Interpretation and translation; and</li> <li>Remain silent.</li> </ul> </li> <li>The information shall be given orally or in writing, in simple and accessible language, taking into account the needs of the suspects/persons.</li> </ul>
Article 4	Letter of Rights on arrest	<ul style="list-style-type: none"> <li>Entitles suspects or accused persons, who are arrested or detained, to a written Letter of Rights. They should be able to read the letter and keep it throughout the time they are detained.</li> <li>The Letter of Rights shall also contain information on the following rights: <ul style="list-style-type: none"> <li>Access of the materials of the case;</li> <li>To have consular authorities and one person informed;</li> <li>Access to urgent medical assistance; and</li> <li>The maximum number of hours they may be deprived of</li> </ul> </li> </ul>

		<p>liberty before being brought before a judicial authority.</p> <ul style="list-style-type: none"> <li>• Information about challenging the lawfulness of an arrest; obtaining a review of the detention; or making a request for provisional release.</li> <li>• Drafted in simple and accessible language.</li> <li>• Suspect or accused receive the letter written in a language that they understand.</li> <li>• Model example provided in Annex 1.</li> </ul>
Article 5	Letter of Rights in European Arrest Warrant Proceedings	<ul style="list-style-type: none"> <li>• Persons who are arrested for the purpose of the execution of a European Arrest Warrant shall be promptly provided with a Letter of Rights to safeguard the fairness of proceedings and the effective exercise of the rights of the defence.</li> <li>• Model example provided in Annex 2.</li> </ul>
Article 6	Right to information about the accusation	<ul style="list-style-type: none"> <li>• Entitles suspected or accused persons to information about the criminal act that they are suspected or accused of having committed.</li> <li>• Persons who are arrested or detained are to be informed of the reasons for their arrest or detention.</li> <li>• Ensures detailed information is provided, at the latest in court, on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused.</li> <li>• Any changes in the information given are to be promptly informed to the suspect or accused person.</li> </ul>
Article 7	Right of access to the materials of the case	<ul style="list-style-type: none"> <li>• Documents which are essential to challenging effectively the lawfulness of the arrest or detention should be made available to arrested persons or their lawyers.</li> <li>• Access must be granted at least to all material evidence in possession of the competent authorities, to those persons or their lawyers in order to safeguard the fairness of the proceedings.</li> <li>• Access to the materials 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 court.</li> <li>• Without prejudice to the requirement relating to documents essential to challenging detention, access may be refused if it may lead to a serious threat to the life or the fundamental rights of another person or to safeguard public interest.</li> </ul>

		<ul style="list-style-type: none"> <li>• Refusal of access to certain materials must be taken by a judicial authority or is at least subject to a judicial review.</li> <li>• Access shall be free of charge.</li> </ul>
Article 8	Verification and remedies	<ul style="list-style-type: none"> <li>• When information is provided to suspects or accused persons, it must be noted using a recording procedure.</li> <li>• Right to challenge a possible failure or refusal of the competent authorities to provide information.</li> </ul>
Article 9	Training	<ul style="list-style-type: none"> <li>• Requirement to provide for training of ‘judges, prosecutors, police and judicial staff’ on the right to information.</li> </ul>
Article 10	Non-regression	<ul style="list-style-type: none"> <li>• Directive does not limit safeguards arising under international or national law offering higher level of protection.</li> </ul>

## 2. Purpose and objectives

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

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

...

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

These recitals capture the general tone of the Roadmap in building upon and consolidating rights arising from the ECHR as interpreted by the ECtHR. This is why, in this Toolkit, we provide you with relevant principles of ECHR case-law to show where the Directive is coming from. However, the Directive is clearer, easier to use, and it may also provide more robust protection than the ECtHR so we encourage you to base your arguments on the Directive itself as a rule. The other recitals then relate to, and in some cases elaborate upon, the specific rights in the Directive which are covered in this Toolkit.

## D. PREPARATORY WORK FOR USING THE DIRECTIVE

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Before considering the practical situations in which you might want to rely on the Directive, it is advisable for you to do some background work to ensure you have the right legal and other materials in mind when approaching questions under the Directive.

### 1. Examine national law and practice in light of the Directive

The aspects of criminal procedure relevant to this Directive may be second nature to you. However, it is worth taking a step back and examining the legislative and practical picture again in light of the Directive. There may have been new amendments to national legislation and/or policy made recently to implement the Directive, and it will be helpful to look at the relevant provisions from the perspective of the Directive's requirements as this will help you form an initial view as to where issues of compliance may arise.

Use any systems available in your national system for identifying the relevant provisions. From the EU perspective, there is a systematic (but imperfect) way to identify the relevant legislation through the 'Eur-Lex' database which stores or links to all EU legislation and case-law, and increasingly national law and case-law too. Here is a brief indication of how to use this system to find legislation considered by the government of your Member State to ensure compliance with the Directive:

- ➔ Identify the relevant national legislation
  - Go to <http://eur-lex.europa.eu> and choose your language;
  - In the section 'search by document reference' (or the equivalent in your language) type '2012' in the 'Year' field and '13' in the 'Number' field, and click the 'Directive' box (searching for Directive 2012/13/EU);
  - This will return a link with the full title of the Directive. Click on this;
  - In the display, you will see the text of the directive and a table with links to several language versions. Above this, there are tabs, one of which is called 'Linked documents' (or the equivalent in your language). Click on this;
  - Further down the page you will see an option saying 'Display the national implementing measures: NIM', a link to the implementing laws of each country. Click on this;
  - Scroll through the list of results until you see the name of your Member State appear as the 'author', with the title of the legislation in question. Bear in mind though that you may need to do further research through local systems, as this system may not capture everything that is relevant.

We suggest that you review your national legislation, bearing in mind your understanding of how it operates in practice, to establish how the Directive is being applied on the ground in your jurisdiction. The key questions, we would suggest, are these:

- ➔ Examine national law and procedure in light of the Directive
  - Notification of rights***
    - How are rights notified to persons suspected or accused?
    - Is the same process used for arrested and not arrested persons?

- For arrested persons, when if at all do they receive a written notification of their rights? Is this a record of an oral notification, or a separate document? Is this letter provided before questioning and is the suspect able to keep it? Is the drafting easily comprehensible? Are translations available for non-nationals?

#### ***Notification of accusations***

- What information is received by suspected persons upon arrest? What form does this notification take?
- What detail of the suspicion is provided at the point of arrest regarding (i) the acts which the person is suspected of having committed; and (ii) the legal classification given to those acts? Think about what is required under law, and what is actually supplied in practice.

#### ***Access to the case file***

- Are supplementary materials provided with the accusation at the point of questioning? Who makes this decision? Is this judicially controlled?
- Are materials provided during the investigative phase prior to the trial itself? What restrictions apply? Who makes the decision? Is this judicially controlled?
- Are there specific provisions governing the issue of access to documents in the context of pre-trial detention / arrest decisions?

## **2. Speak to colleagues / bar associations**

It seems likely that the Directive, and possibly national implementing measures, will not immediately become known to all concerned. Yet, if more lawyers are aware of the measures and seek to rely on them, police and courts will notice recurrent arguments. This will make the issue harder to ignore and enhance the credibility of arguments based on the Directive. We suggest:

#### **➔ Spread the word:**

- Enquire with local / national Bar Associations to see if they have any existing intelligence, resources or initiatives relating to these issues. If not, suggest it.
- Circulate this Toolkit among legal networks and through Bar Associations.

The discussion surrounding the Directives and how to use them is new and a key part of the implementation strategy developed by LEAP. In that context, LEAP Advisory Board member for Portugal, Vania Costa Ramos, has written about using another of the Directives in Portuguese criminal practice and we would encourage you to read the English translation we have made available.<sup>19</sup> If you have written something which you think could help colleagues in other EU Member States, please contact us.

<sup>19</sup> Vania Costa Ramos, 'The use of European law in criminal practice', English translation provided by Fair Trials, available at <http://www.fairtrials.org/publications/article-the-use-of-european-law-in-criminal-proceedings/>.

