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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**on the implementation of Directive 2012/13/EU of the European Parliament and of the  
Council of 22 May 2012 on the right to information in criminal proceedings**

# **1. INTRODUCTION**

## **1.1. Background**

Directive 2012/13/EU on the right to information in criminal proceedings<sup>1</sup> ('the Directive') is the second instrument which has been adopted pursuant to the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>2</sup>. On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm Programme — An open and secure Europe serving and protecting citizens<sup>3</sup>.

The first measure adopted pursuant to the Roadmap was Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings<sup>4</sup>. Following the adoption of these first two directives, further work related to procedural rights has been carried out. The EU has since adopted four more directives on the right to access a lawyer and communicate with third persons while being deprived of liberty<sup>5</sup>; on strengthening certain aspects of the presumption of innocence and the right to be present at the trial<sup>6</sup>; on procedural safeguards for children<sup>7</sup> and on legal aid<sup>8</sup>.

These six directives aim to contribute to the general objective of increasing mutual trust by allowing better application of the principle of mutual recognition, the cornerstone of the EU area of freedom, security and justice. They do this by providing common minimum standards for procedural rights in all criminal proceedings, and by providing a more consistent implementation of the right to a fair trial set out in Article 47 of the Charter of Fundamental Rights of the European Union<sup>9</sup> as well as Article 6 of the European Convention on Human Rights (ECHR).

## **1.2. Purpose and main elements of the Directive**

Directive 2012/13/EU seeks to help ensure that the right of suspects and the accused to information in criminal proceedings is applied in practice.

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<sup>1</sup> OJ L 142, 1.6.2012, p. 1.

<sup>2</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 C 295, 4.12.2009, p. 1.

<sup>3</sup> OJ C 115, 4.5.2010, p. 1.

<sup>4</sup> OJ L 280, 26.10.2010, p. 1.

<sup>5</sup> Directive 2013/48/EU 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 L 294, 6.11.2013, p. 1.

<sup>6</sup> Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, OJ L 65, 11.3.2016, p. 1.

<sup>7</sup> Directive (EU) 2016/800 on procedural safeguards for children who are suspects and accused in criminal proceedings, OJ L 132, 21.5.2016, p. 1.

<sup>8</sup> Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1.

<sup>9</sup> OJ C 326, 26.10.2012, p. 392.

By establishing common minimum rules governing the right to information in criminal proceedings (and European arrest warrant proceedings) the Directive aims to increase Member States' confidence in each other's criminal justice systems. To that end it builds on and seeks to promote the rights laid down in, for example, Articles 47 and 48 of the Charter of Fundamental Rights of the European Union<sup>10</sup>.

The Directive sets out minimum standards for all suspects or accused persons within the EU regardless of their legal status, citizenship or nationality. It is designed to help prevent miscarriages of justice and reduce the number of appeals.

The Directive establishes the right to information in criminal proceedings and European arrest warrant proceedings. Persons have this right from the moment they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence, and until the conclusion of the proceedings.

It lays down the right to information about procedural rights orally (Article 3) or in writing if the person is deprived of liberty (Article 4) or subject to a European arrest warrant (Article 5), the right to information about the accusation (Article 6) and the right to access to materials of the case (Article 7).

### **1.3. Scope of this implementation report**

This evaluation of the implementation of the Directive has been carried out in accordance with Article 12 of the Directive, which requires the Commission to submit a report to the European Parliament and to the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with the Directive.

The description and analysis in this report are based primarily on the information provided by Member States. They are complemented by publicly available studies carried out by the European Union Agency for Fundamental Rights<sup>11</sup> or by external stakeholders assessing the implementation of the procedural rights directives using Justice Programme action grants<sup>12</sup>.

The report focuses on the measures Member States have taken so far to implement the Directive. It assesses whether Member States have implemented the Directive within the

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<sup>10</sup> See CJEU, 5 June 2018, *Kolev a.o.*, C-612/15; other relevant judgments on this Directive are CJEU, 15 October 2015, *Covaci*, C-216/14; CJEU, 22 March 2017, *Tranca a.o.*, Joined Cases C-124/16, C-188/16 and C-213/16.

