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Key issues of the right to information under Directive 2012/13/EU

Anneli Soo, PhD, Lecturer of Criminal Law at the University of Tartu

1. General information and the scope of the directive

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings¹ embraces the idea that suspects and accused persons have a right, at least from a certain point of the criminal proceedings (e.g., in cases of arrest or detention), to know of what and why they are suspected and what their rights are either at that moment or generally in the proceedings. Therefore, the directive covers three important aspects of the right to information in criminal proceedings, i.e.:

1. The right to be informed about one's rights;
2. The right to be informed about one's charges;
3. The right to access to the materials of the case.

Directive 2012/13/EU is based on Measure B in a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings of the 30 November 2009, adopted by the Council of the EU which stated that 'there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.'² Measure B in the roadmap states that '[a] person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.' The very initial idea of the directive was to cover only cross-border cases, which was nevertheless discarded by the Commission before drafting the directive based on an argument that in practice it is often impossible to distinguish between domestic cases and cases with cross-border

¹ OJ 2012 L 142/1.

² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ 2009 C 295/1, recital 2.

dimension.³ The directive is said to have undergone a long negotiation during which the Council substantially improved the initial text of the directive proposed by the Commission towards more extensive, protective, and precise rights.⁴ During the negotiations three main complexities arise. First, as the right to information is closely related to other defence rights like the right to a lawyer, presumption of innocence etc., the directive had to in its own way predict the future as by the time of negotiations only Measure A (the right to interpretation and translation) was formulated as a directive. Second, Measure B unlike Measure A focused mainly on pre-trial stage of criminal proceedings, which rules differ considerably among the Member States. And third, the right to information, which enhances the principle of equality of arms often contradicts the objective of ensuring efficient conduct of criminal prosecution, a balance that had to be carefully established in the directive.⁵ Luckily to all suspects and accused persons in Europe, compromises were found in all of these aspects, and the directive composed of 14 articles was adopted. On top of this, over half of the content of the directive consists of 45 recitals and two Annexes at the end.⁶

Transposition date of Directive 2012/13/EU was 3.5 years ago, on 2 June 2014. After transposition deadline passes directives become directly applicable to the national law on a condition that the provision of the directive is sufficiently precise and unconditional.⁷ In that case, if the national law is contrary to the directive, it has to be set aside.⁸ This means that even if the Member State refuses to implement the directive, the individuals can still invoke the rights incorporated to the directive. Unlike substantive law, procedural rules can be applied to all proceedings pending at the time when they enter into force.⁹ In addition, implementation of directives is subject to the monitoring of the Commission. Member States not only have to report upon the way in which they have implemented directives, but the Member State which fails to implement a directive can be brought before the ECJ by the Commission. When one analyses if the national law meets the requirements of Directive 2012/13/EU, three aspects have to be taken into consideration. When one analyses if the national law meets the requirements of the directive, three aspects have to be taken into consideration. First, the Charter of Fundamental Rights of the European Union (Charter)¹⁰ applies now to the subject matter covered by Directive 2012/13/EU. Second, Strasbourg standards have to be taken into account, but Article 52 (3) of the Charter guides the EU to consider the Strasbourg standards only as minimum ones. Therefore, when one reads the directive, she has to carefully consider if the EU has harmonised or raised certain existing Strasbourg standard. In Strasbourg system the right to information arises from Articles 5 and 6 of the European Convention on Human Rights (ECHR). Third, the standards of the directive themselves are minimum ones and do not restrain the Member States from guaranteeing higher protection to suspects and accused persons.

³ S. Cras, L. De Matteis. The Directive on the Right to Information. *Eucrim* 2013 (1), p 23

⁴ *Ibid.*

⁵ Complexities related to drafting Directive 2012/13/EU can be in detailed found at *ibid*, pp. 23–24.

⁶ Annex 1. Indicative model Letter of Rights; Annex 2. Indicative model Letter of Rights for persons arrested on the basis of a European Arrest Warrant.

⁷ *Criminal proceedings against Antoine Kortas*, 1 June 1999, C-319/97, p. 21.

⁸ A. Klip. *European Criminal Law. A Integrative Approach*, 3rd Ed. Intesentia, 2016, p. 169.

⁹ *Criminal proceedings against Giovanni Dell'Orto* *European Court of Justice*, 28 June 2007, C-467/05, p. 48.

¹⁰ OJ 2012, C 326/391.