# I – NOTIFICATION OF RIGHTS TO SUSPECTS

## A. THE ISSUE

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

The Directive responds to the problem of ineffective notification of rights. The Commission stated in relation to this Directive that, in many of the 8 million criminal proceedings in the EU every year, suspects are only informed about their defence rights orally, in a technical and incomprehensible language, or not at all.<sup>20</sup>

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

- Written notifications of procedural rights given to suspects are often drafted in complex legal terminology (sometimes simply reproducing provisions of the criminal procedure code) which are difficult to understand for many suspects;
- The right to silence is often notified in terms which make its exercise unattractive. The right may be expressed as the right to ‘refuse to answer questions’ and the letter (as the Austrian one did as of November 2014) may draw attention to possible adverse consequences such as increased possibility of pre-trial detention or the missing of an opportunity to clarify one’s innocence;
- Rights are notified only when a person is formally placed under suspicion / arrest / investigation; in some cases, persons questioned as witnesses are in fact suspected but are not informed of their rights and may provide answers which influence the course of the proceedings.
- The failure to notify rights effectively means that suspects ‘waive’ their rights to silence and to a lawyer without sufficient understanding of what those rights are, leading to doubt as to whether these ‘waivers’ are granted in knowing and unequivocal manner.

## B. THE ECHR BASELINE

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In its case-law on Article 6(1) and (3)(c), concerning the right to silence and the right to legal assistance, the ECtHR has commented on several occasions on the provision of information to suspects about their rights. This generally arises on the basis of its case-law concerning the ‘waiver’ of these rights, which the case-law suggests can be valid only if it is done knowingly:

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<sup>20</sup> Europa, 3 December 2010, Letter on Measure B: [http://europa.eu/rapid/press-release\\_IP-10-1652\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1652_en.htm?locale=en)

*'Neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards (...) A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (...).'<sup>21</sup>*

When procedural rights are not effectively conveyed to the suspect, the ECtHR finds that the waiver is not effective, as it considers that the decision to waive the right was not taken on a properly informed basis. Consequently, the reliance on statements obtained in that context then means prejudice is caused to the fairness of the proceedings as a whole. The court has pointed to various factors, both objective and subjective, relating to the notification of rights which affect the validity of a waiver of the right of access to lawyer and to counsel:

- *The fact that rights were notified in a language other than the suspect's native language, without the assistance of an interpreter.<sup>22</sup>*
- *The fact of the notification being given only orally in the form of a standard caution (which barely serves the purpose of acquainting the suspect with the content of the rights);<sup>23</sup>*
- *The 'stressful situation' and 'quick sequence of the events' leading to questioning of the suspect;<sup>24</sup>*
- *A 'certain confusion' in the mind of the suspect at the point of questioning;<sup>25</sup>*
- *The young age of the suspect;<sup>26</sup>*
- *The suspect's level of literacy;<sup>27</sup>*
- *Familiarity with police encounters,<sup>28</sup> and*
- *Drug dependency of the suspect.<sup>29</sup>*

## C. RELEVANT PROVISIONS OF THE DIRECTIVE

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### 1. Scope of the notification obligation

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

<sup>21</sup> Case of [Saman v. Turkey](#) App. no 35292/05 (Judgment of 5 April 2011).

<sup>22</sup> [Saman v. Turkey](#), cited above note 21, paragraph 35.

<sup>23</sup> [Panovits v. Cyprus](#), cited above note 10, paragraph 74.

<sup>24</sup> [Zaichenko v. Russia](#), cited above note 10, paragraph 55.

<sup>25</sup> [Stojkovic v. France and Belgium](#), cited above note 10, paragraph 53.

<sup>26</sup> [Panovits v. Cyprus](#), cited above note 10, paragraph 67.

<sup>27</sup> Case of [Kaciu and Kotorri v. Albania](#), Apps. nos. 33192/07 and 33194/07 (Judgment of 25 June 2013), para. 120.

<sup>28</sup> [Pishchalnikov v. Russia](#), cited above note 10, paragraph 80.

<sup>29</sup> Case of [Plonka v. Poland](#), App. no. 20310/02 (Judgment of 31 March 2009), para. 38.

'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.'

This raises the issue as to what protection the Directive affords to a person whom the authorities have reason to believe has committed an offence but who is not 'made aware' that they are suspected or accused. This is covered on the section on witnesses later in this Toolkit (see Part IV).

## 2. Notification of rights

### a. Notification of rights to all suspects and accused persons

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

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

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

A further detail on the timing is provided by recital 19, which provides:

'(19) The competent authorities should inform suspects or accused persons promptly of those rights, as they apply under national law, which are essential to safeguarding the fairness of the proceedings, either orally or in writing, as provided for by this Directive. In order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.'

You will already note the emphasis on ensuring that rights are conveyed effectively, to enable their exercise: rights must be notified 'promptly', 'in order to allow for those rights to be exercised effectively'; the language must be 'simple and accessible language' taking into account particular needs of the suspect. The provisions also require provision of the information 'at the latest before the first official interview', an expression which poses difficulty for the same reason mentioned above in relation to Article 2(1): questioning may occur before formal notification of suspicion.



### 3. Notification of rights – arrested persons

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

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

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

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

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

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

A little more detail is provided in Recital 22:

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

Again, we would point out the emphasis, in the text of the Directive, upon the role of the Letter of Rights in facilitating comprehension of procedural rights. We would also suggest that the ‘opportunity to read the Letter of Rights’ makes little sense if not read with the idea contained in recital 19, namely that this should place before questioning. These are ideas we will develop below.

## D. USING THE DIRECTIVE IN PRACTICE

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

The Directive does not govern the substance of the rights to silence, counsel etc. which is left for national law, as the case may be, subject to obligations under other Directives (i.e. Directive 2010/64/EU for the right to interpretation and translation, Directive 2013/48/EU for the right of

access to a lawyer etc.). However, the Directive does impose standards relating to the manner in which such rights, as they exist in national law, are notified.

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

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

Ensuring the Directive is respected means two things: (i) seeking to ensure it is complied with at the point of notification, and (ii) seeking a remedy if it is not complied with at the point of notification. The possible need to seek a remedy later means you need to be careful to document the existence of the infringement of the Directive, so that you can rely on it in court.

### a. When assisting a suspect

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

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

Indeed, a Letter of Rights is not redundant if counsel is present. For instance, a detained suspect may be questioned again following the departure of the lawyer and would benefit from having a Letter of Rights to remind him of the advice given by his lawyer on staying silent. Equally, pending implementation of the Access to a Lawyer Directive, rules may differ as to the extent to which the lawyer is allowed to intervene during questioning, and it may be that physically being in possession of a Letter of Rights fortifies the suspect in exercising the right to silence as advised prior to the questioning by his lawyer. More obviously, it is clear that obtaining a Letter of Rights – in his own language, translated in accordance with Directive 2010/64/EU – will be of use to a foreign suspect or accused person so it is important for the lawyer to insist upon it.

- ➔ The arrested suspect you are assisting has not been given a Letter of Rights or has not had his rights explained sufficiently. What to do?
- Refuse to proceed to interview until the Letter of Rights has been provided and the suspect has had an opportunity to read it.
- Point out relevant factors such as the stressful nature of the situation, any signs of anxiety in the client which show why particular care needs to be taken to ensure

the suspect understands his rights. Think about factors established in the ECtHR case-law (p. 14 above) e.g. drug dependency, youth etc.

- This will assist you later on if you need to claim a remedy for the failure to comply with the Directive, should you have a reason to do so.

### **b. When assisting a witness who becomes a suspect**

Though this may be more or less common depending on the jurisdiction, it may be that you are present when a person is questioned as a witness when they are, in reality, suspected. This calls for action to ensure not only that they are advised of their rights, but also that they are told what the allegation against them is. For this reason we examine the special case of witnesses after we have covered both notification of rights and notification of accusations for ordinary suspects (see Part II).

## **2. Challenging the failure to notify rights**

More likely is that you will face the situation (later in the proceedings) when the client's interests have already been prejudiced by procedural acts (in particular police questioning) taken without the suspect being notified of his rights in accordance with the Directive. This is most likely going to be the case when the suspect waived the right to legal assistance, meaning there was no one there to help him exercise his rights.

### **a. Paradigm case**

We begin by considering the relatively simple situation in which the client has not been notified of rights at all, and made incriminating statements in the initial questioning. Assume that this oversight is visible from the record established by the police. When (at a later stage) you are mandated to act in the case, you can say that there has been a clear violation of the Directive and claim a remedy (invalidity of the act, disregarding the evidence etc.) as there has been a breach of defence rights. You can see a clear 'link' here between an established violation of the Directive and the need for a remedy to ensure the useful effect of the Directive. This would also extend to the 'fruit of the poisoned tree', i.e. subsequent procedural acts which were made possible only by the act which infringed the Directive. This is helpful to bear in mind as you consider more realistic examples.

### **b. Establish how notification was ineffective**

As mentioned above, the Directive does not govern the substantive rights, in particular the right to silence or of access to a lawyer. However, the ECtHR recognises the ineffective notification of rights as capable of creating unfairness on its own as it makes any subsequent renunciation of rights and decisions taken as to the defence unreliable. The same approach should apply with the Directive: if prejudice arises due to the ineffective notification of rights, a remedial obligation arises in order to safeguard the fairness of the proceedings.