<sup>11</sup> See the study by the European Union Agency for Fundamental Rights (FRA), '*Rights of suspected and accused persons across the EU: translation, interpretation and information*', November 2016. Available at <http://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation>

<sup>12</sup> See the study done by Council of Bars and Law Societies of Europe (ECCB) '*TRAINAC Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings*', published in 2016. Available at: <http://europeanlawyersfoundation.eu/wp-content/uploads/TRAINAC-study.pdf>. See also "Inside Police Custody" and "Inside Police Custody 2", carried out by the Irish Council for Civil Liberties in 2014 and 2018. Available at: [https://intersentia.be/nl/pdf/viewer/download/id/9781780681863\\_0/](https://intersentia.be/nl/pdf/viewer/download/id/9781780681863_0/).

specified timeframe, and whether national legislation achieves the objectives and fulfils the requirements of the Directive.

## **2. GENERAL ASSESSMENT**

Under Article 11, Member States had to transpose the Directive into national law by 2 June 2014. At the date of expiry of the transposition period, seven Member States had not communicated the necessary measures to the Commission: Cyprus, the Czech Republic, Luxembourg, Malta, Slovenia, Slovakia, and Spain. The Commission therefore decided in July 2014 to launch infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union, against these seven Member States for failing to communicate their transposition measures.

The Commission's main objective has been to ensure that all Member States transpose the requirements of the Directive into their national law, so that the rights it contains are protected throughout the European Union. The transposition of the Directive is a prerequisite to properly assess the extent to which the Member States have taken the necessary measures to comply with the Directive. The Commission started assessing whether the national measures comply with the Directive as soon as they were notified by Member States. However, Luxembourg, for example, transposed the Directive only in March 2017, and Romania completed its initially partial notification with transposition measures on 12 July 2016 and 6 October 2017. These delays in transposition have postponed the overall assessment process. The last infringement proceedings for non-communication could be closed only in January 2018. In these circumstances, and given the complexity of the assessment of all the measures communicated by the 27 Member States bound by the Directive with particular regard to their different national legal systems, the Commission has not been in a position to submit this report earlier

Although the Directive's impact is limited to setting minimum rules and consequently leaves the possibility for differences between national criminal procedural laws, it does impose clear obligations on Member States.

The assessment has raised certain issues of compliance in several Member States, in particular as regards the Letter of Rights in criminal proceedings and European arrest warrant proceedings, the right to information about the accusation and the right of access to the materials of the case. Unless remedied, such divergences may negatively affect the effectiveness of the rights provided by this Directive. The Commission will take every appropriate measure to ensure conformity with the Directive throughout the European Union, including where necessary initiating infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union.

In accordance with Articles 1 and 2 of the Protocol (No 22), Denmark is not taking part in the adoption of the Directive and is not bound by it or subject to its application. Hence, Denmark is not considered in the following assessment.

In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, the United Kingdom and Ireland have notified that they wish to take part in the adoption and application of the Directive.

### **3. SPECIFIC POINTS OF ASSESSMENT**

#### **3.1. Subject matter (Article 1)**

Article 1 of the Directive specifies that the Directive lays down rules concerning the right to information of suspects and accused persons, relating to their rights in criminal proceedings and to the accusation against them as well as to persons subject to a European arrest warrant.

Most Member States already had legislation on the right to information. The transposition process therefore involved Member States amending any pre-existing legislation or adopting more specific legislation.

#### **3.2. Scope (Article 2)**

Article 2 of the Directive outlines the scope of application of the Directive.

##### **3.2.1. Scope of application — Article 2(1)**

Article 2(1) of the Directive provides that the right to information in criminal proceedings and proceedings for the execution of a European arrest warrant applies from the time a person is made aware by the competent authorities that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, that is, until the decision is final.

According to Recital 19 of the Directive ‘[t]he competent authorities should inform suspects or accused persons promptly [...] and at latest before the first official interview [...] by the police or another competent authority’.

Most Member States do not specifically address the moment at which a suspect or accused person is ‘made aware’ of the suspicion or accusation, nor do they specify that the right to information applies throughout the criminal proceedings. However, a systematic analysis of the different stages of criminal proceedings in the respective national legal contexts shows that conformity can be inferred for a large number of Member States.

However, issues arise with regard to three Member States<sup>13</sup> which lay down the obligation to provide information about rights only when a person is deprived of their liberty. For persons who are not deprived of liberty, the same safeguards do not apply.

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<sup>13</sup> One Member State concerned only for part of its territory.

As regards the personal scope, certain discrepancies of the terms ‘suspect’ and ‘accused’ have appeared in Member States’ legislations. The large majority of Member States distinguish between both terms when referring to the persons subject to the criminal proceedings. However, two Member States only use the notion of ‘accused person’ in their legal systems, but not the notion of “suspect”. Persons are considered as accused when they have been charged with a criminal offence.

