

Directive 2012/13/EU
on the Right to Information in Criminal Proceedings

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I. Introduction

Despite the approximation of domestic laws of the Member States, achieved through the case law of the European Court of Human Rights (ECtHR), its effect on establishing common procedural standards is limited due to the reactive nature of the Court's jurisprudence (depending upon the cases brought before it); its case-by-case approach; and the shortcomings of the enforcement mechanisms¹.

In an attempt to establish a coherent set of procedural rights and standards, on 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights in criminal proceedings ("the Roadmap"). The ultimate objective of the Roadmap was to harmonise, between Member States, the rights of individuals in criminal proceedings to the extent necessary to enhance mutual trust and facilitate mutual recognition of judicial decisions in criminal matters (art. 82 par. 2 of the Treaty on the Functioning of the European Union)².

By taking a step-by-step approach, the Roadmap called for the adoption of 5 measures with regards to: the right to translation and interpretation (measure A); the right to information on rights and information about the charges (measure B); the right to legal advice and legal aid (measure C); the right to communication with relatives, employers and consular authorities (measure D); and special safeguards for suspects or accused persons who are vulnerable (measure E). The Roadmap is designed to operate as a whole and, therefore, only when all its components have been implemented will its benefits be experienced in full³.

The Directive on the Right to Information in Criminal Proceedings (2012/13/EU) – also known as Directive B – is, in effect, the second "step" of the Roadmap. It follows Directive "A" on the right to interpretation and translation in criminal proceedings and precedes Directive "C" of 22 October 2013 (2013/48/EU) on the right of access to a lawyer. The Directive intends to promote common minimum standards for the information of suspects and accused persons in order to ensure the fairness of criminal proceedings and reflects the corresponding right to be informed. The right to

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¹ Ed Cape and Jacqueline Hodgson, "The right to access to a lawyer at police stations", *New Journal of European Criminal Law*, Vol. 5, Issue 4, 2014, p. 453-454

² Directive 2012/13/EU, preamble par. 9-10

³ Directive 2012/13/EU, preamble par. 11

information in criminal proceedings arises from articles 5 and 6 of the European Convention on Human Rights (ECHR) and its scope has been formulated by the case law of the ECtHR⁴.

This presentation on the Directive will showcase the case law of the ECtHR on various aspects of the right to information in criminal proceedings, in juxtaposition with the relevant provisions of the Directive, which were founded upon the Court's jurisprudence.

II. The Directive 2012/13/EU on the right to information in criminal proceedings

A. Scope of the Directive: At which point is someone entitled to the right to information?

In order to identify at which moment the procedural safeguards of article 6 of the ECHR come into play, we need to determine when a person is considered to face "criminal charges".

In *Aleksandr Zaichenko v. Russia*⁵, the ECtHR declared (in 42) that "charge", for the purposes of Article 6 par. 1, may be defined as the official notification of an individual by the competent authority that they have allegedly committed a criminal offence. However, the Court also uses a substantive criterion according to which a person is charged, despite not being formally accused, when their situation is affected by criminal investigations (see also *Deweert v. Belgium*, judgement of 27-2-1980, in 46). This indicates that the obligation to inform an individual arises in situations when, a suspect is first questioned as a witness by the authorities despite the latter's suspicions. For instance, in *Brusco v. France*⁶ the Court ruled (in 47) that the same guarantees apply to witnesses whenever they are in reality suspected of a criminal offence⁷.

The Directive's provisions

According to art. 2 par. 1, the Directive applies throughout criminal proceedings to all suspects and accused persons, regardless of their legal status, citizenship or nationality⁸, from the time they are made aware by the competent authorities that they are suspected or accused of having committed a

⁴ Silvia Allegrezza, Valentina Covolo, "The Directive 2012/13/EU on the right to information in criminal proceedings: Status Quo Or Step Forward?", *European Criminal Procedure law in service of protection of the Union financial interests: State of Play and Challenges*, Eds. Durdevic, Z., Ivcevic Karas, E., 2016, p. 41-42