#### **i. Form and language**

A situation commonly described is that in which the suspect is advised of his rights but in such a way that he does not truly understand them, and as a result fails to exercise them. Bear in mind the

requirement of the Directive: information should be provided in ‘simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons’. The Directive also places a clear emphasis on providing the document as a separate item, disassembled from the bureaucracy of other documentation, such as written notification of suspicion (as showed by the indicative model in the Annex to the Directive, which is a standalone document). The requirement for the suspect to have ‘an opportunity to read’ the document means the requirement cannot be satisfied by recording in writing oral notification of rights immediately prior to questioning. We suggest you look for both objective factors (e.g. the drafting of the Letter of Rights) and subjective factors (such as the state of mind or the circumstances).

Objective factors would, of course, relate to the manner in which the information is conveyed. Based on the conversations with members of the LEAP network we would recommend the following:

- ➔ How was the information conveyed?
- Was the letter provided?
- Check the Letter of Rights, which should be in your detained client’s possession, and compare it with the indicative model in the Directive;
- Compare the letter with other models and identify the ways in which you believe it is unclear;
- Compare the letter with the language of the criminal procedure code and establish whether and establish whether it is explaining or simply reproducing it;
- Does the letter use legal terminology (‘harm your defence’, ‘prejudice your interests’) which is difficult for most suspects to understand?
- Is the Letter of Rights provided as a separate item with a special status or is it simply joined together with the notification of suspicion, without due prominence being given to the rights it contains?

In addition to objective points, you should also consider the specific circumstances in which the suspect found himself when notified, including any vulnerabilities arising from this. In searching for relevant parameters, since the Directive (and the Charter) are to be read in light of the ECHR, it may be helpful to consider some of the factors considered important by the ECtHR when determining whether suspects have knowingly waived their (see the case-law above p. 15).

## ii. Timing of the notification

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

- ➔ Take instructions from the client:
- When was the information conveyed?
- Were comments made by the police as to the consequences of exercising the rights mentioned in the letter or in relation to the significance of the document?
- Was the suspect advised of procedural rights in due time to consider exercising them *before* being questioned?
- Was the suspect given an opportunity to read the Letter?

### iii. Dissuasive notification

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

- ➔ Was there a 'dissuasive notification'
- Identify the manner in which the notification was dissuasive. In the case of a Letter of Rights, this can be done from the text.
- Assess the extent to which this, combined with the pressure of the circumstances, can objectively be said to create a dissuasive effect.

### c. Document the violation

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

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

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

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

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

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

'detailed procedural rules governing actions for safeguarding an individual's rights under [EU] law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law'.<sup>30</sup>

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

#### d. Establish prejudice

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

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

#### e. Invoke the Directive & frame your argument

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

- ➔ Argue: the Directive seeks to ensure that a suspect is effectively notified of his rights to ensure that he can exercise them and not waive them on an ill-informed basis. In particular, Articles 3 and 4 together require that an arrested person be provided with a Letter of Rights notifying him of, inter alia, the right to counsel and the right to silence in simple and accessible language such as to enable him to exercise defence rights. These provisions, intended to confer rights on individuals, undoubtedly have vertical direct effect.
- ➔ In this case, the requirement of the Directive was not respected. The client was not provided with a Letter of Rights at all / the Letter of Rights provided did not meet the requirement of simple and accessible language / the Letter of Rights was not provided before the questioning / insufficient care was taken to ensure the

<sup>30</sup> See, among others Case C-432/05 *Unibet* [ECLI:EU:C:2007:163:43](#), para. 43. The principle covers time-limits for bringing appeals, rules regarding standing, costs and court fee requirements for bringing claims etc.

client was advised of his rights as was called for in the particular circumstances. This is established by the record of proceedings / other evidence which the court must take into account in order to ensure the client can invoke his EU law rights.

- ➔ This violation of the Directive caused the client to incriminate himself without fully understanding his right to remain silent / otherwise caused prejudice to the defence of the client.
- ➔ Article 8(2) of the Directive requires that there be a right to challenge the failure to provide information in accordance with the Directive. In accordance with Articles 47 and 48 of the Charter, a legally effective remedy is required and this should require the court to take such action as is available to it under national law to remedy the violation of the Directive, in particular by declaring the questioning / procedural act invalid and/or disregarding any evidence arising from that act. For more information about the right of challenge, see the 'Using EU Law' Toolkit.

## PART II – NOTIFICATION OF REASONS FOR ARREST / ACCUSATIONS

### A. THE ISSUE

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

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

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

### B. THE ECHR BASELINE

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These issues are already fairly well covered in the case-law of the ECtHR, on the basis of Articles 5(2) and Article 6(3)(a) and (b), which provide:

**Article 5**

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

**Article 6**

*3. Everyone charged with a criminal offence has the following minimum rights:*

*(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

*(b) to have adequate time and the facilities for the preparation of his defence;*

On the basis of these provisions, the ECtHR has developed principles relating to the notification of rights to persons ‘charged’ (which, in relation to Article 6, may apply to suspects not yet categorised as such under national law, including those formally deemed witnesses – see Part IV).



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

*Paragraph 2 of Article 5 (art. 5-2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5 (...) [B]y virtue of paragraph 2 (...) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.<sup>31</sup>*

Applying this approach in criminal cases, the ECtHR has reached some relevant findings, pointing to the need for factual statements, prompt delivery of reasons and accommodation to the needs of the particular suspect:

- *Violation due to the provision of written orders indicating only the relevant legal provisions, without mentioning any factual circumstances;<sup>32</sup>*
- *Violation due to delay in providing full reasons, noting that the description of the legal provisions may not have been sufficient absent an opportunity for the suspect to familiarise himself with the legal provisions ;<sup>33</sup>*
- *Violation due to the questioning of an arrested suspect who was deaf, dumb (voiceless), illiterate and had a mental disability, using an official sign-language interpreter when the suspect did not use that form of sign language, without having recourse to the assistance of the suspect's mother.<sup>34</sup>*

In relation to Article 6 ECHR, the ECtHR has developed a standard statement of principle has been developed, specifying a right of information to enable defence at all stages of the process:

*The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (...). Article 6 §3 (a) of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed. <sup>35</sup>*

The ECtHR has applied these principles to various situations, relating to different stages of proceedings, always asking whether the alleged failure to notify the accusation prejudiced the fairness of the whole proceedings. Here are some recent examples:

<sup>31</sup> [Fox and others v. United Kingdom](#) App. no 12244/86 (Judgment of 30 August 1990), paragraph 40.

<sup>32</sup> [Petkov and Profirov v. Bulgaria](#) App. no 50027/08 (Judgment of 24 June 2014), paragraph 61.

<sup>33</sup> [Kortesis v. Greece](#) App. no 60593/10 (Judgment of 12 June 2012), paragraph 61.

<sup>34</sup> [Z.H. v. Hungary](#) App. no 28973/11 (Judgment of 8 November 2012), paragraphs 42-43.

<sup>35</sup> Case of [Kamasinski v. Austria](#), App. no. 9783/82 (Judgment of 19 December 1989), paragraph 79; Case of [Pélissier and Sassi v. France](#), App. no. 25444/94 (Judgment of 25 March 1999), paragraphs 51-52, [Mattocia v. Italy](#), cited above note 13, paragraph 58.

### **Upon initial arrest**

- No violation as the arrest warrant leading to arrest clearly stipulated the criminal charges laid against the applicant;<sup>36</sup>
- Violation due to questioning at a roadside stop without the person, who was effectively under suspicion, being notified of the accusation against him;<sup>37</sup> and
- No violation as the applicant had been given a copy of an intelligence report detailing the actions she was alleged to have committed.<sup>38</sup>

### **At trial**

- Violation arising from the failure of the prosecutor to appear at trial and specify the allegations prior to the applicant's conviction.<sup>39</sup>

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

*If the courts hearing the merits of the case have (...) the possibility to reclassify facts of which they are validly seized, they must ensure that accused persons have had the opportunity to exercise their rights of defence on that point in a concrete and effective manner. This implies that they should be informed, in timely manner, not only of the cause of the accusation, that is to say the material facts which are put forward against them and on which the accusation is based, but also, in a detailed manner, the legal classification given to those facts [our translation].<sup>40</sup>*

The ECtHR has then made several findings applying these principles:

- Violation due to a court of appeal, rehearing the case of the persons convicted for criminal bankruptcy, unpredictably convicting them of aiding and abetting that offence without giving them the opportunity to offer a defence.<sup>41</sup>
- Violation arising from the decision of the Court of Cassation to reclassify the offence as a more serious one without warning or inviting debate on the reclassification, in circumstances where the applicant might have had arguments to make had this been predictable.<sup>42</sup>

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

<sup>36</sup> Case of [Hoxhia v. Albania](#), App. no. 29861/03 (Judgment of 8 October 2013), paragraph 131.