### **3.2.2. Minor offences — Article 2(2)**

Article 2(2) of the Directive ensures that when the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, the right to information is granted for the appeal proceedings.

This provision is relevant for those Member States where administrative authorities, the police or courts having jurisdiction in non-criminal matters are responsible for dealing with minor offences. For the remaining Member States, the provision does not apply because sanctions on minor offences are imposed by courts having jurisdiction in criminal matters.

### **3.3. Right to information about rights (Article 3)**

Article 3 of the Directive states that suspects or the accused must be provided promptly with information concerning at least the procedural rights set out explicitly in this Article. This information must be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

#### **3.3.1. Information on procedural rights — Article 3(1)**

In accordance with Article 3(1) and taking into account Recital 19 of the Directive, the information has to be provided promptly to suspects and accused persons.

Most Member States have transposed this provision accordingly. Although several Member States do not explicitly refer to the requirement of ‘prompt’ provision of information, this can be inferred from the fact that suspects or the accused are provided with information regarding their rights at the latest before the first questioning. However, in three Member States information on rights is only provided when the person is deprived of liberty (see 3.2.1.).

##### **3.3.1.1. Information on the right of access to a lawyer — Article 3(1)(a)**

Article 3(1)(a) was transposed accurately by almost all Member States. However, three Member States either did not transpose the provision, or did not transpose it in misdemeanour proceedings. In three Member States the information is not provided to suspects or accused persons who are not deprived of liberty.

### **3.3.1.2. Information on entitlement to free legal advice and the conditions thereof — Article 3(1)(b)**

25 Member States have rules in place informing suspects and accused persons of any entitlement to free legal advice, but two have no corresponding provisions. In some Member States discrepancies were identified because national legislation does not clearly set out that information on the conditions for obtaining free legal aid must be provided to suspects or the accused. In one Member State information about the right to free legal advice is not ensured in the context of misdemeanour proceedings. Lastly, in three Member States the relevant information is only provided to persons who are deprived of liberty.

### **3.3.1.3. Information on the right to be informed of the accusation — Article 3(1)(c)**

Almost all Member States transposed this provision. However, in three Member States this information is provided only when the person is deprived of liberty.

### **3.3.1.4. Information on the right to interpretation and translation — Article 3(1)(d)**

The majority of Member States complied with this provision. However, conformity issues arise in a few Member States where the right to information on interpretation and translation is not clearly regulated. In two Member States the national legislation provides neither for the right to translation nor for the right to be informed about it.

### **3.3.1.5. Information on the right to remain silent — Article 3(1)(e)**

All Member States transposed this provision correctly, except one. Many Member States transposed the provision in a more detailed manner, for example adding that the right to remain silent entails the right to comment on the accusation; or to make a statement, or to answer questions or not.

### **3.3.2. Providing information in "simple and accessible" language and taking into account particular needs of vulnerable persons — Article 3(2)**

Most Member States transposed this provision, however their approaches vary. Some Member States made general references to vulnerable persons, without mentioning any specific categories or defining vulnerability<sup>14</sup>. Several other Member States mention specific categories of vulnerable persons, such as:

- persons with hearing and speech impairments,
- persons with visual impairments,
- mentally disabled persons,
- persons with learning disabilities,
- persons suffering from mental conditions,
- persons over 75,

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<sup>14</sup> Vulnerable persons are defined by the Commission's Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings as 'persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities'.

- pregnant women,
- single parents raising minor children, and
- persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

However, some Member States do not provide for special treatment for vulnerable persons, which is not fully in line with the Directive. In one Member State, the needs of vulnerable persons have to be taken into account only if the person is arrested. In few jurisdictions it is not clearly regulated who is protected, and when.

Eleven Member States have transposed the requirement to provide information on rights in ‘simple and accessible language’ explicitly into their national legislation. However, 14 Member States do not meet the requirement to provide the relevant information in a language that a person understands or do not state that information must be provided in ‘simple and accessible language’.

### **3.4. Letters of Rights on arrest (Article 4)**

Article 4 of the Directive obliges Member States to promptly provide persons deprived of liberty with a Letter of Rights containing information about additional specific rights listed under the Directive. The Annex to the Directive sets out model letters for (I) persons who have been arrested or detained, and (II) persons arrested on the basis of a European arrest warrant.