⁵ Judgement of 18-2-2010

⁶ Judgement of 14-10-2010

⁷ In this case, the ECHR stresses the importance of the right to remain silent and the right not to incriminate oneself, which are generally accepted international legal principles at the heart of the notion of a fair trial (in 44). The ECHR found that the fact that the applicant was made to take an oath before answering the questions of the police amounted to a form of pressure, and that the threat of criminal proceedings (should he be found to have committed perjury) must have placed him under an even greater pressure; this sort of pressures amount to a form of coercion which violates article 6 (in 52). The ECHR stressed that a person has the right to be assisted by a lawyer during police interrogations and to be informed of their right to remain silent and not to incriminate themselves (in 45). It also underlines the fact that the article 6 safeguards are meant to ensure that a lawyer can inform a suspect, prior to the interrogations, of their right to silence and privilege against self-incrimination, and also provide assistance during the interrogation (in 54).

⁸ Directive 2012/13/EU, preamble par. 16

criminal offence until the conclusion of the proceedings. However, par. 2 and par. 17 of the Directive's Preamble ("the preamble") exclude the application of the Directive in minor offences, where a sanction is imposed by an authority. On this occasion, the Directive applies only to the proceedings before the court following an appeal or referral of the case.

Although the Directive defines the "conclusion of the proceedings" as "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", it does not include rules on exactly when the authorities should notify a person that they are considered a suspect. The only reference on this matter is to be found in *par. 19* of the preamble which mentions that such information must be provided promptly and at the latest before the first official interview of the suspect. In view of this, the term "*suspect*" must be understood as any individual who has not yet been officially charged or indicted by prosecuting authorities⁹.

B. The Right to Information

The right to information, as outlined by the Directive, is threefold and consists in:

- i) the right of the suspect or accused person to be informed of their procedural rights;
- ii) the right to be informed about charges; and
- iii) the right to access the case file.

i. Right to information about one's rights

The right to information about one's rights ensures the protection of other fundamental rights in criminal procedure, due to the fact that it creates a precondition which allows a person to be aware of the rights they are granted. Indeed, only a person, who knows their rights, is able to use them effectively and defend themselves in fair trial - in case of unjustified infringement¹⁰.

Article 6 of the ECHR does not provide for the right to be informed of one's rights. However, the ECtHR has ruled that the minimum information, which must be provided to defendants, is that they have the right to remain silent and the right to not incriminate themselves.

In *Aleksandr Zaichenko v. Russia* the Court declared (in 38) that these rights lie at the "heart" of the notion of a fair procedure under Article 6, because they protect the accused against improper compulsion by the authorities and thereby contribute to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6.

⁹ Silvia Allegrezza, Valentina Covolo, "The Directive 2012/13/EU on the right to information in criminal proceedings: Status Quo Or Step Forward?", p. 43

¹⁰ Irēna Nesterova, Ārija Meikališa, "The right to information about the right to silence as EU procedural guarantee in criminal proceedings and its impact on national legal systems", https://www.law.muni.cz/sborniky/dny_prava_2012/files/pravoEU/NesterovaIrena_MeikalisaArija.pdf, p.

Furthermore, in the cases of *Panovits v. Cyprus*¹¹ (in 72-75) and *Padalov v. Bulgaria*¹² (in 53-55), the Court ruled that authorities have a positive obligation to inform the accused of their right to legal representation. A passive approach, where law enforcement waits for the accused to claim their right, is insufficient, and they must actively ensure that the accused understand their right to legal assistance and legal aid, as well as their right to remain silent. As is stated (in 78) in *Pischnalnikov v. Russia*¹³ “if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected”.

Moreover, according to the Court, authorities need to take into account any particular vulnerabilities of suspects when providing such information. For instance, in *Plonka v. Poland*¹⁴ the applicant, who had been suffering from alcohol problems for 20 years, was arrested on suspicion of homicide. She claimed that she had not been properly informed about the possibility of obtaining legal assistance during questioning. The ECtHR found (in 37-38) that, given the applicant’s particular vulnerability, a pre-printed declaration form signed by the applicant acknowledging that she had been reminded of her right to remain silent or to be assisted by a lawyer could not be considered reliable. The position of the applicant should have been taken into account during questioning and in particular when apprising her of her procedural rights.

