

Breaking THE BARRIERS

TRANSNATIONAL PARTICIPATORY
JUDICIAL TRAINING ON PROCEDURAL RIGHTS

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BOOKLET

on EU standards on procedural rights of suspects and accused
persons in criminal proceedings

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Glossary

CFREU	Charter of Fundamental Rights of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJTN	European Judicial Training Network
MS	Member State(s)

About the ‘*Breaking the Barrier*’ project

This booklet forms part of the material developed in the context of the project titled ‘*Breaking the barriers: transnational participatory judicial training on procedural rights – Breaking the Barrier*’, which is co-funded by the European Union’s Justice Programme (2014-2020). *Breaking the Barrier* is implemented by a transnational consortium of partners under the coordination of the Themistokles and Dimitris Tsatsos Foundation – Centre for European Constitutional Law (CECL). The partnership comprises institutions from Austria (Ludwig Boltzmann Institute of Human Rights - BIM), Greece (CECL), and Spain (Spanish Judicial School Escuela Judicial Del Consejo General Del Poder Judicial De España – CGPJ). *Breaking the Barrier* is supported by the National School of the Judiciary in Greece and the Federal Ministry of Justice in Austria. The project started on 1/10/2019 and is expected to end on 30/6/2021.

In designing *Breaking the Barrier*, we aimed to respond to the need to increase the number of judges and prosecutors trained in the EU standards on procedural rights for suspects and accused persons in the three partner countries, in a manner which complements the work of national and European judicial training providers. To do so, we are addressing the following concerns: (a) the need to reduce language barriers, which prevent a large number of judges and prosecutors from participating in trainings on EU criminal procedural law, organised primarily at the cross-border and EU level; (b) the need to provide judges and prosecutors with high-quality training through tailored training curricula and material available in multiple national languages; and (c) the need to promote a common judicial culture through cross-border activities which enhance judicial cooperation and facilitate the uniform application of EU law.

Specifically, the project focuses on the Directives on Access to a Lawyer (Directive 2013/48/EU), the Presumption of Innocence (Directive (EU) 2016/343), Legal Aid (Directive (EU) 2016/1919) and Procedural Safeguards for Children who are suspects or accused persons in criminal proceedings (Directive (EU) 2016/800). Its main activities include the development of tailored training modules and material based on a training needs assessment performed through desk and primary research in the partner countries; the organisation of a three-day transnational “train the trainers” workshop; and the organisation of two, two-day cross-border initial and continuous training seminars for trainee and acting judges and prosecutors.

A total of 120 judges and prosecutors – 70 acting and 50 trainee judges and prosecutors – and 12 judicial trainers are expected to be trained in the course of the project.

For more information, please visit the project website at
www.breakingthebarriers.eu



The Centre for European Constitutional Law

The Themistocles and Dimitris Tsatsos Foundation – Centre for European Constitutional Law (CECL) is the coordinator of the *Breaking the Barrier* project. CECL is a leading research institute founded by the late Professor Dr. Dr. h.c. mult. Dimitris Th. Tsatsos in 1995, and located in Athens, Greece. It hosts the National Contact Point of the Fundamental Rights Network (FRANET) coordinated by the European Union Agency on Fundamental Rights (FRA) since 2007, conducting extensive research and data collection on fundamental rights. CECL also coordinates the Research Group “Constitution-Making and Constitutional Change” of the International Association of Constitutional Law and is a member of the Greek Section of the European Network on the European Social Charter and Social Rights (ANESC).

CECL aims to promote the development of democratic institutions, fundamental rights and the welfare state, to deepen European integration, and to strengthen international cooperation under the principle of respect to the cultural identity of each state. CECL provides institutional know-how and capacity-building to public bodies in Greece, Member States of the European Union, and third countries; undertakes theoretical and applied research in the fields of Greek, European and comparative public law and public policies; and promotes public awareness on developments in the European area. CECL has participated as a coordinator or partner in numerous European, national, and international projects, and is an experienced judicial training provider, with a focus on EU law.

For more information, please visit

www.cecl.gr/en/

Introductory note

The 2009 Roadmap for strengthening procedural rights

The 2009 Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings was adopted during the Swedish Presidency of 2009 by Council Resolution 2009/C 295/01¹. It forms part of the Stockholm Programme and aims to facilitate mutual recognition in criminal matters by enhancing mutual trust among the Member States' criminal justice systems. The Roadmap envisioned the introduction of EU standards for the protection of procedural rights on six key aspects of the right to a fair trial, in a manner complementary to the protection afforded by article 6 of the ECHR.