#### **3.4.1. Provisions of a Letter of Rights — Article 4(1)**

Article 4(1) of the Directive states that Member States must ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They must be given an opportunity to read the Letter of Rights and must be allowed to keep it in their possession throughout the time that they are deprived of liberty.

Almost all Member States have national rules requiring a Letter of Rights. Whereas some Member States refer literally to the Letter of Rights, others use different terminology, such as ‘declaration’, ‘written information or notification or notice’ or ‘leaflet’. Nevertheless, despite the different terminology, all documents referred to in the respective national laws fulfil the role of a Letter of Rights under the Directive.

One Member State’s law does not provide for a Letter of Rights as such. Although it refers to a written declaration of rights, its purpose is not only informative. The declaration is handed over to a person when they are formally charged and is presented with a decree of accusation and an interview record to sign. This document mentions certain of the accused person’s rights but does not correspond to the list set out in the Directive.

Another Member State also does not have a uniform Letter of Rights. Different templates are used by courts and the police and it is unclear whether these different templates contain all

the rights required under the Directive. Moreover, it is not ensured that the person is allowed to keep the letter.

Most Member States transposed the requirement to provide the Letter of Rights ‘promptly’, albeit they expressed it in different ways in their national laws. However, the national law of a few Member States either does not determine when the Letter must be provided or allows the authority’s obligation to vary depending on the type of proceedings.

Not all Member States explicitly transposed the obligation to give suspects and the accused the opportunity to read and to keep the Letter of Rights. Moreover, one Member State allows for a deviation from the obligation to provide the person with written information (even at a later stage) in cases where providing written information can reasonably not be done and providing oral information is deemed sufficient.

### **3.4.2. Content of the Letter of Rights — Article 4(2)**

Article 4(2) of the Directive introduces the list of rights that the Letter of Rights has to contain, in addition to the information set out in Article 3 of the Directive, namely:

- (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.

#### ***3.4.2.1. Information on the right of access to the materials of the case — Article 4(2)(a)***

A majority of Member States transposed this provision adequately. Some Member States use a general reference to the right of access to the materials of the case, for example the right to consult or examine the file of the case, or the right to access evidence or judicial documentation, the documents of the criminal case or the information gathered during the criminal investigation.

However, certain issues arise in eight Member States. The Member State which does not have a ‘Letter of Rights’ (*see 3.4.1*) does not have rules in place that refer to the right to access the materials of the case. Four Member States provide for access to essential documents related to arrest and detention instead of general information on access to materials of the case. Finally, in one Member State it is not clear whether, for certain types of criminal proceedings, information about the right to access the materials of the case is included in the Letter of Rights.

#### ***3.4.2.2. Information on the right to have consular authorities and one person informed — Article 4(2)(b)***

This provision was correctly transposed by a large majority of Member States. In a few Member States there were some issues of conformity with the Directive, for example due to placing a limitation on contacting family members exclusively, or on contacting a relative,

educational institution or employer. In one Member State the right to contact the consular authorities is not included in the Letter of Rights.

#### **3.4.2.3. *Information on the right of access to urgent medical assistance — Article 4(2)(c)***

Almost all Member States (except one) transposed this provision. One Member State provides for the right to medical assistance, but it is not mentioned in the Letter of Rights itself.

#### **3.4.2.4. *Information on the maximum number of hours or days suspects or the accused may be deprived of liberty before being brought before a judicial authority — Article 4(2)(d)***

A large majority of Member States transposed this provision appropriately. However, each country's national legislation varies somewhat since the Directive does not specify the maximum time a person may be deprived of their liberty before they are brought before a judicial authority.

Issues arise in five Member States due to the absence of information regarding these time-periods in the national Letters of Rights. In one Member State the Letter of Rights provided to detainees contains relevant information, whereas the Letter of Rights provided to persons under arrest does not contain any reference to the maximum time period.

#### **3.4.3. *Basic information on challenging the arrest or detention and requesting a provisional release — Article 4(3)***

Under Article 4(3) of the Directive, the Letter of Rights must contain 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.

A majority of Member States transposed the provision adequately. However, in five Member States national rules do not ensure that the Letters of Rights contain information on the possibility of challenging the lawfulness of the arrest, of obtaining a review of the detention or making a request for provisional release. In one Member State where a proper Letter of Rights does not exist (*see 3.4.1*), this information is not provided to the suspect or accused person.

#### **3.4.4. *Manner of drafting the Letter of Rights — indicative model — Article 4(4)***

Article 4(4) of the Directive states that the Letter of Rights must be drafted in simple and accessible language. Annex I to the Directive also sets out an indicative model Letter of Rights.