<sup>37</sup> [Zaichenko v. Russia](#), cited above note 10, paragraphs 41-43.

<sup>38</sup> Case of [Niculescu v. Romania](#), App. no. 25333/03 (Judgment of 25 June 2013), paragraph 119.

<sup>39</sup> Case of [Malofeyeva v. Russia](#), App. no. 36673/04 (Judgment of 30 May 2013), paragraphs 113-120.

<sup>40</sup> Case of [Drassich v. Italy](#), Application no. 25575/04, (Judgment of 11 December 2007), paragraph 34 (French only).

<sup>41</sup> [Pélissier and Sassi v. France](#), cited above note 35, paragraphs 56-62.

<sup>42</sup> [Drassich v. Italy](#), cited above note 40, paragraphs 36, 41-43.

### C. RELEVANT PROVISIONS OF THE DIRECTIVE

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

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

Some further details are provided by recitals 27 and 28, which provide:

- '(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings.
- (28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.'

These provisions of Article 6 are somewhat confusing and need clarification by the CJEU, making it difficult to comment on them at all without relying on a possibly contestable interpretation. Some of the views expressed to us during in-person trainings about their meaning are the following.

- Article 6(1) is a general obligation, reflecting Article 6(3)(a) ECHR. It thus applies throughout the proceedings and affords a right of information to all persons within the scope of the Directive, suspected or accused, arrested or not.
- Article 6(2) reflects the obligations in Article 5(2) ECHR (combined with Article 5(1)(c) ECHR) and provides a protection to persons arrested so they know the basis for their arrest. There is a possible link to Article 7(1) of the Directive (see later).
- Article 6(3) essentially refers to the act of indictment, requiring a clear legal classification of the offence and the nature of participation of the accused. This would seem to match the focus in the ECtHR case-law on the indictment / particulars of offence,<sup>43</sup> which enable the accused to prepare for the trial of the merits. However, a problem arises from the *a contrario* interpretation: if legal classification is only definitely required for the indictment, then this might not be required for the early notification given to people arrested. This is possibly answered, however, by the requirement in Article 6(2) to specify the ‘criminal’ act the person is suspected or accused of having committed: if it is criminal, it is because a provision of law criminalises it and a classification is presupposed. Indeed, Recital 28 refers to the ‘possible legal classification’ being provided before the first official interview. Article 6(3) simply requires the allegation to be fully specified and classified in the indictment, as befits that stage of proceedings, as this is a crucial point of defence preparation (as recognised by the ECtHR).
- Article 6(4) reflects the requirement<sup>44</sup> in ECtHR case-law for reclassifications<sup>44</sup> of the offence to be notified in order to provide the suspect or accused with an opportunity to offer a defence; the suggestion that this should be done only ‘where this is necessary’ might be intended to reflect the allowance made by the ECtHR for reclassifications which could have been anticipated, and thus did not ‘need’ to be notified in advance.

## D. USING THE DIRECTIVE IN PRACTICE

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

#### a. Failure to classify the offence

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

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

A case currently pending before the ECtHR, *Čierny v. Slovakia*,<sup>45</sup> relates to the case of a person arrested for a conspiracy to traffic offence, carrying a penalty of four to ten years and made confessions, expressed remorse etc. Later, the offence was reclassified as an aggravated form of the

<sup>43</sup> Case of [Juha Nuutinen v. Finland](#), App. no. 45830/99 (Judgment of 24 April 2007), paragraphs 30-32.

<sup>44</sup> *Pélissier and Sassi v. France*, cited above note 35, *Drassich v. Italy*, cited above note 40.

<sup>45</sup> Case of [Čierny v. Slovakia](#), App no. 29384/12 (pending).

same offence, carrying a penalty of ten to fifteen years and requiring mandatory representation. There is no decision of the ECtHR at this stage, but this clearly shows the issue which is raised by the under-classification of an offence at the point of questioning. It may entail the non-application of procedural protections available under national law for more serious offences and/or induce cooperation by the suspect on the expectation of a lower charge etc. Fair Trials has intervened in this case to emphasise the importance of effective notification of procedural rights and the accusation to ensure sensible decision-making by the accused. We encourage you to see Article 6(1) as holding the authorities to the provision of full information and avoid abuse of these possibilities.

### **c. Failure to specify factual allegations sufficiently**

Practitioners also report that, in some cases, little factual information will be given beyond the bare legal head of accusation (e.g. fraud committed against a person in a certain time, without details as to the alleged wrongdoing), perhaps in order not to reveal the detail of ongoing investigations. This makes it difficult for the suspect to cooperate and offer exculpatory evidence, which may be helpful to the police. In addition, it makes it difficult to offer a response to a request for detention. Practitioners in Spain have, in particular, lamented the failure to provide more than bare allegations, which make it impossible to have a serious discussion about the strength of the case at the pre-trial detention instance. The pre-trial court, legally speaking, has jurisdiction only to review the grounds of detention, not the strength of the case, so there is a vacuum of judicial review of the strength of the case until later.

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

We encourage you to refer to the Directive at the point of questioning. Refer back to your preparatory work to see if national legislation governing the provision of information to suspects has been amended to implement the Directive. This has been the case in France, for instance, where an additional requirement for legal classification of the offence at the point of questioning has been instituted. Make your case to the relevant pre-trial institution (in most cases, the police):

- ➔ Demand on the basis of the Directive that the suspect is informed in detail of the alleged crime, both in respect of its legal classification and its facts.
- ➔ In respect of the facts, explain how the failure to provide detail is (a) depriving the suspect of an opportunity to comment usefully on the lawfulness of the arrest or provide exculpatory evidence and (b) forcing the suspect to make decisions as to whether to exercise his right to silence on an ill-informed basis.
- ➔ Ask for the specific criminal offence which the police / prosecution intend to charge, and any other alternatives which they are contemplating. Make it clear that the advice you are giving to the client is based upon a certain understanding of which offence is going to be charged.
- ➔ Consider carefully if the client giving a statement in the context of a less serious offence might later incriminate your client of a more serious one. If in doubt, advise silence until the exact content of the accusation is known. Weigh this risk carefully against the risk of your client being detained.
- ➔ Seek access to the evidence which is available at this stage, in accordance with Article 7(1) as we interpret it (see Part III). If you get access, this will help you to

evaluate the strength of the case at that point and the potential for a more serious accusation to be made subsequently. If you do not get access, this will strengthen your case when relying on the Directive later.

- Ensure that your requests, including your references to the Directive, are recorded in police protocols / records of proceedings. Ask for any refusal to provide such information to be recorded too, together with the reasons given.

### 3. Challenging the violation

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

The likely immediate repercussion of a failure to specify detail in the allegations, in particular, is that you will be deprived of the opportunity to have a serious discussion about the strength of the case before a pre-trial detention instance. Fair Trials believes that it is clear from the text of the Directive that it is intending to provide an arrested person with the opportunity for an effective judicial review of detention (Article 6(1) provides the reasons for arrest, in detail, and Article 7(1) provides access to the documents necessary for challenging the lawfulness of detention). You should therefore encourage the pre-trial detention court to protect your clients' rights under Article 6 of the Charter (right to liberty) by ensuring sufficient information is provided.

- Demand that the pre-trial detention court compel the prosecution to provide more information, if insufficient detail has been provided so far.
- Argue: the Directive specifically seeks to ensure respect for the right to liberty protected by Article 6 of the Charter by placing the suspect in possession of sufficient information and case materials to challenge his arrest / detention. It necessarily falls to the pre-trial detention instance to ensure observance of these rights by compelling the investigative / prosecutorial authority to provide more detail or, in default, releasing the suspect.

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

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

- Argue: Article 6(1) requires the provision of information 'in such detail as is necessary to safeguard the fairness of proceedings and ensure the effective exercise of the rights of defence' and requires the provision of the most extensive information available at the time of questioning.
- The 'effective exercise of the rights of defence' at trial may be prejudiced by the failure to provide more detailed information earlier in the proceedings, e.g. by circumventing procedural protections available for more serious offences, inducing cooperation on the basis of a false idea as to the seriousness of the

offence etc. It may also prevent the defence from carrying out or proposing investigative actions to obtain exculpatory evidence.

