



# Guidance Booklet for Lawyers on the Right to Information, Right of Access to a Lawyer and Right to Legal Aid

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# PURPOSE OF THE BOOKLET

This Booklet offers an overview of three key European Union (EU) defence rights instruments: Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer, and Directive 2016/1919/EU on legal aid. It addresses common practical issues faced by lawyers and other criminal justice practitioners, illustrating how these Directives should operate in real cases. In doing so, it aims to support the effective exercise of suspects' and accused persons' rights and promote fair and efficient criminal proceedings across the EU.

It is intended primarily for practising lawyers in the criminal law field, working in European Union and is particularly relevant for those who advise or represent suspects and accused persons from the earliest stages of police contact through to trial (and potentially subsequent appeal).

It is grounded on the premise that access to clear, accessible and practical information can support observance of the rights established in these EU Directives.

These Directives form part of the "**Procedural Rights Roadmap**" adopted in 2009, which aims to strengthen the procedural rights of suspects and accused persons in criminal proceedings. It also covers the **right to interpretation and translation**, **the presumption of innocence and the right to be present at trial**, as well as **procedural safeguards for children who are suspects or accused persons**. The Roadmap was incorporated into the EU Stockholm Programme, within which the European Council highlighted that safeguarding the rights of suspects and accused persons is a fundamental value of the Union and essential to maintaining mutual trust among Member States.



# DIRECTIVES' OVERVIEW

**Directive 2012/13/EU** on the **right to information** in criminal proceedings sets minimum rules for ensuring that suspects and accused must be promptly informed about (i) their procedural rights, (ii) the reasons for the arrest/accusation and (iii) given access to the case files throughout the EU.

Regarding the procedural rights, these should be promptly provided with information concerning at least the following:

- ✓ Access to a lawyer
- ✓ Any entitlement to free legal advice
- ✓ The right to be informed about the accusation
- ✓ The right to interpretation and translation
- ✓ The right to remain silent

Furthermore, upon arrest or detention, **a written Letter of Rights in clear and simple language must be given to the suspects or accused persons**, who must have the opportunity to read it and be allowed to keep it in their possession. This Letter must include, in addition to the rights mentioned above, the following:

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

Model examples of Letter of Rights in criminal proceedings and in European Arrest Warrant (EAW) proceedings can be found in Annex 1 and 2 of the [Directive](#), respectively.

Suspects and accused must also be informed, in sufficient detail, of the criminal act they are suspected or accused of, so they can effectively exercise their defence rights and ensure fair proceedings. They must also be told the reasons for any arrest or detention, including the specific offence involved.

Lastly, they (and their lawyers) must receive free access to essential documents to challenge the lawfulness of arrest or detention, and to all material evidence (including exculpatory) held by authorities.



For a more detailed description please see the Fair Trials' Toolkit on the Right to Information Directive, available [here](#). For a brief presentation of the main points of Directive 2012/13/EU, please take a look at the EU Agency for Fundamental Rights' (FRA) reports "[Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings](#)", and "[Rights of suspected and accused persons across the EU: translation, interpretation and information](#)" which include dedicated sections on the right to information. Providing standards overview, regional challenges and examples of promising practices the following report from the EU Project 'From law to practice: Strengthening procedural rights in police custody (ProRPC)' is also available [here](#).

**Directive 2013/48/EU** on the **right of access to a lawyer** lays down essential requirements on the rights of suspects and accused persons in criminal proceedings and in EAW cases. It applies from the moment a person is made aware by authorities that they are suspected or accused of an offence, until the criminal proceedings are concluded.

This Directive is largely based on the principles and standards established in the European Court of Human Rights case law, such as [Salduz v Turkey \(2008\)](#), according to which access to a lawyer from the first police interrogation is a fundamental requirement of a fair trial and that restrictions on this right will generally irretrievably prejudice the rights of the defence.

Article 3 (2) specifies that the accused or suspected persons have the right to access a lawyer without undue delay, from the earliest of the following:

Before the interrogation by the police or other law enforcement or judicial authority



When the authorities are carrying out certain investigative or evidence gathering acts

After the deprivation of liberty



When the person has been summoned to appear before a criminal court

Moreover, confidential communication with legal counsel, their effective participation during questioning, and their presence at key investigative acts must be safeguarded. It also requires that if a person's status changes from witness to suspect, questioning must stop immediately and the person must be informed of their rights, including access to a lawyer. For EAW proceedings, the Directive ensures access to a lawyer in the executing State and the ability to appoint one in the issuing State.