Most Member States provide for a Letter of Rights drafted in simple and accessible language. Twelve Member States explicitly require this in their national legislation, for eight Member States this could be inferred from the actual content of the model Letter of Rights.

However, the national legislation of five Member States does not ensure that the written information be provided in simple and accessible language, and due to the absence of a

national model it could not be established whether this requirement is fulfilled. In one Member State where a proper Letter of Rights does not exist (see 3.4.1), this requirement is not fulfilled.

### **3.4.5. Language of the Letter of Rights — Article 4(5)**

Article 4(5) of the Directive obliges Member States to ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons must be informed of their rights orally in a language that they understand. A Letter of Rights must then be given to them without undue delay in a language that they understand.

Thirteen Member States transposed the provision correctly. Three Member States did not transpose it. Some others did not fully transpose this Article because, for instance, they do not ensure that oral information will be provided to suspects and accused persons in a language that they understand if the Letter of Rights is not available in the appropriate language, and that this will be followed by a translation of the Letter of Rights. Moreover, some Member States do not require a translation of the Letter of Rights to be provided ‘without undue delay’. Finally, in one Member State information needs to be provided orally only where the person cannot read or write and not if the information is not available in the appropriate language.

## **3.5. Letter of rights in European arrest warrant proceedings (Article 5)**

Under Article 5 of the Directive, persons arrested to execute a European arrest warrant must be provided with a Letter of Rights listing their specific rights according to the law implementing Framework Decision 2002/584/JHA<sup>15</sup>. Paragraph (1) requires the information to be provided promptly, and paragraph (2) states that the Letter of Rights must be drafted in simple and accessible language and refers to the model letter in Annex II.

### **3.5.1. Provision of Letter of Rights in European arrest warrant proceedings — Article 5(1)**

A majority of Member States transposed this provision adequately. Several Member States refer to the Letter of Rights literally, others have chosen different terminology such as ‘declaration’, ‘written information’, ‘written notification’, ‘written notice’ or ‘leaflet’.

The requirement of being ‘prompt’ (sometimes paraphrased as ‘immediately’, ‘without undue delay’, ‘at the time of the notification of custody’, ‘upon reception’, ‘as soon as possible’ or ‘as soon as practicable’) was transposed by most Member States. However, three Member States do not meet this requirement.

In several Member States there are no separate provisions regulating the obligation to provide information on the rights of suspects and accused persons in European arrest warrant proceedings. A ‘bridge provision’ means the rules applicable in criminal proceedings also

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<sup>15</sup> OJ L 190, 18.7.2002, p. 1.

apply to European arrest warrant proceedings. This raises concerns as the content of the Letter of Rights under Article 4 of the Directive varies from the one required under Article 5.

Finally, one Member State<sup>16</sup> does not require a Letter of Rights for European arrest warrant proceedings. In two other Member States it is unclear whether the relevant information is provided in writing.

### **3.5.2. Manner of drafting the Letter of Rights — indicative model — Article 5(2)**

Under Article 5(2) of the Directive, the Letter of Rights in the European arrest warrant proceedings must be drafted in simple and accessible language. Annex II to the Directive also sets out an indicative model Letter of Rights.

Most Member States provide for the existence of a Letter of Rights drafted in simple and accessible language. Eleven Member States have explicitly laid down this requirement in national legislation, for six Member States this could be inferred from the actual content of the model Letter of Rights.

However, for the remaining Member States the national legislation does not ensure that the written information is provided in a simple and accessible language. Due to the absence of a national model it could not be established whether this requirement is fulfilled.

## **3.6. Right to information about the accusation (Article 6)**

Article 6 of the Directive lays down the obligation to inform suspects and accused persons about the accusation and changes to it.

### **3.6.1. Information about the criminal act promptly and in detail — Article 6(1)**

Article 6(1) of the Directive obliges Member States to ensure that suspects or those accused are provided with information about the criminal act they are suspected or accused of having committed. That information must be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and ensure the defence can effectively exercise their rights.

All Member States but two complied with the obligation to provide the information on the accusation promptly. Many opted to paraphrase with ‘as soon as possible’, ‘immediately’, ‘without undue delay’, ‘in the shortest possible period’ or ‘urgently’, but nevertheless in general at the latest before the first interrogation.

The scope and content of the information provided differs depending on the national law. Some Member States opted for to introduce more detailed rules, and information is provided to the suspect or accused person which goes beyond the requirements of the Directive.