- Whilst Article 6(3) requires the provision of detailed information on the accusation and the nature and legal classification of the offence 'at the latest' upon submission of the merits of the accusation to the judgment of a court, this is simply recognising the fact that full information will always have to be provided then in order for a trial to take place. Preserving the fairness of the proceedings and ensuring effective exercise of the rights of defence at trial may require fuller information earlier on.
- Indeed, Article 6(4) requires that suspects and accused persons are notified 'promptly' of any changes in the accusation where this is necessary to safeguard the fairness of the proceedings. This recognises the fact that changes to the accusation may affect the conduct of the defence, and that withholding such information may prejudice that fairness.
- Despite requests made earlier in the proceedings for fuller information, which it would have been possible to provide, this was not provided and the Directive was therefore breached. This caused prejudice to the suspect, e.g. s/he gave statements which were held against him/her subsequently.
- The fact that this may have been consistent with national law is not determinative. The court must ensure the effectiveness of the Directive and take action if the standards of the Directive are not respected.
- Accordingly, the court must take action to remedy the failure of the Directive (disregarding the evidence, invalidity of the act etc.).
- If the court is in doubt as to the meaning of the provisions, it should make a reference for a preliminary ruling to the CJEU.

## III – ACCESS TO THE CASE FILE

### A. THE ISSUE

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One of the issues most commonly identified in Fair Trials discussions with practitioners is the problem arising from lack of or restricted access, at the pre-trial stage, to the material evidence which is uncovered by investigative authorities. There are several problems reported:

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

### B. THE ECHR BASELINE

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The issues surrounding access to the case file arise (expressly or by implication) in the cases relating to Articles 6(3)(a), (b) and (c) ECHR. These provide, so far as relevant here:

*3. Everyone charged with a criminal offence has the following minimum rights:*

*(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

*(b) to have adequate time and the facilities for the preparation of his defence;*

*(c) to defend himself in person or through legal assistance (...);*

The ECtHR has developed principles relating to the issue of access to the case file based on these articles, the content of which is somewhat difficult to delineate clearly.

#### 1. Access to the case file at the pre-trial stage

The ECtHR has, first of all, spoken of the link between the obligation to provide information about the accusation under Article 6(3)(a) and the disclosure of the linked evidence, stating:



*'the notification of the accusation required by Article 6(3)(a) should not necessarily be attended by the disclosure of supporting evidence to enable the accused to prepare for trial (...) The existence of such evidence may still be dependent on the results of an on-going investigation.'*<sup>46</sup>

It has recognised some limits to this, however, under Article 5(4) ECHR. In a well-established line of case-law, it has repeatedly stated that the judicial review of pre-trial detention must be such as to ensure equality of arms, which requires that access be provided to some evidence:

*'The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions of the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer.'*<sup>47</sup>

What has never been made clear by the ECtHR is the point at which this should happen. Article 5(4) relates to the judicial review of detention and so cannot regulate what happens prior to that point. Whilst Article 5(2) ECHR requires a person to be provided with reasons for their arrest, this has not been interpreted as implying a right of access to the relevant underlying materials.

Lawyers in some jurisdictions (notably France, Belgium and Luxembourg) have argued that the rights protected by Article 6(3) ECHR entitle the suspect / their lawyer to access the police file prior to initial questioning. There is not particularly clear support for this in the case-law. One statement frequently referred to is that relating to the role of the lawyer at the police station. Following its landmark ruling in [Salduz v. Turkey](#), establishing the right of access to a lawyer as from the first questioning by police, the ECtHR discussed the role of the lawyer in that context:

*'Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.'*<sup>48</sup>

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

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<sup>46</sup> *Haxhia v. Albania*, cited above note 36, paragraph 131.

<sup>47</sup> Case of [Chruściński v. Poland](#), App. no. 22755/04 (Judgment of 6 November 2007), paragraph 56.

<sup>48</sup> Case of [Dayanan v. Turkey](#), Application no. 7377/03 (Judgment of 13 October 2009), paragraph 32.

*'What is, however, clear to the Court is that the applicant's lawyer had not been allowed to examine the investigation file at that point (...), which would seriously hamper her ability to provide any sort of meaningful legal advice to the applicant.'*<sup>49</sup>

To date, this view has not been shared by senior courts. Decisions of constitutional instances in France and Belgium, where these points have been widely canvassed, have suggested that the initial questioning phase is an investigative one, and that the full panoply of equality of arms guarantees do not apply until the contested judicial phase.

## 2. Access to the case file to prepare for trial

The ECtHR has given a number of judgments under Article 6(3)(b) in relation to complaints that the failure to provide access to the case file in a timely manner before trial has deprived the applicants of the 'time and facilities to prepare a defence'. The ECtHR states:

*'[T]he "facilities" to be provided to everyone charged with an offence include the possibility of being informed, for the purposes of preparing his defence, of the result of the investigations carried out throughout the proceedings. The Court reiterates that it has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached.'*<sup>50</sup>

However, the ECtHR accepts that access need not necessarily be given to the accused himself:

*Restriction of the right to inspect the court file to an accused's lawyer is not incompatible with the rights of the defence under Article 6.*<sup>51</sup>

Nevertheless, there are various examples of situations where restrictions on access to the case file, have been sufficient to establish a breach of Article 6(3)(b):

- *Inability to obtain access to the case file until a late stage;*<sup>52</sup>
- *Trial preparation time limited to just a few hours;*<sup>53</sup>
- *Failure to provide a copy of a judgment for the purposes of preparing an appeal;*<sup>54</sup>
- *Being given 20 days to review a file of 17 000 pages, of which one week was spent photocopying the file,*<sup>55</sup> *By contrast, 21 days to review 49 pages resulted in no violation;*<sup>56</sup>
- *Restrictions on the ability of lawyers to communicate documents in the file to the suspect or involve him in analysis of those documents, in circumstances where the applicant may have had comments to make on their contents;*<sup>57</sup> *and*

<sup>49</sup> *Sapan v. Turkey*, cited above note 17, paragraph 21.

<sup>50</sup> Case of *Beraru v. Romania*, App. no. 40107/04 (Judgement of 18 March 2014), paragraphs 69-70.

<sup>51</sup> Case of *Kremzow v. Austria*, App. no. 12350/86 (Judgment of 21 September 1993), paragraph 52.

<sup>52</sup> *Beraru v. Romania*, cited above note 50, paragraph 70.

<sup>53</sup> *Vyerentsov v. Ukraine*, cited above note 16, paragraphs 73-76.

<sup>54</sup> Case of *Chorniy v. Ukraine*, App. no. 35227/06 (Judgment of 16 May 2013), paragraph 43.

<sup>55</sup> *Öcalan v. Turkey*, cited above note 16, paragraph 142.

<sup>56</sup> *Kremzow v. Austria*, cited above note 51, paragraph 48.

- *The reading by prosecutors, at a final trial hearing in a complex fraud case, of documents which were material to the case combined with a refusal of an adjournment to enable the defence to study those documents.*<sup>58</sup>

### C. RELEVANT PROVISIONS OF THE DIRECTIVE

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

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

As with Article 6, these provisions led themselves to several possible interpretations and will need to be clarified by the CJEU. We will consider these when looking at the different issues relating to access to the case file discussed above.

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<sup>57</sup> *Öcalan v. Turkey*, cited above note 16, paragraph 147.

<sup>58</sup> Case of [Gregacevic v. Croatia](#), App. no. 58331/09 (Judgment of 10 July 2012), paragraph 57.

## D. USING THE DIRECTIVE IN PRACTICE

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### 1. Access to the case file at the point of questioning

#### a. The debate as to the requirements of Article 7(1)

Whether Article 7(1) requires access to case the file at the police station is something of a ‘hot topic’ at the time of writing. Organised groups of lawyers in France and Spain have taken the view that this provision implies a right of access to the (police) file which is essential to enable the suspect, through his lawyer, to contest the grounds for the person’s arrest, initially at the police station itself.

Senior courts have not yet ruled on this. Concerns exist, among police and prosecutors, as to the potential impact of a requirement to provide evidence at this stage, in particular as it could lead to delays which would use up precious time in a period usually limited to between 24 and 72 hours before a person must be brought before a judge. Doubt also arises from Recital 30, which provides:

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

Whilst the specification of the sort of material may be helpful, the reference to Article 5(4) ECHR suggests that access to this material becomes necessarily required only at the point when the arrest is judicially reviewed, which would imply no development of the ECtHR position (see p. 33 above).