Certain temporary restrictions can be allowed in exceptional circumstances, notably when there is "an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case" for actual or potential victims.

The Directive also allows suspects or accused persons to waive the right of access to a lawyer, provided the waiver is voluntary, informed, unequivocal, and can be withdrawn at any time.



For a more detailed explanation and concise overview of its main provisions, you may refer to the following materials: the FRA report "[Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings](#)" and Fair Trials' [Toolkit on the Access to a Lawyer Directive](#).

**Directive 2016/1919/EU** on the **right to legal aid** establishes common minimum standards on access to State funded legal assistance for suspects, accused persons and requested persons in EAW proceedings. Its importance lies in guaranteeing equal access to justice and safeguarding the right to a fair trial.

This Directive is deeply intertwined with the Right of access to a lawyer Directive and serves the purpose of guaranteeing that same right, through public funding, i.e. funding by a Member State of the assistance of a lawyer, therefore enabling the exercise of the right of access to a lawyer and ensuring its effectiveness.

**It applies to suspects or accused persons in criminal proceedings who benefit from the above-mentioned right of access to a lawyer pursuant to the respective Directive and meet one of the three additional criteria:**

The persons are deprived of liberty.

Are required by law to be assisted by a lawyer in accordance with regional or national law.

Are required or permitted to attend an investigative or evidence gathering act.

It also applies to requested persons under an EAW who have the right to access a lawyer upon arrest by the executing State, as well as to persons who, while not being initially suspects or accused, became so during questioning.

To determine whether someone has sufficient resources to pay for its own lawyer within criminal proceedings, Member States can apply a means test, a merits test or both. In any event, the merits test is considered to be fulfilled in the following circumstances: (a) when a suspect or accused person is brought before a competent court or judge to decide on detention at any stage of the proceedings within the scope of this Directive; and (b) during detention.

**Legal aid must be granted without undue delay, and at the latest:**

Before questioning by the competent authority.

Before any investigative or evidence-gathering acts are carried out.



A more detailed description and implementation guidance regarding this Directive can be found in the [Commission Report to the European Parliament and the Council](#), as well as in specialised legal aid toolkits produced under EU funded projects and non-governmental organisations (for example, Fair Trials' and Legal Experts Advisory Panel's [Transposition toolkit](#) and [Legal Aid Directive Toolkit](#)).

## GOOD PRACTICES

FULL-PROOF, along with several other initiatives, have been able to identify good practices that are applied across Member States. Below you will find a table with a few of them.

### Good Practices

Lawyers can apply for a digital copy or complete copies of the original file, sent to their office to produce complete copies and/or an electronic file using their own technical facilities, which improves full and swift access to case files for defence preparation.

An online platform connects lawyers and suspects or accused persons before their first interview by the police and/or investigative judge.

Mandatory permanent education system, requiring lawyers (including legal aid lawyers) to attend a minimum of 18 training hours per year to keep their knowledge updated.

Training programmes are established for actors involved in criminal proceedings related to this Directive.

Legal aid providers compile and make public informative lists of lawyers, including expertise, experience, and language skills, available at police stations, courts, and online.

For additional good practices take a look at the [FAIR Project Best Practices Handbook](#)

# PRACTICAL CHALLENGES AND PROPER PROCEDURES

The questions selected in this Booklet are based on the current practice as well as on the conclusions of different workshops and roundtables conducted under the FULL-PROOF project. It also draws significantly from the Fair Trials' Toolkits that thoroughly describes not only the Directives, but common issues that come up in their practical applicability.

Given the extensive content and reach of the three Directives, we chose to focus on one to two questions, based on practical examples, where the suspects or accused's rights in the preliminary stages of criminal proceedings (or EAW proceedings) were not observed. Certain common challenges that were identified in preliminary interviews with lawyers were taken into account and seek to demonstrate how they could deal with those types of situations and ensure proper procedures are followed and guaranteed at all times.