According to Article 2 (1) of the directive '[the] Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.' Here the case law of the European Court of Human Right (ECtHR) has to be taken into account according to which 'charge' in the context of Article 6 has to be defined as the official notification of an individuals by the competent authority that they have allegedly committed a criminal offence, a definition in line with the test whether 'the situation of the [person] has been substantially affected'.¹¹ Therefore, Article 6 of the ECHR comes into play also when a person is questioned as a witness despite the fact that the authorities suspect her of committing the crime.¹² However, the directive does not apply to all offences as in Article 2 (2) there is a minor offences exception, which states that for offences sanctioned by an authority other than a court having jurisdiction in criminal matters, the directive applies only to the appellate proceedings before such court. In any case, it has to be taken into consideration that all offences falling under Engel criteria should be covered by the directive. Whether the directive applies only natural persons or also to legal persons is unclear and therefore, up to the ECJ to decide.¹³

2. The right to be informed about one's rights

The right to be informed about one's charges is not verbatim provided in the ECHR, but it can be deduced from the case law of the ECtHR. For the ECtHR the right to information is closely related to important defence rights as the right to counsel, the right to remain silent and the right not to incriminate oneself, which a person can meaningfully exercise only if she has been made aware of them.¹⁴ The right to be provided with a written Letter of Rights, which the directive encompasses, is a new one and cannot be found from the Strasbourg case law.¹⁵

Article 3 (1) of the directive obliges the Member States to ensure that suspects and accused persons are promptly provided with information concerning at least the following rights:

1. the right of access to a lawyer;
2. any entitlement to free legal advice and the conditions for obtaining such advice;
3. the right to be informed of the accusation;
4. the right to interpretation and translation;

¹¹ *Aleksandr Zaichenko v. Russia*, 18 February 2010, No. 39660/02, p. 42.

¹² *Brusco v. France*, 14 October 2010, No. 1466/07.

¹³ S. Cras, L. De Matteis, *op.cit.*, p 26.

¹⁴ *Panovits v. Cyprus*, 11 December 2008, No. 4268/04, p 73; *Aleksandr Zaichenko v. Russia*. 18 February 2010. No. 39660/02, p. 42.

¹⁵ A. Tsagkalidis. Directive 2012/13/EU on the Right to Information in Criminal Proceedings. ERA, Krakow, 2 March 2017. Available at: www.era-comm.eu/procedural.../Article_Right_to_Information.pdf.

5. the right to remain silent.¹⁶

The term 'promptly' is rather vague, but here attention should be paid that it must be interpreted with respect to the possibility for suspects or accused persons to effectively exercise their procedural rights.¹⁷ Here recital 19 specifies that '[i]n order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.' Recital 20 states that after such notification, reiteration of information should not be required, 'unless the specific circumstances of the case or the specific rules laid down in national law so require'. In any case, the information of such rights may be given either orally or in writing, in simple and accessible language, taking into account needs of vulnerable suspects and accused persons (Article 3 (2)). If suspect or accused person does not speak the official language, translation or interpretation into a language she understands should be provided in accordance with the standards of Directive 2010/64/EU¹⁸ (recital 25).

When a person has been arrested or detained¹⁹ she has to be promptly provided with a written Letter of Rights, which has to be allowed to keep in her possession throughout the time she is deprived of liberty (Article 4 (1)). In the Letter of Rights, which has to be in simple and accessible language and which model has been provided in Annex 1 of the directive (Article 4 (4)), the rights listed in Article 3 (1) should be provided next to the following rights and pieces of information (Article 4 (2) and (3)):

1. the right of access to the materials of the case;
2. the right to have consular authorities and one person informed;
3. the right of access to urgent medical assistance;
4. the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority; and
5. basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

The Letter of Rights has to be provided to suspects or accused persons in a language that they understand. In case a Letter of Rights is not available in the appropriate language, suspects or accused persons have to be informed of their rights orally in a language that they understand and a Letter of Rights in a language that they understand has then be given to them without undue delay (Article 4 (5)).

¹⁶ As the EctHR differentiates the right to remain silent and the right not to incriminate oneself, it is up to the ECJ to decide if this list also includes the latter. S. Allegrezza, V. 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. Croatian Association of Criminal Law, 2016, p. 43.

¹⁷ S. Cras, L. De Matteis, *op.cit.*, p 27.

¹⁸ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. OJ 2010 L 280/1.

¹⁹ Here recital 21 specifies that '[r]eferences in this Directive to suspects or accused persons who are arrested or detained should be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights.'