The Directive’s provisions

Article 3 stipulates that suspects or accused persons are provided promptly with information on a minimum number of rights. In particular, national authorities must inform the suspect or the accused at least about a) the right to 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 (article 6 of the Directive); d) the right to interpretation and translation; and e) the right to silence.

This information must be provided orally or in writing and in a simple and accessible language. Indeed, one thing the Directive 2012/13/EU and the case law of the ECtHR have in common is that information on the rights needs to be clear and delivered in a manner the accused understands¹⁵. According to par. 38 of the preamble, this could be achieved by different means, including non-legislative measures such as appropriate training for the competent authorities or by a Letter of Rights drafted in simple and non-technical language so as to be easily understood by a layperson without any knowledge of criminal procedural law.

Furthermore, it is explicitly stated in par. 26 of the preamble that the authorities need to take into account any particular needs of vulnerable suspects or accused persons, who are likely to not understand the content or meaning of the information; for example because of their young age or

¹¹ Judgement of 11-12-2008

¹² Judgement of 10-8-2006

¹³ Judgement of 24-9-2009. In this case, the applicant, Aleksandr Pishchnalnikov, is a Russian national who was born in 1959 and lived, until his arrest, in Revda (Russia). Convicted of -among other things- murder, kidnapping, theft and robbery, the applicant complains about the excessive length of the criminal proceedings against him and about being denied legal assistance at various stages of those proceedings.

¹⁴ Judgement of 31-3-2009

¹⁵ See *Panovits v. Cyprus*, at 72-74

their mental or physical condition. Member States should also ensure that, when providing information, suspects and/or accused persons are provided with translations or interpretation into a language that they understand, in accordance with the standards set out in Directive 2010/64/EU on translation and interpretation¹⁶.

To those who are arrested or detained, the Directive grants higher standards of protection. In particular, Member States are required to provide the arrested or detained person, with a Letter of Rights, which includes, in a simple and comprehensible language, information about the previously mentioned rights of article 3 plus additional information on:

- 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;
- d) the maximum number of hours and days suspects or accused persons may be deprived of their liberty before being brought before a judicial authority; and
- e) basic information about any possibility, under national law, of challenging the lawfulness of the arrest, obtaining a review of the detention and/ or making a request for provisional release.

The Letter of Rights should be provided in a language the arrested or detained person understands. In case a translation is not available, the information should be provided orally -but a Letter of Rights must be given to them without undue delay in a language they understand.

It should be highlighted that the right to be provided with a Letter of Rights is a new and specific measure not found in ECtHR case law.

Furthermore, in article 5, the Directive provides that persons who are arrested and detained under a European Arrest Warrant have the right to be provided with a Letter of Rights that details the additional rights to which they are entitled. The rights include being informed of the EAW and its contents, as well as of the possibility of consenting to surrender to the issuing judicial authority, and, in the absence of such consent, to have a hearing by the executing judicial authority (Art. 11 par. 1 and Art. 14 of Framework Decision on the EAW). The arrested person has also the right to be assisted by legal counsel and by an interpreter (Art. 11 par. 2 of the Framework Decision on EAW).

ii. Right to information about the accusation

Following the right to be informed about one's rights, the right to receive information about the accusation is equally important. That is because the suspect will need to make important decisions with regards to the preparation of their defence strategy (e.g. whether to seek legal advice, remain silent or answer questions). Indeed, one can decide on the above matters only when one is aware of the case against one. Failure to specify the allegations can lead to unwise decisions on behalf of the suspect. Moreover, in case the charges are altered during the investigations or the trial, it is equally

¹⁶ Directive 2012/13/EU, preamble par. 25

important for the accused and their defence counsel to be informed immediately in order to adapt their strategy accordingly¹⁷.

Article 6 par. 3(a) of the ECHR states that everyone charged with a criminal offence must “*be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*”. This obligation cannot be complied with passively; it is a positive duty that requires active steps to be taken by the prosecutor or the police. The information should be comprehensive, in order to ensure the person fully understands the extent of the charges and to allow them to prepare an adequate defence.