## Concerning Directive 2012/13/EU – Right to information

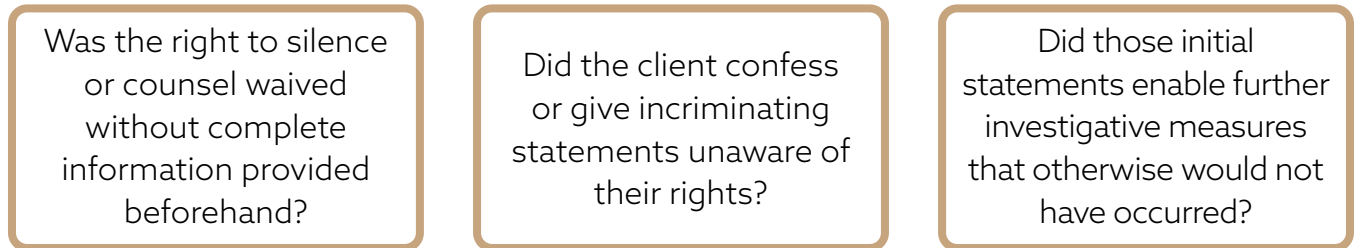
### Verification to be carried out by defence lawyer upon arrival

As explained in the [FAIR Project Best Practices Handbook](#), because suspects and accused persons oftentimes don't fully understand their procedural rights, defence counsels have an **additional responsibility** of giving information on and explaining in detail the procedural rights in a clear manner.

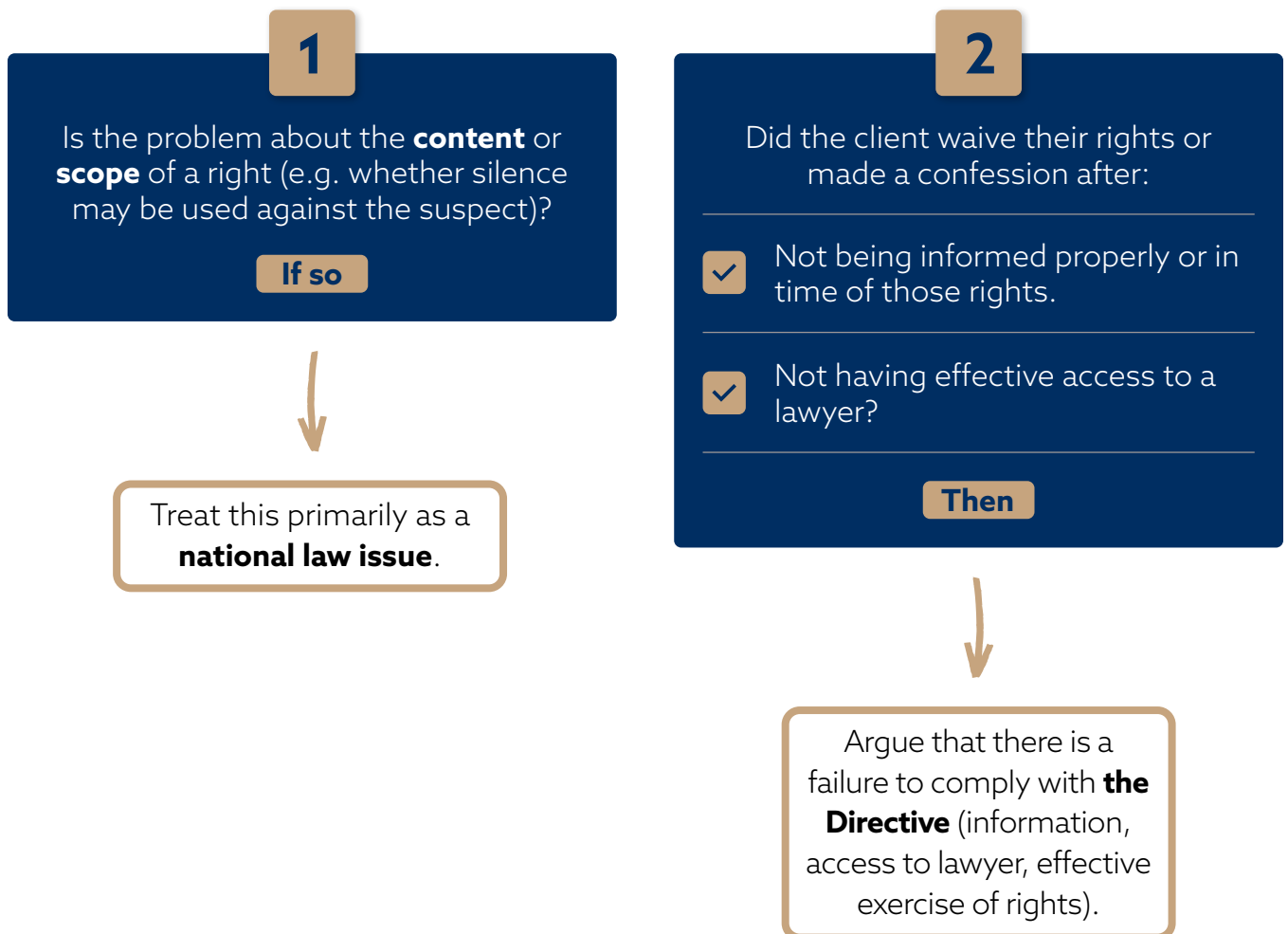
**As such, they should assess with their clients and other relevant actors that already participated in pre-trial proceedings (e.g., the police, but also through available records of such notifications) the following:**