#### b. Fair Trials’ view: Article 7(1) requires access at the point of questioning

Fair Trials encourages you to take the expansive view of Article 7(1). We believe that, fundamentally, the question of the provision of documents upon arrest is subject to a general misunderstanding due to the limited extent to which it is covered by Article 6 case-law of the ECtHR. Article 6 exists to protect the fairness of the trial, and the ‘equality of arms’ requirement applies at trial; pre-trial proceedings fall within the scope of Article 6 only to the extent that they impact upon the fairness of the proceedings, restricting the extent to which disclosure at the police station can enter into the ECtHR’s consideration. Article 5(4) is limited to the judicial review of initial arrest, and can require equality of arms only at that stage. As a result, a general view has arisen that equality of arms is essentially a characteristic of judicial procedure, and that police are essentially free to withhold evidence and use the questioning phase as a purely investigative opportunity.

This ignores the fact that public authority has been delegated to the police for them to interfere with a person’s liberty, which the person has the right to challenge. Fair Trials suggests initial questioning is, aside an investigative act, also the point at which that authority should provide the person with sufficient knowledge of the grounds of their arrest to enable them to form a view as to whether to speak and make their views known or challenge the arrest before a court. If it is to be a useful opportunity, both the reasons for the arrest and key evidence should be made available.

Article 7(1) does not make the same distinction between the judicial phase and the initial phase, and should be read as requiring access to the case file at the stage of initial questioning:

- Article 7(1) refers to a person being ‘arrested or detained’, ‘at any stage in criminal proceedings’. There appears to be a deliberate emphasis upon covering the whole procedure relating to deprivation of liberty, which includes initial arrest.
- Article 7(1) identifies the documents which need to be made available: those which are necessary for challenging that arrest or detention effectively. In the case of an initial arrest, this can only refer to the evidence deemed to constitute lawful grounds for interference with the person’s liberty (i.e. reasonable suspicion of an offence).
- Whilst it is true that Recital 30 suggests the necessary documents must be made available at the latest upon the judicial review of detention, this is simply the reflection of an existing non-derogable minimum standard established by the ECHR under Article 5(4). In fact, the Directive foresees access to such documents earlier, as shown by the expression ‘at the latest’.
- In the EU law tradition, respect for the rights of the defence as protected by Article 48 of the Charter is paramount in the adoption of decisions adversely affecting an individual. The rights of defence include the right to be heard, which requires access to the case file, as arises in the defence rights case-law of the CJEU. The General Court of the EU has stated:

‘The principle of respect for the rights of the defence requires, first, that the entity concerned must be informed of the evidence adduced against it to justify the measure adversely affecting it. Secondly, it must be afforded the opportunity effectively to make known its view on that evidence (...) Consequently (...) the evidence adduced against that entity should be disclosed to it either concomitantly with or as soon as possible after the adoption of the measure concerned’.<sup>59</sup>

- Whilst the context is different (these cases concern the adoption of restrictive measures by EU Institutions) this approach shows that from the perspective of the Charter, the rights of defence, including the right to be heard, are safeguarded during the administrative phase, prior to subsequent judicial review. The administrative authority, required to act lawfully, is supposed to hear the views of the affected person in relation to the substantive grounds for the decision.
- This should apply *a fortiori* when the person is deprived of their liberty. The arrested person is entitled to be informed of the reasons for his arrest under Article 6(2), and the evidence substantiating those reasons under Article 7(1). This enables the person, through their lawyer, to form a view as to the legality of the arrest and decide whether to make their views known or exercise the right to silence and challenge the arrest by judicial review. The fact that this combination of reasons and materials does not (yet) arise clearly in ECtHR case-law is not determinative, since the Directive is not limited by the latter and is intended to build upon it.

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

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<sup>59</sup> Case T-496/10 *Bank Mellat v Council* [ECLI:EU:T:2013:39](#), paragraph 53.

- ➔ Take action at the pre-trial stage, if you are there
  - Insist upon being given access to the case file prior to questioning by the police, prosecutor or investigating judge, mentioning that you rely on the Directive;
  - Explain that this access is necessary in order to enable you to assess the lawfulness of the arrest and your client to make his views known on the substance of the allegation, subject to his right to silence;
  - Ensure your request is recorded in any police protocols, mentioning the Directive. If the access is not provided, consider advising silence until the contents of the file has been supplied, and ensure the reasons for the refusal of access are recorded. Explain how this refusal is undermining your ability to advise the client usefully and forcing the client to make decisions without sufficient illumination as to their potential consequences.
- ➔ Take action to challenge a violation before a court, if access was not provided, in accordance with the general approach set out in the 'Using EU Law' Toolkit.
  - Explain to the court why you believe Article 7(1) provides a right of access to the police case file prior to questioning;
  - Establish that the right of access has not been granted in accordance with that requirement (this should be simple if the national procedure rules do not allow access to the case file at this point, such that the denial of access is simply the application of the ordinary procedure).
  - Establish why this has damaged your client's interests. If you have a reason to be seeking a remedy (e.g. a confession was made or the right to silence was not exercised) this may be self-evident.
  - On the basis of the violation of the Directive, seek the application of a remedy (invalidity of the act, exclusion of the evidence etc.).
  - Show the court information about the discussion of Article 7(1) in different jurisdictions, demonstrating that it is an issue in need of clarification and suggest that the court should seek a reference for preliminary ruling to the CJEU.

## 2. Access to the case file and effective judicial review of arrest/detention

The more straightforward challenge relates to the provision of access to the case file after initial questioning, as the investigation progresses. In this regard, the starting point is Article 5(4) ECHR which, as we have seen, requires access to those materials which are necessary for challenging detention in order to ensure equality of arms in the judicial review.

Despite the relatively clear nature of the case-law on Article 5(4), respect for this standard has not always been very good, with some laws and practices enabling restrictions on access to the file even when the person is detained. The Estonian procedural code, for instance, provides for a right of access to documents necessary for challenging detention but allows the prosecutor to restrict this right for overriding reasons. And even where the issue appeared to have been solved by legislation, problems may persist in practice. In Poland, for instance, new provisions require the prosecutor to disclose evidence mentioned in the detention motion, which may risk certain material evidence not being mentioned and thus not made available. We look at how to use Article 7(1) to tackle this.

### a. Starting point: Article 7(1) is subject to no derogation

The first point to underline is that Article 7(1) is subject to no derogation. Article 7(4) provides grounds for restricting access to material evidence, but states specifically that this applies only as a derogation to Article 7(2) and (3). Those provisions, discussed further below, relate to the disclosure of material evidence beyond that which is necessary for challenging detention and are themselves expressed as being 'without prejudice to [Article 7(1)]'. Article 7(1) knows no derogation.

This is consistent with ECtHR case-law on Article 5(4), which has recognised that even if evidence is confidential for national security reasons, the protection of that material cannot come at the expense of substantial restrictions on the rights of defence and the relevant evidence will have to be disclosed, perhaps with allowances made for its confidential nature.<sup>60</sup>

### b. Challenging a legal restriction upon access

Suppose you are dealing with a legislative measure which enables the prosecutor to restrict access to the case file at the pre-trial stage. Previous domestic case-law recognises this as permissible if there are sufficient grounds. What to do?

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

### c. Challenging a 'prosecutor decides' restriction

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

- ➔ Select your forum (this might be: (i) a judicial challenge / appeal against a refused request to the prosecutor for disclosure; (ii) a request to / recourse before a pre-trial judge; or (iii) simply a request made to the pre-trial detention judge).
- ➔ Argue: Article 7(1) has direct effect and requires access to documents which are necessary for challenging detention effectively. The purpose of the

<sup>60</sup> Case of [Dochnal v. Poland](#), App. no. 31622/07 (Judgment of 18 September 2012), paragraph 87.

provision is to ensure that the detention decision is not taken on the basis of evidence which is not seen by the detained person, and that evidence tending against detention is not overlooked due to the suspect's inability to base arguments upon it. Access should therefore be provided not just to documents mentioned by the prosecutor, but also others which the court considers have a bearing upon its decision. This means the court should consider of its own motion whether there are other parts of the file which are germane to its decision, and ensure these are supplied to the defence.

→ It follows from the above that, in order to ensure observance of the Charter right to liberty (Article 6), which incorporates the judicial review obligations in the ECtHR case-law, the court should exclude the prosecution from relying upon evidence which has not been disclosed and order the disclosure of other evidence it considers material.

### **3. Access to the case file at the pre-trial stage – irrespective of detention**

#### **a. The gap in the ECHR case-law**

Irrespective of the detention of the client, does the Directive provide a right of access to the case file at the pre-trial stage? As seen above, the ECtHR has recognised that practical restrictions on the 'time and facilities to prepare a defence' prior to trial can lead to violations of Article 6(3)(b) ECHR if they make trial preparation impossible.<sup>61</sup> However, the ECtHR case-law is not very helpful in terms of seeking access to the case file earlier in the proceedings.