The Court has explained the rationale of this article in the case of *Mattoccia v. Italy*¹⁸ (in 61): “*While the extent of the “detailed” information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence. In this respect, the adequacy of the information must be assessed in relation to sub-paragraph (b) of paragraph 3 of article 6, which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing embodied in paragraph 1 of article 6*”.

According to the Court, the right of information enables defence at all stages of the process. In the case¹⁹ of *Pélissier and Sassi v. France*²⁰, the applicants complained that, although they were charged for committing criminal bankruptcy, a crime for which they were acquitted, the Court of Appeals had decided to convict them of aiding and abetting criminal bankruptcy, without hearing arguments from the parties on the issue. In its judgement, the Court first observed that special attention must be paid to the notification of the “accusation” to the defendant because particulars of the offence play a crucial role in the criminal process. Its service puts the suspect formally on written notice on the factual and legal basis of the charges against them. Furthermore, the Court emphasised (in 51) that article 6 par. 3(a) of the Convention affords the defendant the right to be informed in detail not only of the “cause” of the accusation, that is to say the acts they are alleged to have

¹⁷ Fair Trials International, “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”, March 2015, p.24

¹⁸ Judgement of 25-7-2000

¹⁹ See also, *Kamasinski v. Austria* (judgement of 19-12-1989, at 80) and *Mattoccia v. Italy* (judgement of 25-7-2000, in 58)

²⁰ Judgement of 25-3-1999. In this case the applicants, François Pélissier and Philippe Sassi, are French nationals. Mr Pélissier, was born in 1944 and lives in Sanary-sur-Mer; Mr Sassi was born in 1935 and lives in Cannes. After a criminal investigation, the applicants were committed to stand trial before the Toulon Criminal Court on charges of criminal bankruptcy. That court acquitted them in 1991, finding that they had not acted as de jure or de facto managers. In a judgment delivered on 26 November 1992, the Aix-en-Provence Court of Appeals upheld that finding, but convicted them of aiding and abetting criminal bankruptcy instead. It sentenced them to a suspended term of eighteen months’ imprisonment and imposed a FRF 30,000 fine. The applicants’ appeal to the Court of Cassation was dismissed on 14 February 1994. The applicants complained that the Court of Appeals had decided in deliberations to convict them of aiding and abetting criminal bankruptcy, which was not the offence charged, without hearing argument from the parties on the issue. They also complained of the length of the proceedings. They relied on Article 6 par. 1 and 3 (a) and (b) of the Convention. Mr Pélissier also complained under Article 6 par. 1 of the Convention that a certificate relied on by the Court of Appeal should not have been admitted in evidence.

committed and on which the accusation is based, but also the legal characterisation given to those acts. Moreover, the Court stated that the obligation to provide information on the accusation against the suspect is an ongoing one and for this reason the prosecution should not be allowed to contradict or amend the accusation without notifying the accused. On these grounds, the Court concluded (in 50-56) that there has been a breach of article 6 par. 3(a) of the Convention, because the applicants were not notified that the facts against them had been re-characterised and that they were suspected of a variation of the original crime.

The Directive's provisions

The Directive encompasses in article 6 the various aspects of the right to information on the accusation, as they were outlined by the jurisprudence of the ECtHR. It is worth noting that, according to the Directive, the right to information on the accusation takes different forms depending on the procedural stage of the criminal proceedings.

Initially, article 6 par. 1, which reflects article 6 par. 3(a) of the ECHR, guarantees that the suspected or accused receives general information about the criminal act that they are suspected or accused of having committed in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of defence.

This information should be provided “promptly”. According to par. 28 of the preamble, this means at the latest before their first official interview by the police or another competent authority. Moreover, a description of the facts, including (where known) time and place, and the possible legal classification of the alleged offence must also be provided in sufficient detail.

The standards of the right to information are higher at later stages of the proceedings. Article 6 par. 3 stipulates that the accused is provided, at the latest on submission of the merits of the accusation to a court, with detailed information on the accusation, which must include: the nature and legal classification of the criminal offence, as well as the nature of their participation in the alleged criminal act. Article 6 par. 4 provides further guarantees by requiring the national authorities to inform promptly the suspects or accused of any changes in information already given to them.