For persons subject to EAW upon their arrest an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA²⁰ in the executing Member State has to be promptly provided (Article 5 (1)). Similarly to arrested and detained persons, the Letter of rights has to be in simple and accessible language (its model can be found in Annex 2) (Article 5 (2)).²¹ Article 5 (2) does not say anything about translation, but if the person subject to EAW does not understand official language, principles laid down in Article 4 (5) should apply.

3. The right to be informed about one's charges

The general right to be informed one's charges arises from Article 6 (3) a of the ECHR stating 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'. The arrested person's right to be informed of the charges arises from Article 5 (2) of the ECHR according to which arrested person has to be 'informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'. The suspect or accused can make her decision on defence strategy only if she knows case against her. Equally, if the charges are altered in the course of criminal proceedings, it is very important for the suspect or accused and her counsel that they are immediately informed in order to allow them to adapt the chosen strategy.²² In *Mattochia v. Italy* the ECtHR has given further explanation to the meaning of 'detailed information' in Article 6 (3) a stating that '[w]hile 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 [...]' Here the right to be informed not only composes of information of the cause of the accusation, i.e. the acts suspect is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.²³ If the accusation is altered, the defence should be given opportunity to prepare to the new one.²⁴ When it comes to Article 5 (2) of the ECHR the information that has to be provided to the arrested person must be 'in simple, non-technical language that he can understand, the

²⁰ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ 2002 L 190.

²¹ Annex 2 provides five rights, which the Letter of Arrest to persons subject to EAW has to contain:

- 1.) the right to be informed about the content of the European Arrest Warrant on the basis of which a person has been arrested;
- 2.) the right to speak confidentially to a lawyer;
- 3.) the right to interpretation and translation;
- 4.) the right to consent or not consent to being surrendered to the issuing Member State;
- 5.) if a person does not consent to being surrendered the right to hearing.

²² Fair Trials. 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.

²³ *Pélissier and Sassi v. France*, 25 March 1999, No. 25444/94, p. 51.

²⁴ *Ibid*, p. 62.

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 the directive the right to be informed about one's charges arises from Article 6. Here the difference can be made between people who are arrested and who are not, and between the initial and later stages of criminal proceedings.

At initial stages of the proceedings suspects or accused persons have to be provided with information about the criminal act they are suspected or accused of having committed promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence (Article 6 (1)). Recital 28 clarifies that such information should be given at the latest before the first official interview by the police. A description of the facts and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence. In *Covaci* case the conformity of national notification procedure was under scrutiny of the ECJ. To be more exact, the German law provides that the accused not residing in the country is under an obligation to appoint a person authorized to accept service of a penalty order. The period of two weeks for lodging an objection against that order runs from the service of the latter to the authorized person. Here the ECJ concluded that the notification procedure of such nature is consistent with Article 6 (1) of the directive in so far as the period for lodging an objection begins to run from the time when the accused person actually becomes aware of the penalty order.²⁶

Suspects or accused persons who are arrested or detained have to be informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed (Article 6 (2)). In such manner Article 6 (2) corresponds to Article 5 (2) of the ECHR. The word 'promptly' has gone missing from Article 6 (2), but here it should be taken into consideration that rights provided in the directive can never fall below Strasbourg standards. However, the meaning of 'promptly' in Article 5 (2) of the ECHR cases is difficult to deduce from the ECtHR's case law as it is extremely dependent on specific circumstances of the case.²⁷ So here the directive suffers similar vagueness. The principle provided in recital 28 that information of charges should be given 'in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence' should apply here similarly to Article 6 (1).

At later stages of criminal proceedings, i.e. at the latest on submission of the merits of the accusation to a court Member States have to 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

²⁵ *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Nos. 12244/86, 12245/86, 12383/86, p. 10.

²⁶ Criminal proceedings against Gavril Covaci, 15 October 2015, C-216/14, pp. 66–67. Same conclusion was reached in Criminal proceedings against Ianos Tranca and Others, 22 March 2017, C-124/16, C-188/16 and C-213/16.

²⁷ A. Tsagkalidis, *op. cit.*, pp. 7–8.

accused person (Article 6 (3)). Here, in comparison to two previously analysed stages, the information should be complete and allow the accused to fully exercise her defence rights.²⁸

For persons subject to EAW the right to be informed about charges arises from Article 11 of Framework Decision 2002/584/JHA. Here Article 11 (1) provides that when a requested person is arrested, the executing competent judicial authority has to, in accordance with its national law, inform that person of the EAW and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority. Further, Article 11 (2) states that persons subject to EAW have the right to assistance of a lawyer and an interpreter.