The case-law indicates that notification of accusations, which must happen earlier in proceedings, 'need not necessarily be attended by the disclosure of supporting evidence to enable the accused to prepare for trial (...) The existence of such evidence may still be dependent on the results of an on-going investigation'.<sup>62</sup> Whilst this suggests that restrictions on access must be justified by reasons relating to the investigation, there is little basis for the ECtHR to comment on pre-trial restrictions. All it can do is determine, after the proceedings are over, whether any restrictions on access to the case file caused prejudice to the fairness of the proceedings as a whole. It can comment on pre-trial restrictions to the extent that these interfere with the right to effective judicial review of pre-trial detention under Article 5(4) ECHR, but there is a 'gap' in the Article 6 case-law.

#### **b. Fair Trials' view: Article 7(2) requires pre-trial access, subject to the application of judicially reviewable exceptions**

The position under the Directive is, we believe, more helpful:

- Under Article 7(3), the right of access to all material evidence under Article 7(2) is expressed as applying 'at the latest' upon submission of the merits of the accusation to a court. This reflects the fact that, at the point of trial, full equality of arms must be ensured. However, the rule indicated in Article 7(3) is that such access should be provided 'in due time to allow the effective exercise of the rights of defence', and nothing prevents this being invoked at the pre-trial stage.

<sup>61</sup> *Iglin v. Ukraine*, cited above note 16, paragraph 60 ; *Vyrentsov v. Ukraine*, cited above note 16, paragraphs 73-76; *Öcalan v. Turkey*, cited above note 16, paragraph 142.

<sup>62</sup> *Haxhia v. Albania*, cited above note 36, paragraph 131.



- Of course, Article 7(4) recognises the possibility of limiting such access where this ‘could prejudice an ongoing investigation’.<sup>63</sup> However, a decision invoking this provision has to be taken by a judge or subject to judicial review. This, combined with Article 8(2) of the Directive, creates a legal basis for judicial oversight of access to the case file at the pre-trial stage, which does not exist independently in the ECtHR case-law. The court having jurisdiction over the pre-trial phase, or over the prosecutor in charge of the pre-trial phase, should be seised on this basis.
- This provides a forum within which a decision should be taken about access to the case file in accordance with the Directive. You can make arguments based on the notion of the ‘exercise of defence rights’. In particular, you may wish to refer to the ‘whole range of services’ associated with legal assistance as recognised by the ECtHR, including ‘discussion of the case’ and ‘collection of evidence favourable to the accused’. These are things which the defence has an interest in doing in the pre-trial phase, which may be difficult without access to the case file.

On that basis we would offer the following advice:

- ➔ Make an application to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking access to the file or challenging a refusal to provide access to the case file.
- ➔ Argue: Article 7(2) provides you with a right of access to all material evidence, in principle. In accordance with Article 7(3) this has to be provided in due time to exercise defence rights. The exercise of defence rights includes responding to steps taken by investigative authorities at the pre-trial stage, including by supplying exculpatory evidence, adapting the defence strategy or even seeking the dismissal of the case if this is available under national law.
- ➔ The right of access to the case file can be restricted on grounds provided for by Article 7(4), in particular relating to the needs of an ongoing investigation. However, there must be a genuine need of the investigation justifying the non-disclosure of information and the restriction on access to the case file must be kept to the minimum necessary to meet that need.
- ➔ This implies a requirement upon the authority to justify the refusal of access by reference to concrete and substantiated elements justifying the application of this restriction such as to enable effective judicial review, or, if the authority is a judge, for it to motivate its decision by reference to such matters.
- ➔ Powers available under national law for prosecutors / the court to restrict access to the case file on certain grounds linked to the needs of the investigation (e.g. Article 302 of the Spanish code, Article 34 of the Estonian code, Article 156 of the Polish code) must be interpreted in light of this obligation.
- ➔ Identify and enumerate in the request, to the extent that it is possible to do so, the possible documents or materials which may be of interest. Explain how the non-provision of these documents undermines the exercise of rights of defence, e.g. challenging the lawfulness of investigative steps.
- ➔ Point out to the judge / the court when challenging a prosecutor’s decision, that it is able to make a reference to the CJEU concerning the requirements of Article 7 of the Directive. See the ‘Using EU Law’ Toolkit for more information on the process.

<sup>63</sup> This exception is to be read restrictively: see Recital 32 of the Right to Information Directive.

#### 4. Access to the case file to prepare for trial

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

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

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

- ➔ Identify the restriction you wish to complain of and establish, practically, how this is restricting your ability to prepare for trial. It may be worth linking this to examples of violations of Article 6(3)(b) ECHR such as those detailed above, as this will show that you have firm grounding for your request.
- Seek the preventive remedy, if this is available (e.g. adjournment), or the corrective remedy (appeal etc.) on the basis of Article 8(2) of the Directive.

## IV – WITNESSES AND OTHER NON-SUSPECTS

### A. THE ISSUE

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Practitioners frequently report that significant damage can be done to the defence of a suspect or accused person by various informal forms of questioning which may happen prior to their formally acquiring that status. In particular, incriminating statements may be made by the person in an informal context, which are either then formally held against him if this is permissible, or which may at least influence the development of the investigation going forward.

### B. THE ECHR BASELINE

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#### 1. The concept of being ‘charged’

Article 6 of the ECHR confers rights upon a person at the pre-trial stage in order to ensure the fairness of the proceedings as a whole. The standard statement is that these guarantees become applicable when a person becomes ‘charged’ within the meaning of Article 6. This may be at a point before they formally become a suspect within the meaning of national law. The ECtHR states:

*That concept is “autonomous”; it has to be understood within the meaning of the Convention and not solely within its meaning in domestic law. It may thus be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (...). A “charge” may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (...). The legislation of the State concerned is certainly relevant, but it provides no more than a starting point (...). The prominent place held in a democratic society by the right to a fair trial favours a “substantive”, rather than a “formal”, conception of the “charge” referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a “charge” within the meaning of Article 6 (...). In particular, the applicant’s situation under the domestic legal rules in force has to be examined in the light of the object and purpose of Article 6, namely the protection of the rights of the defence.<sup>64</sup>*

#### 2. Witnesses who are / become suspects

Applying the above approach, the ECtHR has moved towards recognising that, when the authorities have plausible reasons to suspect a person, they become ‘charged’ within this definition, such that they acquire defence rights. A recent re-statement of this is the following:

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<sup>64</sup> Case of [Mikolajova v. Slovakia](#), App. no 4479/03 (Judgment of 18 January 2011), paragraphs 40-41.

*The Court considers a person to acquire the status of a suspect calling for the application of the Article 6 safeguards not when it is formally assigned to him or her, but when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence (...).*<sup>65</sup>

This approach was originally derived from the case of *Brusco v. France*,<sup>66</sup> which related to old provisions of law which have long since been amended.

*A person was cited by judicial order to appear as a witness and held in police custody for questioning whilst having, under domestic law, the status of a witness. The ECtHR noted that, at this point, testimony of other witnesses already provided reason to suspect the applicant of having been involved in the commission of the offence, and that when he was cited to appear and held for questioning he was a 'charged' within the meaning of Article 6, despite having the formal status only of a witness in national law. Accordingly, the failure to notify him of his right to silence infringed Article 6.*

Applying this approach, the ECtHR therefore finds violations of Article 6 when an incriminating statement made by a person in a context where they were, objectively, under suspicion but where they were not informed of their rights to legal assistance and silence is used against them to found a conviction; by contrast, where an admission is made completely voluntarily, in circumstances where police did not have reason to suspect the person, no violation arises. For instance:

- *Violation due to the failure to inform a person at a roadside stop, when there was already suspicion against them for theft of diesel fuel, of his right to silence and legal assistance before asking him questions about the offence, with his statement being used at trial;*<sup>67</sup>
- *Violation due to the failure to inform a person questioned in the context of a mutual legal assistance request from another country, in which context they did not have the status of a suspect, of their right to silence, despite the fact of the mutual legal assistance revealing that there was evidence to indicate the person had committed an offence;*<sup>68</sup>
- *No violation when a person, one among many questioned as a witness, voluntarily confessed in full, no further questioning then taking place until he had been provided with legal advice.*<sup>69</sup>

### C. RELEVANT PROVISIONS OF THE DIRECTIVE

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The key provision here is Article 2(1), defining the scope of application of the Directive *ratione personae* and *temporis*. It states:

<sup>65</sup> [Bandeltov v. Ukraine](#), cited above note 9, paragraph 56.