In addition to the general right to information about the accusation, article 6 par. 2 of the Directive, which corresponds to article 5 par. 2 of the ECHR, provides the right of information about the reasons for the arrest or detention. Even though the Convention requires that a person is informed “promptly” about the reasons of their arrest, this requirement is omitted from the wording of the Directive. However, par. 42 of the preamble states that the Directive’s provisions should be interpreted and implemented consistently with ECHR rights²¹.

It is difficult to draw exact rules about the acceptable timing from the ECtHR’s jurisprudence, due to the fact that few cases have dealt with this issue. The Court has assessed each case according to its facts and specific characteristics and thus it has avoided formulating a general rule about the maximum time limits.

²¹ Ed Cape, “Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?”, *Criminal Law Review*, 2014, 53

For example, in *Kaboulov v. Ukraine*²², the applicant was arrested to be deported, and the ECtHR held that a 40-minute delay in informing him of the reasons for his arrest would not necessarily raise an issue under article 5 par. 2.

In comparison, in *Saadi v. the United Kingdom*²³, the Court found a breach (in 84-85) of article 5 par. 2, when an asylum-seeker was only informed of the reasons for his detention at a reception centre after 76 hours.

Furthermore, the Court has been particularly flexible in cases concerning investigations of alleged terrorists, holding that it may be sufficient to provide the general nature of the charge initially, with greater detail being provided soon afterwards²⁴. The ECtHR will tolerate short delays in providing information under article 5 par. 2, but only if there are special features and complexities in the case in question.

Regarding the content of the information provided, in the case of *Fox, Campbell, and Hartley v. the United Kingdom* the Court held that (par. 40) “*by virtue of paragraph 2 (art. 5-2) 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 (art. 5-4)*”²⁵.

In *Kaboulov v. Ukraine*, a violation of article 5 was nevertheless found because the Government failed to provide any reliable indication of whether, and if so when, the applicant was informed that his detention was with a view towards extraditing him (in 147).

iii. Right of access to the materials of the case file

The right of suspects or accused persons to access evidence related to their case is based on the right to an adversarial trial and on the equality of arms principle²⁶, as laid down in article 6 par. 1, par. 3(b) and article 5 par. 4 of the ECHR.

²² Judgement of 19-11-2009

²³ Judgement of 29-1-2008

²⁴ Such as in *Fox, Campbell and Hartley v the UK*, (judgment 30-8-1990, in 40), *Murray v. the United Kingdom*, (judgement of 28-10-1994, at 72)

²⁵ In this case, the applicants were only told that they were arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists. The ECtHR stated that it was insufficient for an arresting officer to simply tell the suspects that they were arrested under a particular law. Instead, they must be informed of “the reasons why they were suspected of being terrorists” and of “their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations.” The Court also held that such information must be conveyed in a way that the person can understand, using “simple, non-technical language” (in 40). It did not find a violation of article 5 par. 2, because the applicants were provided with the details on the charge “promptly,” i.e. seven hours after the arrest (in 41-42).

²⁶ ECtHR, “Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb)”, 2014, p. 21: “Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (*Foucher v. France*, par. 34; *Bulut v. Austria*; *Bobek v. Poland*, par. 56; *Klimentyev v. Russia*, par. 95). Equality of arms requires that a fair balance be struck between the parties, and applies equally to criminal and civil cases. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing

This right, as formulated by the jurisprudence of the ECtHR²⁷, can be summarised as follows: The accused and their legal counsels have the right to access the case files that the authorities have against them and the evidence that may be presented against them in court, in order to prepare their defence. This right applies throughout the criminal proceedings: from pre-trial stages to trial hearings²⁸.

In the case of *García Alva v. Germany*²⁹ the Court declared (in 39) that “*The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention. [...] These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party*”.

In *Kamasinski v. Austria*³⁰, the Court found (in 88) that it was acceptable to provide such access only to the lawyer, but not the suspect personally. However, in *Foucher v. France*³¹ the Court stated (in 35-36) that, when a suspect has no lawyer or is self-represented, they must personally be provided with access to the case file.