If any changes are made to the charges in course of criminal proceedings, suspects and accused persons have to be notified promptly where this is necessary to safeguard the fairness of the proceedings (Article 6 (4)). Here recital 29 states that where ‘the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence.’ It has to be noted that the extension of the right to obtain information about the modification of the charges to the pre-trial stage goes well beyond the protection provided under the ECHR, and in this aspect the directive has raised the existing standard.²⁹

4. The right to access to the materials of the case

The right to access to the case file arises from Article 5 (4) and Article 6 (1) and 6 (3) b of the ECHR. In relation to Article 5 (4) the ECtHR has stated that equality of arms is not ensured if counsel is denied access to those documents in the investigation file that are essential to effectively challenge the lawfulness of her client’s detention.³⁰ According to the case law of the ECtHR right to review the lawfulness of arrest does not simply require information about the possibility to appeal a detention order and the related procedural conditions. It also implies the opportunity for the arrested person to know the reasons for her detention and have access to the case file within adequate time, in order that the right to review the arrest warrants be effectively exercised according to the principle of equality of arms.³¹ In relation to Article 6 (1) the ECtHR has ruled that according to fundamental aspect of fair trial criminal proceedings should be adversarial and the principle of equality of arms should be honored. Therefore, the prosecution should disclose to the defence all inculpatory and exculpatory material evidence in its position.³² It is acceptable to provide access only to lawyer and not to the accused personally,³³ but in cases the accused represents herself, access to the case should be given to her.³⁴ However, the Strasbourg case law accepts

²⁸ S. Cras, L. De Matteis, *op.cit.*, p 29.

²⁹ *Ibid*, p. 30.

³⁰ *Schöps v. Germany*, 13 February 2001, No. 25116/94, p. 44.

³¹ S. Allegrezza, V. Covolo, *op. cit.*, p. 44.

³² *Jasper v. United Kingdom*, 16 February 2000, No. 27052/95, p. 51; *Edwards and Lewis v. United Kingdom*, 27 October 2004, Nos. 39647/98 40461/98, pp. 46–48.

³³ *Kamasinski v. Austria*, 19 December 1989, No. 9783/82, pp. 87–88.

³⁴ *Foucher v. France*, 18 March 1997, No. 22209/93, pp. 35–38.

restrictions both under Article 5 (4) and Article 6 (1). In *Piechowicz v. Poland* the ECtHR noted that '[a]ny restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this caused are counterbalanced in a way that the individual still has a possibility effectively to challenge the allegations against him[.]'³⁵ Here the Strasbourg court has acknowledged the need for criminal investigation to be conducted efficiently, which may imply that part of evidence is kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice, but this goal cannot be pursued at the expense of excessive restrictions to the rights of the defence.³⁶ In *Jasper v. the United Kingdom* the Strasbourg court concluded that '[o]nly such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports 1997-III, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities[.]'³⁷

Similarly to ECtHR's case law, Directive 2012/13/EU makes a difference between two types of situations when it comes to the right to access to the case file (in the directive wording the right to access to the materials of the case is used): the right to access to the materials of the case upon arrest and general right to access to the materials of the case. In any of these cases, the right to access to the materials of the case have to be provided free of charges (Article 7 (5)).³⁸ Materials of the case should be understood as documents, and where appropriate photographs and audio and video recordings (recitals 30 and 31). Here the approach of the EU seems to be slightly old-fashioned as nowadays digital evidence acquires increasing importance. Nevertheless, recital 31 provides only exemplary list, which can be complemented depending on national law and specific circumstances of the case (e.g., hard or real evidence may be added to this list next to the digital evidence). All of these materials do not have to be physically in one specific case file. As recital 31 explains, access should be given to evidence 'as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case [...] Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law.' In Article 7 the importance of participation of counsel in preparing the defence is acknowledged by granting access not only to suspects and accused persons, but also to their lawyers.

In any case, access to the materials of the case has to be granted to suspects and accused persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence (article 7 (2)). Such access should be granted in due time to allow the effective exercise of the rights of the defence in any case no later than upon submission of the merits of the accusation to the judgment of a court (Article 7 (3), the first sentence)). Where further material evidence comes into the possession of the competent

³⁵ *Piechowicz v. Poland*, 17 April 2012, No. 20071/07, p. 203.

³⁶ *Albrechtas v. Lithuania*, 19 January 2016, No. 1886/06, p. 81.

³⁷ *Jasper v. United Kingdom*, 16 February 2000, No. 27052/95, p. 52.