Specifically, the Roadmap introduced a list of measures related to translation and interpretation, information on rights and information about the charges, legal advice and legal aid, communication with relatives, employers and consular authorities, special safeguards for suspected or accused persons who are vulnerable, and pre-trial detention. At the same time, it stressed the non-exhaustive nature of this catalogue, encouraging the protection of procedural rights other than those listed therein – such as the presumption of innocence and the right to be present at one's trial. These measures would take effect through a step by step approach which led to the introduction, between 2010 and 2016, of six Directives and a Green paper on pre-trial detention. The Roadmap Directives are: Directive 2010/64/EU on the right to interpretation and translation, Directive 2012/13/EU on the right to information, Directive 2013/48/EU on the right to access to a lawyer, Directive 2016/1919/EU on the right to legal aid, Directive 2016/343/EU on the presumption of innocence, and Directive 2016/800/EU on procedural safeguards for children suspected or accused in criminal proceedings. They apply across the EU with the exception of Denmark and Ireland. Their transposition period has already expired at the time of writing.

When drafting the Directives, the EU legislator opted for the minimum standards approach, which ensures the existence of a least common denominator for all MS when it comes to the protection of procedural rights in criminal proceedings. At the same time, the Directives also adopt the principle of non-regression in relation to fundamental rights standards, as enshrined in the EU Charter of Fundamental Rights, the ECHR, or other relevant provisions of international law, as well as of domestic law, which provide a higher level of protection, thus ensuring that the most protective provisions applicable prevail in any given case. Conversely, the Directives allow for MS to derogate from certain specific standards enshrined in them, temporarily and on a case by case basis. All such derogations should be proportional and strictly limited in

¹ [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204(01)).

time, should not be based exclusively on the type or the seriousness of the alleged offence, and should not prejudice the overall fairness of the proceedings.

The Directives are meant to complement each other and the right to a fair trial in general. They should, therefore, be read as a whole and in conjunction with articles 6 ECHR and 47 CFREU, with due regard to the interpretation of the right to a fair trial by the European Court of Human Rights. ECtHR jurisprudence has played a central role in the inception, interpretation and application of the Directives, which largely codify Strasbourg case law. Therefore, landmark cases offering insight on the interpretation of the relevant norms are referenced in this booklet when appropriate. For further details on the interpretation of article 6 ECHR by the Strasbourg court, please refer to the *Guide on article 6 of the European Convention of Human Rights – Right to a fair trial (criminal limb)*, issued and updated by the ECtHR².

Finally, all Directives make special reference to the particular needs of vulnerable persons, and urge national authorities to take them into account when implementing or applying the Directives. According to the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings³, vulnerable suspects or accused persons should be understood to mean all suspects or accused persons who are not able to understand or effectively participate in criminal proceedings due to their age, their mental or physical condition or any disabilities they may have. Children are always considered to be vulnerable and should be given a specific degree of protection in accordance with their needs.

General principles

The general principles for the interpretation and application of EU Directives are applicable in the context of the Roadmap Directives. Of particular relevance to judges and prosecutors are the doctrine of indirect effect and the principles of effectiveness and equivalence⁴.

A Directive's indirect effect stems from the obligation for harmonious interpretation, which obligates national authorities, including – but not limited – to courts, to interpret national law in a manner safeguarding the content and spirit of the Directive, from the moment its transposition period expires. This means that judges

² The 2020 version is accessible at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

³ Commission Recommendation 2013/C 378/02.

⁴ See also the *Guide to the Procedural Rights Directives*, developed by the EJTJN, accessible at <http://www.ejtn.eu/Documents/About%20EJTN/Criminal%20Justice%202018/CR201804-Vilnius/Guide%20to%20directives.pdf>.

and prosecutors are under the obligation to rectify inaccuracies and fill lacunae in national legislation implementing the Directives, essentially performing a judicial review of its provisions in relation to EU law standards.

The principles of effectiveness and equivalence relate to the remedies available to the beneficiaries of a Directive's safeguards, whose rights under EU law have been infringed. Although remedies are primarily a matter of domestic law, based on the principle of "national procedural autonomy", they must, nevertheless, comply with certain standards. Specifically, they must be equivalent to those in place for analogous breaches of national law and effective in terms of allowing the right-bearer to pursue their claims in a manner which is not excessively difficult.