Moreover, the ECtHR has also set down rules about the practicalities of providing access to evidence:

-In *Mooren v. Germany*³², the Court held (in 121) that a four-page summary of the case file did not satisfy the prosecution’s disclosure obligations, as it unfairly restricted the applicant’s

the court’s decision. The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of article 6 par. 1 looking at the two concepts together. There has been a considerable evolution in the Court’s case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (*Borgers v. Belgium*, par. 24). In criminal cases article 6 par. 1 overlaps with the specific guarantees of article 6 par. 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in article 6 par. 3 are constituent elements, amongst others, of the concept of a fair trial set forth in article 6 par. 1.”

²⁷ Open Society Justice Initiative, “Arrest Rights Brief No.2: The Right to Information”, 2012, p. 14

²⁸ European Union Agency for Fundamental Rights, “Rights of suspected and accused persons across the EU: translation, interpretation and information”, 2016, p.22

²⁹ Judgement of 13-2-2001. In this case, the Public Prosecutor’s Office dismissed the lawyer’s request for consultation of the investigation files on the ground that it would endanger the purpose of the investigation (at 40). The contents of the files played a key role in the court’s decision to prolong the applicant’s detention (at 41). While in particular circumstances the information collected during investigations may be kept secret “in order to prevent suspects from tampering with evidence and undermining the course of justice,” these legitimate goals “cannot be pursued at the expense of substantial restrictions on the rights of the defence.” Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to a suspect’s lawyer (at 42).

³⁰ Judgement of 19-12-1989

³¹ Judgement of 18-3-1997

³² Judgement of 9-7-2009

ability to challenge his detention. Similarly, an oral account of facts and evidence in the case file failed to comply with the requirements of equality of arms³³.

- In **Schöps v. Germany**³⁴, the Court emphasized (in 52) that the authorities must organise their procedure to facilitate the consultation of the case file by the defence without undue delay and should not be overly-formalistic in doing so.
- In **Lietzow v. Germany**³⁵, the Court declared (in 46) that the accused should be granted access to the materials of the case file “irrespective of whether [he] is able to provide any indication as to the relevance for his defence of the pieces of evidence to which he seeks to be given access”. In other words, the suspects or the accused are not required to provide any justification as to why they are requesting to be granted access to evidence of the case file.
- In **Niedbala v. Poland**³⁶, the Court ruled (in 71) that, when the prosecution has submissions in support of detaining the person on remand, these must be communicated to the person or their lawyer, who must also be afforded the opportunity to comment on the prosecutor’s submission.
- In the case of **Chambaz v. Switzerland**³⁷, the Court issued an important judgement in relation to the right to access to evidence which is in the possession of the authorities, irrespective of the proceedings it is connected to. In this case, the applicant, Yves Chambaz, was the subject of parallel administrative and criminal investigations for tax evasion. The applicant requested to be granted access on the file of the criminal investigation in order to be able to defend himself in the proceedings before the Administrative Court. His request was denied³⁸; the Court found that the restrictions imposed in Mr Chambaz’s case had not pursued the aims of protecting vital national interests or preserving the fundamental rights of others, since he had been refused access to the documents on account of his “attitude”, in particular his lack of explanations. The Court concluded that the right to equality of arms had not been respected, in breach of article 6 par. 1.

The ECtHR has acknowledged 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, interfering with witnesses or undermining the course of justice³⁹.

³³ The Court also noted that the fact that the domestic court later acknowledged that the applicant's procedural rights had been curtailed by the lack of access to the case file and allowed his counsel to inspect the file at a later date did not remedy the procedural shortcomings that had occurred in the earlier stages of the proceedings.

³⁴ Judgement of 13-2-2001

³⁵ Judgement of 13-2-2001

³⁶ Report of 1-3-1999 of the European Commission of Human Rights

³⁷ Judgement of 5-7-2015

³⁸ In its judgement, the ECtHR reiterated that the only permissible restrictions on access to all evidence in the prosecuting authorities’ possession had to be justified by the protection of vital national interests or the preservation of the fundamental rights of others. The Court had previously held that, in tax proceedings of a criminal nature before the administrative courts, the tax authorities might be required to supply a litigant with certain documents even if they had not been specifically relied on in the case against them.

³⁹ See *Lietzow v Germany*, in 47.