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<sup>16</sup> For part of its territory.

### **3.6.2. Information about the reason for arrest and detention and about the criminal act — Article 6(2)**

Under Article 6(2) of the Directive, suspects or accused persons who are arrested or detained have the right to be informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

Most Member States require a suspect or accused person who is deprived of their liberty to be informed of the reasons for their arrest or detention. However, in two Member States<sup>17</sup> this right is not explicitly ensured for persons who have been arrested, only for those detained. In one Member State, information on the reasons for arrest or detention is provided only when the person is handed over to correction institutions. Finally, in another Member State national legislation requires that the arrested or detained person should be informed about the facts, but it is not specified that the reasons for arrest or detention must be provided.

### **3.6.3. Information on the accusation: the nature and legal classification of the criminal offence and the nature of participation — Article 6(3)**

Under Article 6(3) of the Directive, Member States must ensure that 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. This must be provided at the latest on submission of the merits of the accusation to a court.

The majority of Member States transposed this provision accurately. Disparities arise in several Member States with regard to the timing of the provision of the information on the accusation. In six Member States the merits of the case are first sent by the prosecution to the court and only afterwards to the accused person. In one Member State it is possible that the accused is notified of the charges only moments before brought before the court. In two Member States it is not clear if the decision is delivered to the accused person at the latest on submission of the merits of the accusation to a court. Finally, in one Member State<sup>18</sup> detailed information on the accusation is provided at the latest on the substantive hearing of the case or matter by the court.

The interpretation of the term ‘*at the latest on submission of the merits of the accusation to a court*’, was subject to a preliminary ruling of the Court of Justice<sup>19</sup>. The Court stated that ‘*Article 6(3) of Directive 2012/13 must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of hearing of argument before the court, and after the commencement of that hearing but before the stage of deliberation, where the information thus disclosed is the subject of subsequent amendments, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.*’

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<sup>17</sup> In one of these Member States only for a part of its territory.

<sup>18</sup> For a part of its territory.

<sup>19</sup> CJEU, 5 June 2018, *Kolev a.o.*, C-612/15.

In a few Member States issues arise with regard to the content of the information provided. For example, national legislation does not stipulate that the suspect or accused person must be informed in a detailed manner about the accusation, mention the nature and legal classification of the criminal offence, or specify the nature of participation by the accused. General uncertainties on the level of details provided in regard to the content of the decisions remain in some national legislation.

Finally, the question of how to inform persons who have no fixed domicile or residence within the territorial jurisdiction of a Member State has been subject to two references for a preliminary ruling before the Court of Justice<sup>20</sup>.

#### **3.6.4. Provision of updated information — Article 6(4)**

Under Article 6(4) of the Directive, suspects or accused persons must be informed promptly of any changes in the information on the accusation where this is necessary to safeguard the fairness of the proceedings.

The majority of Member States transposed this provision correctly, but no implementation measures could be identified in five Member States. In several other Member States concerns arise as only certain changes need to be communicated (for example, changes in the legal classification) or because the timing of information is not specified.

### **3.7. Right to access to materials of the case (Article 7)**

Article 7 of the Directive lays down rules regarding access to the materials of the case.

#### **3.7.1. Right of access to essential documents for challenging the arrest or detention — Article 7(1)**

Under Article 7(1) of the Directive, where a person is arrested and detained at any stage of the criminal proceedings, the 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 to be made available to the arrested person or to their lawyers.

The assessment of national implementing measures shows that the understanding of ‘essential documents’ as well as the overall scope of access differs in various Member States.

Only few Member States specify the criterion of ‘essential documents’. One Member State lists essential documents; another Member State explicitly defines and names essential documents. Two other jurisdictions also provide for a definition, but the decision on this matter remains with the custody officer or the court. The remaining Member States do not define what constitutes essential documents.

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<sup>20</sup> CJEU, 15 October 2015, *Covaci*, C-216/14; CJEU, 22 March 2017, *Tranca a.o.*, Joined Cases C-124/16, C-188/16 and C-213/16.