[The booklet](#)

The present booklet aims to codify the procedural rights standards enshrined in the EU Directives on Access to a Lawyer, the Presumption of Innocence, Legal Aid, and Procedural Safeguards for Children who are suspects or accused persons in criminal proceedings. It aspires to serve as an easy-to-use tool for the judges and prosecutors in the EU MS, assisting them in the application of their national criminal procedural frameworks in a manner harmonious to the content of the Directives.

A basic notion underpinning the inception of the *Breaking the Barrier* project is the reinforcement of the role of national judges and prosecutors as the primary implementers of EU law. The present booklet, therefore, deals exclusively with the content of the Directives, and not with the texts implementing them within the different national frameworks. The aim is to facilitate the interpretation of domestic law in a manner which ensures that the effectiveness of the Directives is preserved. This focus on EU law permits the use of the booklet by all justice professionals across the EU, going beyond the scope of the present project.

[How to use this booklet](#)

The booklet codifies the minimum standards enshrined in the Directives on Access to a Lawyer, the Presumption of Innocence, Legal Aid, and Procedural Safeguards for Children who are suspects or accused persons in criminal proceedings. It does not address other Roadmap Directives, which should, nevertheless, always be referred to, insofar as relevant in each specific case. As mentioned, all Roadmap Directives should be read as a whole, and cover different aspects of the same proceedings.

The booklet is divided into chapters corresponding to each Directive. In the beginning of each chapter there is a brief introduction outlining the aim and scope of the relevant Directive, followed by a table listing the applicable standards and the articles of the Directive to which they correspond. The first column of the table, indicating the number of each standard as elaborated in the following sections, contains active links to each subsection to facilitate navigation.

Each standard is analysed in a separate subsection. The analysis takes account of the content of the relevant Directive provisions, the relevant recitals of the preamble and the case law of the ECtHR. On the latter topic, the Guide on article 6, developed by ECtHR (ibid. p.4) has been a primary source in this analysis.

Access to a lawyer

The Access to a lawyer Directive ([Directive 2013/48/EU](#)) aims to ensure that suspects and accused persons in criminal proceedings and requested persons in European arrest warrant (EAW) proceedings have access to a lawyer and have the right to have a third party informed and to communicate with third persons and with consular authorities if they are deprived of their liberty.

The ECtHR has found⁵ that the right of access to a lawyer is fundamental to the exercise of the right to a fair trial, as it prevents the miscarriage of justice and fulfills the aims of article 6 ECHR. Specifically, the right serves as (a) a guarantee to the equality of arms between the investigating or prosecuting authorities and the accused; (b) a counterweight to the vulnerability of suspects in police custody; (c) a fundamental safeguard against coercion and ill-treatment of suspects by the police; (d) a guarantee of respect for the right of an accused not to incriminate him/herself and to remain silent. Furthermore, immediate access to a lawyer is likely to prevent unfairness arising from the lack of appropriate information on rights.

Table 1 – Access to a lawyer directive standards

Directive standard	Description	Directive article
Directive standard 1	Access to a lawyer without undue delay	2
Directive standard 2	Access to a lawyer in a time and manner allowing the practicable and effective exercise of defence rights	3
Directive standard 3	Right to meet in private and to communicate with a lawyer	3 (3) (a)
Directive standard 4	Right to have a lawyer participate effectively in the criminal proceedings	3 (3) (b)
Directive standard 5	Right to confidentiality of communications	4
Directive standard 6	Right to have a third party informed and to communicate with third persons and with consular authorities in the event of deprivation of liberty	5, 6, 7
Directive standard 7	Conditions for waiving the rights enshrined in the Directive	8

⁵ Beuze v. Belgium [GC] (§§ 125-130).

Derogations	Derogations permitted under this directive apply to the right to access to a lawyer at the pre-trial stage of the criminal proceedings and the right to have a third party informed of the deprivation of liberty	3 (5) and (6), 5 (3) and (4), (8), 10 (3), 12 (2)
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Directive standard 1 – Access to a lawyer without undue delay

Persons subject to criminal or EAW proceedings must have access to a lawyer **without undue delay** and until the conclusion of the criminal proceedings, including, where applicable, sentencing and the resolution of any appeal (article 2 of the Directive).

This means that access to a lawyer must be allowed and, where appropriate, facilitated, from the time a person is made aware by the competent authorities, by official notification or in any other way, that they are suspected or accused of having committed a criminal offence or from the time when they become suspects or accused persons in the course of questioning by the police or by another law enforcement authority, **irrespective of whether they are deprived of their liberty**.