However, according to the Court's jurisprudence, any restrictions on the right to access evidence on the case file must be strictly necessary, narrowly construed, and balanced by other measures to ensure the equality of arms. For instance, in *Shishkov v. Bulgaria*⁴⁰, the Court stated (in 77) that “*this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence*”. From this perspective, the Court has held that information which is essential for the assessment of the lawfulness of a detention must be made available in an appropriate manner to the suspect's lawyer, even in cases where the national authorities have submitted that they were concerned about collusion and interference with evidence⁴¹ or the risk of compromising the success of the ongoing investigations⁴².

The Court reaffirmed the above in a recently issued judgement in the case of *Albrechtas v. Lithuania*⁴³. Mr Albrechtas was arrested in 2005 in connection with a murder. Upon his arrest, the applicant was provided with the decision charging him with that crime and with the notice of suspicion, with both documents summarising the prosecutor's case against him. During the applicant's first appearance before the court, his lawyer challenged the need for detention and asked to be shown the evidence against his client. The prosecutor answered that the lawyer had been shown “what was necessary” and dismissed the lawyer's request for consultation of the criminal file, on the grounds that seeing these documents would endanger the success of the investigation. The courts (of the first and second instance) ordered his detention pending trial⁴⁴.

In its judgement (in 78), the Court noted that the information provided to the applicant upon his arrest was not “evidence” but rather only an account of the facts as construed by the prosecutor on the basis of all the information existing in the case file. In the Court's view, it is hardly possible for an accused to properly challenge the reliability of such an account without being made aware of at least some concrete evidence on which the charges are based. According to the Court, this requires that the accused be given a sufficient opportunity to take knowledge of statements and other pieces of underlying evidence, such as the results of the police and other investigations, irrespective of whether or not the accused is able to provide any indication as to the relevance for their defence of the pieces of evidence to which they seek to be given access.

In fact, the Court stated (in 80) that the appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter. The Court reiterated (in 81) that it did not disregard the need for criminal investigations to be conducted efficiently, which may imply that part of the

⁴⁰ Judgement of 9-4-2003

⁴¹ See *Lietzow v Germany*, in 47

⁴² See *Garcia Alva v. Germany*, judgement of 13-2-2001,42

⁴³ Judgement of 19-1-2016

⁴⁴ Mr Albrechtas was ultimately found guilty in May 2012 of having put out a contract for the businessman's murder so that he would not have to repay debts he owed and was sentenced to eight years' imprisonment. He was released from prison in January 2015. Relying in particular on Article 5 par. 4 (right to have lawfulness of detention decided speedily by a court), Mr. Albrechtas complained that he and his lawyer had been denied access to information regarding the grounds for placing him in pre-trial detention in May 2005. He submitted that, without access to the investigation file – in particular statements made by the main prosecution witness against him, G.B., as well as documents concerning the search for him – he could not effectively challenge the grounds for his detention.

information collected during them must 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 excessive restrictions to the rights of the defence.

Restrictions may also apply on the basis of national security concerns. However, these restrictions must be limited in scope, appropriate and justified. For example, in *Moiseyev v. Russia*⁴⁵, the Court highlighted (in 215) that “national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights, such as the right to a fair trial, should have a lawful basis and should be appropriate to achieve their protective function”.

The Directive’s provisions

In article 7, the Directive grants the suspect or the accused full, unrestricted and free access to all material evidence in the possession of the competent authorities, whether for or against them. The term ‘material evidence’ includes all documents, photographs, audio and video recordings⁴⁶. As is clarified in par. 31 of the preamble, this right is not strictly limited to the evidence included in a specific case file, but rather to all material evidence, which relate to one’s case and is in the possession of the authorities. The objective of the disclosure of this information by the authorities is to safeguard the fairness of the proceedings and to enable adequate preparation of the defence (par. 2). Access shall be granted in “due time” and at the latest upon submission of the merits of the accusation to the judgement of a court (par. 3).