³⁸ Recital 34 clarifies that this goes 'without prejudice to provisions of national law providing for fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer.'

authorities, access shall be granted to it in due time to allow for it to be considered (Article 7 (3), the second sentence)). It is not clear from the wording of Article 7 (3) whether general right to access to the materials of the case (i.e. not connected to arrest or detention) also applies to the pre-trial stage of criminal proceedings (e.g., to interrogation of a suspect). For this reason, it has been predicted that in this respect discrepancies may persist among the Member States.³⁹ According to Article 7 (4) rights provided in Article 7 (2) and (3) can be restricted by denying access to certain materials **if it does not prejudice the right to a fair trial and if:**

1. such access may lead to a serious threat to the life or the fundamental rights of another person or;
2. if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted.

Recital 32 emphasises that any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings. Further, restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the ECHR and as interpreted by the case-law of the ECtHR. The decision to deny access can be taken by officials like prosecutors, but if its not a judicial authority that makes the decision, it has to be at least subject to judicial review (article 7 (4)).

Article (7) 1 provides the right to access to the materials of the case upon arrest or detention of a person. Here Member States have obligation to ensure that 'documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.' Although Article 7 (1) mentions only documents, recital 30 expands the list to photographs, audio and video recordings, and due to influences of digital era, this list may be expanded further. These materials should be made available to defence at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention (recital 30). It should be noted that in legal literature opinion has been expressed that Article 7 (4) does not apply to Article 7 (1), which means that Article 7 (1) is not a derogatable right.⁴⁰ According to this standpoint the EU has raised a certain standard, which, as the next example demonstrates, may be difficult for the national courts to grasp. On the 4th of May 2016, the Estonian Supreme Court handed down a ruling which interpreted Article 7 of Directive 2012/134 in conjunction with the case law of the ECtHR, while rejecting the defence argument that Article 7 of this directive raises the standard of protection of the right of access to a case file upon arrest in the EU compared to the Strasbourg standard. In this case, the prosecutor had refused to allow the defence to have access to a case file in the course of proceedings in which the lawfulness of an arrest of a person was determined. Counsel filed an application to the Supreme Court making a preliminary reference to the ECJ, to determine if Article 7 (1) grants limitation to access to a case file upon arrest. The

³⁹ S. Allegrezza, V. Covolo, *op. cit.*, pp. 47–48.

⁴⁰ A. Tsagkalidis, *op. cit.*, p. 13; S. Allegrezza, V. Covolo, *op. cit.*, p. 47;

Supreme Court refused to make a preliminary reference based on an argument that in the case law of the ECtHR, in which light Article 7 (1) must be interpreted, can access to a case file upon arrest be restricted under certain circumstances.⁴¹ As the situation remains unclear, further guidance from the ECJ is most certainly needed.

5. Verifications and remedies

Compared to the ECtHR's case law Directive 2012/13/EU prescribes further steps to be taken to guarantee that the rights laid down in the directive are effective: recording procedure and legal remedies.

According to Article 8 (1) provision of information stipulated in Articles 3 to 6 to suspects and accused persons has to be recorded in accordance with national law. However, this does not oblige the Member States to introduce new recording procedures (recital 35). In comparison, the ECtHR does not require recording as such, but has found a breach of the right to be informed of the reasons for the arrest where lack of reliable information resulted from the absence of recording.⁴² In that sense the right provided in Article 8 (1) is closely related to the right to challenge the possible failure or refusal of the competent authorities to provide information in accordance with Directive 2012/13/EU (Article 8 (2)).⁴³ In a case where the fact that the specific right has been introduced to a suspect or accused has not been recorded, it is easier for the person and her counsel to challenge the failure to introduce one's right to information based on the very same argument that recording is missing. Still, the EU seems to have stopped in the half way when it comes to the remedies. For instance, if the right to silence has not been introduced to the suspect and she consequently gives statements, it is hardly enough that she is able to challenge the failure to introduce her rights. Instead, the main question here is what to do with evidence that has been received in violation of suspect's rights provided in the directive. As the directive provides only the right to challenge possible failures, it is doubtful whether the ECJ has competence to formulate the guidelines for effective remedies in such matters unless this competence is derived directly from Article 47 of the Charter.

⁴¹ See further discussion on this case at A. . Soo. Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. The UK* (13th of September 2016). *European Journal of Crime, Criminal Law and Criminal Justice* 2017 (25), pp. 340–345.

⁴² *Kabulov v. Ukraine*, 19 November 2009, No. 41015/04, pp. 147–148.

⁴³ However, recital 36 states that this 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 challenged.'