Persons subject to **EAW proceedings** (requested persons) have the right to access to a lawyer, both in the executing and in the issuing MS, from the time of their arrest in the executing MS.

Two **exceptions** are stipulated, in respect of **minor offences**:

- (a) Where a sanction of a criminal nature is imposed by an authority other than a court, but may be appealed or referred to a court with jurisdiction in criminal matters (e.g. fines for traffic violations);
- (b) Where the act committed does not, in accordance with national law, incur deprivation of liberty as a sanction.

In the above cases, the Directive is applicable only in the main proceedings and not at the pre-trial stage. Nevertheless, if the suspect or accused person ends up being deprived of their liberty, the Directive applies in full from that moment on.

Directive standard 2 – Practicable and effective exercise of defence rights

Persons subject to criminal or EAW proceedings must have access to a lawyer in such time and in such a manner so as to allow the **practicable and effective exercise of their defence rights** (article 3 of the Directive).

The Directive lists **four (4) distinct procedural stages and investigative acts**, during which such access must be granted:

- (a) Prior to any questioning by a law enforcement or judicial authority;

- (b) During an investigative or other evidence-gathering act, in particular, identity parades, confrontations, and reconstructions of the scene of a crime;
- (c) From the moment of deprivation of liberty;
- (d) In due time before they appear before a criminal court.

In accordance with the ECtHR jurisprudence, in order for the right to a fair trial under Article 6 (1) ECHR to remain sufficiently “practical and effective”, access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right⁶. Access to a lawyer should be secured in such time prior to the relevant proceedings so as to allow for adequate time for the preparation of the suspect or accused person’s defence, with due regard to the nature of the proceedings, the complexity of the case and the stage of the proceedings, as well as the usual workload of the legal counsel⁷.

The police are under an obligation to **refrain from or to adjourn questioning** from the moment a suspect invokes the right to be assisted by a lawyer, and until a lawyer is present and is able to assist them. The same applies when the lawyer has to – or is requested to – leave before the end of the questioning and before the reading out and the signing of the statements taken⁸.

Access to the case file constitutes a distinct aspect of the right to be assisted by a lawyer. A refusal or difficulties encountered by a lawyer in having such access at the earliest stages of the criminal proceedings or during pre-trial investigation may also constitute an infringement of the right, depending on the specific circumstances of each case and the legal system concerned⁹.

Directive standard 3 – Right to meet in private and to communicate with a lawyer

Persons subject to criminal or EAW proceedings must have the right to **meet in private** and to **communicate** with a lawyer (article 3 (3) (a) of the Directive).

National law may permit **practical arrangements** concerning the duration and frequency of such meetings and communications, including the use of videoconferencing and other communication technology, taking into account the circumstances of the proceedings, in particular the complexity of the case and the procedural steps applicable. National law may also permit practical arrangements to

⁶ *Salduz v. Turkey* [GC], §§ 54-55; *Ibrahim and Others v. the United Kingdom* [GC], § 256.

⁷ *Gregačević v. Croatia*, § 51.

⁸ *Soytemiz v. Turkey*, (§§ 44-46, 27).

⁹ *Beuze v. Belgium* [GC], (§ 135).

ensure the safety and security, in particular of the lawyer and of the suspect or accused person, in the place where a meeting is conducted.

MS must secure **adequate facilities** for a suspect or accused person's consultation with their lawyer. Placing the accused person in a glass cabin during a hearing in a manner which prevents their effective communication with their lawyer may give rise to a violation of this right¹⁰.

Directive standard 4 – Right to have a lawyer participate effectively in the criminal proceedings

Persons subject to criminal or EAW proceedings must have the right to have their lawyer **participate effectively** when they are being questioned, and to **attend** the investigative and evidence-gathering acts (article 3 (3) (b) of the Directive).

Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. The lawyer may, *inter alia*, ask questions, request clarification and make statements, which should be recorded in accordance with national law.

Directive standard 5 – Right to confidentiality of communications

Persons subject to criminal or EAW proceedings must have the right to **confidentiality** of all forms of communication, including meetings, correspondence, telephone conversations, etc. (article 4 of the Directive).

The obligation to respect confidentiality implies not only that MS should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, MS should ensure that **arrangements for communication uphold and protect confidentiality**. This is without prejudice to any mechanisms that are in place in detention facilities with the purpose of avoiding illicit enclosures being sent to detainees, such as screening correspondence, provided that such mechanisms do not allow the competent authorities to read the communication between suspects or accused persons and their lawyer. The Directive is also without prejudice to procedures under national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.