Furthermore, some Member States allow for access to essential documents to be refused. In several Member States the existing restrictions regarding access to the materials of the case (*see below, 3.7.2 related to Article 7(2) and 3.7.4 related to Article 7(4)*) also extend to documents which are essential to challenging the lawfulness of the arrest or detention. Access to essential documents can be denied by the authorities in charge of the case if the fundamental rights or interests of other persons may be infringed or if another investigation could be seriously jeopardised. In line with established case law of the European Court of Human Rights<sup>21</sup>, it is not excluded that part of the case materials could be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, such denial of access cannot be pursued at the expense of substantial restrictions on the rights of defence<sup>22</sup>. In some cases reference is made to the presence of ‘*counterbalancing factors*’ which should ensure that the person or their lawyer have the possibility to effectively challenge the detention<sup>23</sup>.

Other issues which arise in the context of this provision relate mainly to the timing of the access to essential documents. Whereas Article 7(1) refers to ‘any stage of the criminal proceedings’, in some Member States access to essential documents is granted only after the first interrogations or even once the pre-trial investigation has been completed. In one Member State not all essential documents are made available to arrested persons who are in police custody.

### **3.7.2. Right of access to all material evidence — Article 7(2)**

Article 7(2) of the Directive obliges Member States to ensure that suspects or accused persons or their lawyers are granted access at least to all material evidence in the possession of the competent authorities in order to safeguard the fairness of the proceedings and to prepare the defence.

A majority of Member States fully transposed this provision. However, issues arise where the access to the case file is granted but the case file does not contain all material evidence. In some cases evidence that is kept outside the case file is not made accessible, or only at the trial stage.

As mentioned above (*see 3.7.1.*), in one Member State only the lawyer has full access to the case file. If a suspect or accused person is not represented by a lawyer, they do not have full access to the file but only to selected documents.

Finally, concerns also arise because certain Member States apply broad derogations from the right of access to the file (*see 3.7.4.*).

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<sup>21</sup> ECtHR, 9 July 2009, *Mooren v. Germany*, n°11364/03; 9 January 2003, *Shishkov v. Bulgaria*, No 38822/97.

<sup>22</sup> ‘*Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect’s lawyer*’, case *Shishkov v. Bulgaria*, n° 38822/97, §77.

<sup>23</sup> ECtHR, 20 February 2014, *Ovsjannikov v. Estonia*, n° 1346/12, §§ 73 and 77; ECtHR, 13 April 2017, *Podeschi v. San Marino*, n° 66357/14, §§ 172-176.

### **3.7.3. Availability of all material evidence in due time — Article 7(3)**

Article 7(3) of the Directive provides that without prejudice to paragraph (1), access to the material evidence must 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 must be granted in due time to allow for it to be considered.

The majority of Member States transposed the provision accurately.

However, a number of discrepancies continue to exist in national jurisdictions. One Member State sets no time limit for access to the file, in a few others access is granted only after the pre-trial investigation has been terminated and the act of indictment has been adopted or notified. In this context, the Court of Justice stated in the above-mentioned case *Kolev*<sup>24</sup> that *‘Article 7(3) of that Directive must be interpreted as meaning that it is for the national court to be satisfied that the defence has been granted a genuine opportunity to have access to the case materials, such access being possible, in some cases, after the lodging before the court of the indictment that indicates the trial stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file of the course of proceedings, provided that all necessary measures are taken by the court in order to ensure respect for the rights of defence and the fairness of the proceedings.’*

Finally, in another Member State access at pre-trial stage is only ensured if it is ‘in the interests of justice on the facts of the particular case’. Finally, in two jurisdictions no clear provision is made for access to material evidence and questions remain as to when and to which extent access to the file is granted.

### **3.7.4. Derogation from the right to access all material evidence following a judicial decision or decision subject to judicial review — Article 7(4)**

Under Article 7(4) of the Directive, access to certain materials may be refused by way of derogation from Article 7(2) and 7(3), 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 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 must ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials under this paragraph is taken by a judicial authority or is at least subject to judicial review. The derogation under Article 7(4) will apply, provided that it does not prejudice the right to a fair trial.

The assessment of national implementing measures shows that Article 7(4) is one of the provisions with the highest level of disparities between Member States. Whereas 10 Member

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<sup>24</sup> CJEU, 5 June 2018, *Kolev a.o.*, C-612/15.

States allow refusals based on the grounds set out in the Directive, others apply a less restrictive approach.

As regards a refusal of access to the file on the ground of a serious threat to the life or the fundamental rights of individuals, some Member States require a ‘serious danger to the life, health, physical integrity or freedom of a person’, or ‘a risk to individuals and a serious violation of their privacy’. However, in other jurisdictions the ‘risk’ for individuals is not required to be serious. Some provide that ‘private interests or interests of other persons’ can be invoked.