- If they have been provided with a written notification of their rights, e.g., the right to remain silent, to be informed of the accusation, etc;
- If they have been informed of their rights at all;
- Whether or not the notification of the rights was effective, keeping in mind its language and form, the timing in which it was delivered and the manner in which it was conveyed (e.g., if it discouraged the suspect or accused of exercising their rights).

If it is concluded, from this assessment, that the Directive has been breached, the lawyer must **establish in what way the fairness of proceedings has been affected by such infringement**. To that end, questions such as the following should be asked:



It is important to differ between invoking national law or European law, in what concerns potential breaches as the ones described above. To have a better overview of the distinction that needs to be made, ask yourself:



Subsequently, **link the breach and the prejudice** and **ask for a remedy** - the one available under **your** national legislation.

The [Cross Justice Project User Manual](#) and FRA's report "[Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings](#)" have identified different legal avenues to challenge, for example, statements that were made without a lawyer present.

## What if some 'essential documents' for challenging arrest or detention are disclosed, but other relevant materials remain withheld by the prosecutor as non-essential?

- 1 Choose the right court/forum:** Target the appropriate pre-trial authority (e.g. appeal a prosecutor's denial, petition the investigating judge, or approach the detention judge).
- 2 Invoke the Directive rights in question:** Cite article 7(2)-(3) for access to all material evidence in time for defence (e.g. countering probes, submitting exculpatory info, adjusting strategy); pair with article 47 of the Charter arguing for equality of arms, which is directly applicable.
- 3 Address restrictions:** Acknowledge Art. 7(4) limits (e.g. investigation needs) but demand concrete proof of necessity; refusals need judicial review/motivation, with minimal impact on defence. For a more in depth analysis of this article please see [here](#), as well as paragraph 52 of the ECtHR judgement [Jasper v. United Kingdom](#).
- 4 Specify and justify needs:** List the desired documents/materials; show how withholding it hampers defence (e.g. contesting probe legality) and, as a consequence, a fair proceeding.
- 5 Escalate if needed:** Alert the court to the Court of Justice of the EU preliminary reference mechanism on the compliance with article 7. For step-by-step descriptions of this procedure listen to the explanatory videos available [here](#).

Regarding what to do as a lawyer in case there is a breach of the obligation to notify the suspect of the accusation and of the crime they are being charged with, take a further look at Fair Trials' Toolkit on the Right to Information Directive, available [here](#).

## Concerning Directive 2013/48/EU – Right of access to a lawyer

Only in pre-trial stage, and in addition to the geographical remoteness derogation, article 3(6) of this Directive allows **temporary derogations** from access to a lawyer in exceptional cases, strictly limited to:

**A**

Where there is an urgent need to **avert serious adverse consequences** for the life, liberty or physical integrity of a person.

**B**

Where immediate action by the investigating authorities is imperative to **prevent substantial jeopardy** to criminal proceedings.

Recital 31 further clarifies that during these temporary derogations, authorities may question suspects or accused persons without a lawyer present, **only if** they inform them of the (exercisable) right to silence, limit questioning to the minimum gathering of information needed to avert serious harm to life, liberty and integrity, and ensure no prejudice to defence rights (e.g. self-incrimination privilege).

In the landmark case [Ibrahim and Others v. UK](#), the ECtHR identified ‘compelling reasons’ for limiting lawyer access, ruling that, with adequate safeguards, incriminating statements from suspects or accused persons without a lawyer could be admitted for conviction without breaching [Article 6 of the European Convention on Human Rights](#). It developed a two-step test, in which the court:

**A**

Evaluates whether there were **compelling reasons** for the restriction.