Article 7 par. 4 of the Directive provides a list of reasons that can justify restricting access to case materials. These include a serious threat to the life or fundamental rights of another person; or, if such refusal is strictly necessary to safeguard an important public interest; for instance, where such access could prejudice an ongoing investigation or seriously endanger national security. The Directive requires a certain, albeit undefined, degree of seriousness of these risks. As the Directive states, these restrictions are only permissible if they do not prejudice the right to a fair trial. Par. 32 of the preamble reiterates the importance of full access to the case file and states that any refusal of access must be weighed against the rights of the defence and will be interpreted strictly in accordance with the right to a fair trial under the ECHR. All decisions refusing access to case materials should be taken by a judicial authority or at least be subject to judicial review⁴⁷.

According to article 7 par. 1, persons who are arrested or detained have the right to access documents related to their specific case in the possession of the authorities which are essential in challenging the lawfulness of their arrest or detention. Documents, and where appropriate photographs, videos and audio recordings, should be made available at the latest before a competent

⁴⁵ Judgement of 9-10-2008

⁴⁶ Directive 2012/13/EU, preamble par. 31

⁴⁷ European Union Agency for Fundamental Rights, “Rights of suspected and accused persons across the EU: translation, interpretation and information”, 2016, p.81 “This is particularly important to ensure effective access to remedies in line with Article 47 of the EU Charter during the pre-trial stage, where the body conducting the proceedings can be a body other than a court, such as the police or public prosecutor”.

judicial authority is called to decide upon the lawfulness of the arrest or detention and in due time in order to allow the effective exercise of the right to challenge such arrest or detention⁴⁸. A challenge on the lawfulness of the arrest or detention is not a prerequisite to obtain access to the relevant information⁴⁹.

It should also be highlighted that there is no provision from derogation from art. 7 par. 1. and, in this sense, the right to access case material in order to challenge an arrest or detention is broader than the general right of the suspect or accused of par. 2.

C. Verification and remedies

The effective exercise of the right to information is safeguarded by two legal mechanisms, which are provided for by the Directive.

According to article 8 par. 2, the 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. Failure to provide relevant information can include situations where notification took place, but was ineffective due to improper form or language or due to other aspects, such as timing or content⁵⁰. However, that right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged⁵¹, but each Member State shall decide on how to accommodate such right. Nevertheless, article 47 of the EU Charter of Fundamental Rights requires that such complaints should be subject to effective judicial review.

It should be emphasised that such right is not provided for by the ECHR, but the ECtHR evaluates the effective exercise of the right to information by assessing the overall fairness of the proceedings. In that sense, the Directive raises the standards of protection compared to the ECHR and the ECtHR's jurisprudence.

Article 8 par. 1 of the Directive provides that Member States shall ensure that, when information is provided to suspects or accused persons, this is noted using the recording procedure specified in the law of the Member State concerned. Indeed, such recordings can be of high importance during procedures where the failure or refusal of the authorities to provide information in accordance with the Directive is challenged. This would help the judicial authorities to assess whether the complaint of the suspect of the accused person is valid.

⁴⁸ Directive 2012/13/EU, preamble par. 30

⁴⁹ Ed Cape, "Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?", *Criminal Law Review*, 2014, p. 63

⁵⁰ European Union Agency for Fundamental Rights, "Rights of suspected and accused persons across the EU: translation, interpretation and information", 2016, p. 86

⁵¹ Directive 2012/13/EU, preamble par. 36

III. Epilogue

It is evident that the Directive on the right to information incorporates, in a clear and detailed manner, the standards of protection provided for the ECHR and the principles of the said right as they were formed by the ECtHR's jurisprudence.

Interestingly, the Directive does not stop there but rather makes further headway: It extends the number of rights of which a suspected or accused person should be informed, it provides for the Letter of Rights and it requires remedies in case of violations. Furthermore, the Directive outlines the different aspects of the right to information; rightfully includes higher standards of safeguards regarding arrested or detained persons who are in a more vulnerable position in criminal proceedings; and extends its scope in EAW proceedings.

The ball is now in the court of the Member States, which face the challenge to transpose and implement the Directive in a way that guarantees the effective exercise of the right to information in accordance with the spirit of the Directive and the principles of the ECtHR. In this respect, the Court of Justice of the European Union will play a crucial role in assessing the compatibility of the national provisions with the European standards.

Nevertheless, one thing is certain: The Directive on the right to information in criminal proceedings brings us one step closer to a real era of freedom, security and justice.