<sup>66</sup> Case of [Brusco v. France](#), App. no 1466/07 (Judgment of 14 October 2010).

<sup>67</sup> [Zaichenko v. Russia](#), cited above note 10

<sup>68</sup> [Stojkovic v. France and Belgium](#), cited above note 10.

<sup>69</sup> [Bandeltov v. Ukraine](#), cited above note 9.

'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' (emphasis added).

Also relevant are the Recitals 19 and 28 of the Directive, providing:

'(19) (...) the information [about procedural rights] should be provided promptly in the course of the proceedings and **at the latest before the first official interview** of the suspect or accused person by the police or by another competent authority.

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

It must also be noted that each of the substantive provisions of the Directive imposes obligations on the Member States in favour of 'suspects or accused persons' (see Articles 3(1), 4(1), 6(1) and 7(2)). This term is not otherwise defined.

## D. USING THE DIRECTIVE IN PRACTICE

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### 1. Preliminary point: the apparent limited scope of the Directive

#### a. The wording of Article 2

It is immediately apparent from the wording of the Directive that it seeks to define the scope of the protections by reference to the point when a person is 'made aware' that they are suspected or accused. This is particularly the case in light of the references in the recitals to the 'first official interview'; though these terms are not otherwise defined, they seem to suggest that procedural rights and accusations need only be notified in advance of formal questioning.

However, the scope provision of the Directive, which does not refer to national law, must be regarded as having an autonomous meaning. And provisions of the Directives must be interpreted in line with the ECHR, as a minimum. The Article 6 guarantee, as we have seen, apply from the point when a person's interests are 'substantially affected' and this effectively means that, in ECHR terms, a person is 'charged' 'when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence'.<sup>70</sup>

A narrow reading of the Directive would lead to the situation where people who, in ECHR terms, are 'charged in criminal proceedings' do not have protection under the Directive – this despite the fact that the Directive aims to build upon Article 6 ECHR. The Directive would be deprived of its useful effect if Member States were able to institute proceedings against people, within the meaning of

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<sup>70</sup> Case of *Bandeltov v. Ukraine*, cited above note 9, paragraph 56.

Article 6 ECHR, and yet escape the obligations imposed upon them in order to safeguard the rights of those same people.

### **b. Fair Trials' view on the scope of the Directive**

Accordingly, we would suggest that this is just a case of cautious legislative drafting and that a person 'charged' within the meaning of Article 6 ECHR enjoys rights under the Directive. A person becomes a 'suspect or accused person' such as to enjoy rights under the Directive not simply when national law assigns them the status of suspect, but whenever their interests are 'substantially affected' and in particular 'when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence'.

## **2. Establishing the violation**

In principle, your approach here is going to be linked to confessions or other evidence supplied by the client before they were officially placed under suspicion. This could be in a multitude of different procedures (among those mentioned to us are roadside stops, informal questioning at the police station, formal questioning as a witness, and provision of evidence under compulsory powers). As soon as you detect that this evidence is having an impact upon the procedure (e.g. justifying further investigation, detention, or liable to be used for conviction), you should take action.

- Identify statements or other evidence given outside the context of formal investigation of the client as a suspect.
- Establish whether this information was given completely voluntarily or whether it has been obtained with a view to being used against your client.

Once you have identified the problematic statement / evidence, you should find a basis to say that this was taken in breach of the Directive due to the failure to notify the individual of their rights under Article 3 and/or of the accusations under Article 6 of the Directive. Effectively, you want to identify, matters which suggest that the person was, at the stage the evidence was acquired, already under suspicion. It would seem logical to look for things arising in the ECtHR case-law:

- Inspect the case file and identify the objective elements that meant that the client was under suspicion at the time the act in question was carried out, e.g.:
  - Evidence received from other witnesses / suspects, in the possession of the investigative authorities, which inculpated the client; and
  - The procedure followed (e.g. forcible procedure for turning over documents) was made as a step in a criminal investigation against the client.

On this basis, you then want to establish whether the Directive was complied with at the time, and in particular whether the client was given information about the accusation and their rights in accordance with Articles 3 and 6 of the Directive.

- Establish whether the Directive was complied with at the time the relevant step was taken:
  - If the step was one taken in writing (e.g. a notice requiring the provision of information or documents), inspect this and see whether it contained any information about procedural rights or the accusation;

- If the step is recorded in the minutes of a judge, police etc., check whether any mention is made of those matters; and
- Speak with the client and ask them about this. If they confirm that they were not given any information, use this evidence in support of your challenge (below). In addition, establish with the client whether they would have proceeded differently had they been advised of their rights.

### 3. Seek a remedy

The type of challenge you will make will depend upon the stage of proceedings at which you find yourself. If it is at a pre-trial stage, you may still be seeking the prevention of further investigative acts, the commuting of charges which are based on the evidence obtained earlier on, or you may be seeking to ensure that the trial court does not take account of any of the evidence collected pursuant to the violation.<sup>71</sup> Either way, you are calling upon the court to ensure the effect of the Directive:

- ➔ Invoke the Directive before the competent court.
- The Directive applies to ‘suspects and accused persons’ and applies from the time that they are ‘charged’ within the meaning of Article 6 ECHR. This is interpreted by the ECtHR as meaning that a person becomes charged when the authorities have plausible reasons to believe that the person has committed an offence.
- For the following reasons (e.g. the authorities had already heard another witness who had denounced the client), this test was satisfied and it was incumbent upon the authorities to notify the ‘witness’ that he was suspected of an offence, and provide the information required by Articles 3 and 6 of the Directive.
- Because of the failure / decision not to do so, the client made decisions regarding the conduct of his defence (e.g. making confessions, supplying documents) without fully understanding the consequences of this.
- Accordingly, in order to ensure the effectiveness of the Directive and safeguard the fairness of the proceedings, the court must redress any prejudice caused when taking its own decision. It must, therefore, declare any investigative steps which have their foundation in the violation of the Directive invalid / disregard any evidence obtained as a result of the violation of the Directive.
- Even if the evidence was obtained prior to the person becoming a suspect, the court must ensure that its decision is free of any contamination from the breach of the Directive, the impact of which must be fully undone.

<sup>71</sup> See the ‘Using EU Law in Practice’ Toolkit for more discussion of the remedies issue.

## CONCLUSION

The case-law of the ECtHR on this subject is full but not exhaustive, and some key areas have not been explored. Where violations arise, this is often due to specific facts of the cases, from which extrapolation is needed in order to arrive at guiding principles. The Directive, in imposing common standards on the right to information in criminal proceedings, provides a more structured normative framework within which local decision-making will have to be taken and judicially controlled.

Fair Trials is cautiously hopeful that this Directive could really help criminal defence. EU fundamental rights principles relating to access to documents and respect for defence rights have had significant impact, e.g. through forcing the disclosure of essential information in the context of UK national security procedures highly restrictive of defence rights in the recent ZZ case.<sup>72</sup> We hope that the CJEU will deliver robust judgments in the criminal context on the basis of the Directive.

Pending interpretation of the Directive by the CJEU, throughout this Toolkit, we have sought to make clear when we are taking a view on the Directive, and have tried to say explicitly where our legal approach has come from. However, we fully accept that there may be other views. Please do not hesitate to give us feedback on this Toolkit: tell us if you found it useful, if you disagree, and why.

We also encourage you to engage with Fair Trials and the networks we coordinate:

- Contact us to let us know how of your experience invoking the Directive.
- Let us know if courts issue positive decisions applying the Directives.
- If questions of interpretation arise, consider the CJEU route: see the Using EU law toolkit, our 2014 paper on strategic approaches to the CJEU<sup>73</sup> and our online training video on the preliminary ruling procedure in criminal practice.<sup>74</sup>
- Visit our website [www.fairtrials.org](http://www.fairtrials.org) regularly for updates on key developments relating to the Directives, and news about in-person trainings.
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper *Towards an EU Defence Rights Movement*<sup>75</sup> for concrete ideas on articles, litigation, conferences etc.

**Fair Trials Europe**

**Legal Experts Advisory Panel**

**March 2015**

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<sup>72</sup> Case C-300/11 ZZ [ECLI:EU:C:2013:363](http://eur-lex.europa.eu/legal-content/EN/REGULATIONS/?uri=CELEX:2013:363).

<sup>73</sup> Fair Trials, *Strategic approaches to litigation before the CJEU on the Roadmap Directives and EAW*, 2014, available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

<sup>74</sup> Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

<sup>75</sup> Fair Trials, *Strategies for implementation of the Roadmap Directives: Towards an EU Defence Rights Movement*, February 2015, available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.





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