**B**

Then, **weighs the prejudice caused** to the rights of the defence by the restriction in the case. In other words, examines the impact of the restriction on the overall fairness of the proceedings.

For further information on these restrictions and current case law on it, see the latest

[ECtHR Key Theme brief](#)

## What if incriminatory statements are made in the context of a police questioning under the Article 3(6) derogation (i.e. without a lawyer present)?

**Lawyers should take into consideration the following steps:**

**1**

Define the lawful scope of the derogation

You should first assess whether the restrictions on access to a lawyer were applied:

**A**

In exceptional circumstance.

**B**

For a temporary period.

**C**

Based on an individualised assessment of the circumstances of the case.

In order to formulate such a case you will need to examine the records to determine:

**A**

What exact danger was claimed.

**B**

If there was an immediate and concrete risk to life, liberty, or physical integrity.

**C**

If questioning was genuinely aimed at averting that risk.

## 2

Check whether the derogation exceeded its limits

You should examine if the questioning remained within the permitted scope by confirming **it addressed the urgent danger** and **stopped once relevant information was obtained** or **the lawyer was present**.

In order to establish that, you need to analyse the timing and substance of the questioning:

- ✓ Did the authorities obtain information that removed the need for emergency measures?
- ✓ Did questioning continue beyond what was required to avert the alleged risk?
- ✓ Were questions still directed at an immediate **preventive** objective, or had they become broader or investigative?

Once the emergency ended or access to a lawyer was unjustifiably withheld, the derogation becomes **impermissible**. Therefore, any questioning conducted after that point falls outside the lawful scope of the derogation and should be challenged accordingly, triggering remedies under Article 12. As the suspect's or accused lawyer, you should seek exclusion of such statements as evidence.

## 3

Handle the evidence obtained during a **valid** derogation

## A

First, acknowledge that in some cases (as was mentioned above), questioning without a lawyer may not breach Article 3 and is **justified by an immediate preventive need**.

This strengthens credibility and focuses the argument on the use of evidence, not legality of questioning alone.

**B**

Next, remind that the purpose of the derogation is **preventive, not investigative**. As such, emphasise that:

- ✓ The derogation exists to neutralise risks, not to build a prosecution;
- ✓ Any investigative use abuses the derogation.

**C**

Argue that even if questioning was lawful, statements obtained cannot be used for conviction or sentence. Rather, such evidence must be treated as evidence obtained in breach of Article 3, even if it was not technically the case, and therefore as **inadmissible for proving guilt**. To support this argument, rely on Article 12(2), which explicitly requires a remedy, even where Article 3 was not breached. If evidence could be freely used, the former article would be redundant.

In sum, we recommend that lawyers advance the following final legal position:

- 1 Article 3(6) allows temporary questioning without a lawyer for urgent **preventive** purposes.
- 2 This avoids an Article 3 violation.
- 3 However, Article 12(2) still mandates a remedy.
- 4 Therefore: Statements obtained under the derogation must not be used for conviction.

## Concerning Directive 2016/1919/EU – Right to Legal Aid

### What if the state-appointed legal aid lawyer in EAW proceedings lacks EAW expertise or language skills?

**A**

Invoke Directive 2016/1919/EU Article 7 to demand quality legal aid services that are adequate for fairness, citing Recital 26's training requirements and the need for effective EAW defence. Request replacement if specific circumstances justify (e.g. poor representation).

**B**

Argue under Article 6 that decisions on lawyer assignment must be diligent and respect defence rights; link with Directive 2013/48/EU (in particular Recitals 45, 48 and Article 11) ensuring free legal aid access from arrest.

**C**

Challenge via Article 8 remedy if unsatisfied, pairing with Article 47 of the Charter for effective protection/equality of arms. Seek court order for suitable lawyer (e.g. via on-duty lists) without client cost.

For detailed recommendations on legal aid read the Council of Bars and Law Societies of Europe (CCBE) [report](#), which sets out a number of guiding principles for the proper delivery of legal aid.

# FULL-PROOF Project

**FULL-PROOF** is a European Union co-funded project that aims to contribute to the streamlining of criminal justice procedures by comprehensively addressing breaches of procedural rights occurring in the initial stages of justice proceedings, concretely those in Directive 2012/13/EU, Directive 2013/48/EU, and Directive 2016/1919/EU.



If you want to know more about this project, please visit our website at:

[www.full-proof.eu](http://www.full-proof.eu)

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