In several Member States access can be restricted because of ‘risks of pressure on or threat to victims, witnesses, investigators, experts or any other persons involved in the proceedings’.

As regards refusing access to the file because of the need to safeguard an important public interest, only few Member States explicitly refer to the need of safeguarding an ‘important’ public interest, but generally refer to a ‘public interest’ or an ‘interest of society’. In some Member States, the reason of ‘national security’ is considered as a ground for refusal, in one jurisdiction accompanied with ‘defence’ reasons.

Many Member States also deny access where it could prejudice an ongoing investigation. National laws invoke a general prejudice, danger or damage to the investigation itself. In some jurisdictions these grounds may also relate to other investigations. More general terms are also used, such as ‘serious reasons’ without further describing what those reasons may entail.

Finally, the requirement that the decision to refuse access to documents be taken by a judicial authority or be at least subject to judicial review is observed by almost all Member States. A few Member States do not provide for judicial review at the stage of police investigation. In these cases, remedies are reviewed by the prosecutor or a superior prosecutor.

### **3.7.5. Free access to documentation — Article 7(5)**

Under Article 7(5) of the Directive, access to the materials of the case must be provided free of charge.

Most Member States transposed this requirement accurately. However, conformity issues have been found in a few Member States and often relate to the cost of copying the files.

## **3.8. Recording and remedies (Article 8)**

Article 8 requires Member States to record when information is provided to suspects and the accused. It also ensures that the failure or refusal to provide information in accordance with the Directive can be challenged.

### **3.8.1. Recording obligation — Article 8(1)**

Article 8(1) of the Directive obliges Member States to require that the provision of information to suspects or accused persons in accordance with Articles 3 to 6 of the Directive

should be noted using the recording procedure specified in the law of the Member State concerned.

The majority of Member States transposed this provision in a conform manner. The record-keeping generally includes registering the fact that information about the rights listed under Article 3 of the Directive was provided, recording the provision of the Letter of Rights in criminal proceedings and the European arrest warrant proceedings as well as noting the fact and the extent of information given regarding accusations. Some Member States lay down general provisions regarding the duty of recording, others lay down specific clauses, or both general and more specific national provisions.

Conformity issues arise in certain Member States due to the non-specificity of national provisions and lack of accuracy. In certain Member States, there is no recording obligation for specific types of criminal procedures or at certain stages of the criminal proceedings.

### **3.8.2. Procedure for appealing against the failure or refusal of the competent authorities to provide information — Article 8(2)**

Article 8(2) of the Directive lays down the obligation to ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with the Directive.

Member States largely transposed this provision accurately. Most of them provide for a general right to challenge the refusal to provide information or relevant omissions of the competent authorities. This also covers refusal or failure to provide information on rights in accordance with the Directive. Other Member States have specific provisions regarding the right to challenge such refusals or omissions.

However, in a few Member States issues arise. For instance, the right to challenge the non-provision of information has not been enacted in national law, or the right to challenge the possible failure or refusal of the competent authorities to provide information covers only certain rights or certain types of proceedings, while others are excluded.

## **3.9. Training (Article 9)**

In accordance with Article 9 of the Directive, Member States are obliged to request those responsible for the training of judges, prosecutors, police and judicial staff involved in criminal proceedings to provide appropriate training with respect to the objectives of the Directive.

Overall, this provision has not been explicitly transposed by the majority of Member States. However, their national frameworks generally include soft-law measures ensuring training programmes for judicial staff.

## 4. CONCLUSIONS

The Directive was introduced to ensure the application of the right of suspects or accused persons to information in criminal proceedings. By establishing common European minimum standards, the Directive has a significant impact on the protection of suspects or accused persons in Member States by providing a more consistent implementation of the rights and guarantees set out in Articles 47 and 48 of the Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights. In this way, the Directive contributes to improving mutual trust among Member States as set out in the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. Overall, the Directive has provided EU added value by improving the protection of citizens involved in criminal proceedings, especially in some Member States where the right to information (including the right of access to the file) did not previously exist or was not as detailed.

The extent of the Directive's impact on Member States varies according to the national criminal justice systems in place. The evaluation highlights that there are still difficulties regarding key provisions of the Directive in some Member States. This is particularly the case as regards the Letter of Rights in criminal proceedings and European arrest warrant proceedings, the right to information about the accusation and the right to access to materials of the case.

The evaluation also shows that there is currently no need to revise the Directive but that its application can be further improved in practice. The Commission will continue to assess Member States' compliance with the Directive and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.