Furthermore, the Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the

¹⁰ Yaroslav Belousov v. Russia, §§ 148-153.

suspicion that the lawyer is involved with the suspect or accused person in a criminal offence. Any criminal activity on the part of a lawyer should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive.

Finally, the Directive should be without prejudice to a breach of confidentiality which is incidental to a **lawful surveillance** operation by competent authorities for the maintenance of law and order and the safeguarding of internal security or the work carried out, for example, by national intelligence services to safeguard national security.

Directive standard 6 – Right to have a third party informed and to communicate with third persons and with consular authorities

Persons subject to criminal or EAW proceedings have the right to have a **third party informed** and to **communicate with third persons and with consular authorities** in the event of **deprivation of liberty** (articles 5, 6 and 7 of the Directive).

Specifically, persons subject to criminal or EAW proceedings deprived of liberty have the right, without undue delay:

- (a) To have at least one person of their choice informed of their deprivation of liberty. If the arrested person is a child, the holder of parental responsibility should be informed as soon as possible.
- (b) To communicate with at least one person of their choice.
- (c) If they are deprived of liberty in an EU country other than their own, they have the right to inform their consular authorities, to be visited by them, to communicate with them and to have legal representation arranged for by them.

Directive standard 7 – Waivers

Waivers of the procedural safeguards related to right to access to a lawyer are subject to specific conditions (article 9 of the Directive).

Specifically:

- (a) The suspect or accused person who wishes to waive their rights, as enshrined in the Directive, must be provided, orally or in writing, **with clear and sufficient information** in simple and understandable language about the **content** of the rights concerned and the **possible consequences** of waiving it.
- (b) Waivers must be given **voluntarily and unequivocally**.
- (c) Suspects or accused persons may **revoke a waiver** with immediate effect at any point during the criminal proceedings and must be informed about that possibility.

Waivers and the circumstances under which they were given must be **recorded** in accordance with the procedure laid down in national law.

The above are without prejudice to national law requiring the mandatory presence or assistance of a lawyer.

Derogations

The directive offers the possibility for the national legislator to derogate from certain rights, **temporarily and on specific grounds**. If a MS has made use of this option, the following restrictions to the right of access to a lawyer are permitted:

- (a) In exceptional circumstances and **only at the pre-trial stage** following a duly reasoned decision where the **geographical remoteness** of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty (article 3 (5) of the Directive).
- (b) In exceptional circumstances, where there is an urgent need **to avert serious adverse consequences for the life, liberty or physical integrity of a person** or where immediate action by the investigating authorities is imperative **to prevent substantial jeopardy to criminal proceedings**, the following rights may be subject to temporary derogation: (a) the right of access to a lawyer, only at the pre-trial stage of the proceedings and only following a duly reasoned decision (article 3 (6) of the Directive); (b) the right to have a third person informed of the deprivation of liberty (article 5 (3) of the Directive) – in this case an authority responsible for the protection or welfare of children must be informed without undue delay of the deprivation of liberty of the child.
- (c) Under the same, mutatis mutandis, conditions the derogation of article 5 (3) also applies to **EAW proceedings**.

Temporary derogations may be authorised only **on a case-by-case basis**, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. All derogations must:

- (a) be proportionate and not go beyond what is necessary;
- (b) be strictly limited in time;
- (c) not be based exclusively on the type or the seriousness of the alleged offence;
and
- (d) not prejudice the overall fairness of the proceedings.

Presumption of innocence

The Presumption of innocence Directive ([Directive \(EU\) 2016/343](#)) lays down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings. The directive applies to any individual (**natural person**) suspected or accused in criminal proceedings, and at all stages of the criminal proceedings, from the moment a person is suspected or accused of having committed a criminal offence to the final verdict. It does not apply to legal persons.

Table 2 – Presumption of innocence directive standards

Directive standard	Description	Directive article
1	Right not to be referred to as being guilty in public statements and judicial decisions	4
2	Right not to be presented as being guilty through the use of measures of physical restraint	5
3	Burden of proof	6
4	Right to remain silent and to not incriminate oneself	7
5	Right to be present at the trial	8
6	Right to a new trial	9
Derogations	No derogations stipulated	-

Directive standard 1 – Right not to be referred to as being guilty

For as long as a suspect or an accused person has not been proved guilty according to law, **public statements** made by public authorities, and **judicial decisions**, other than those on guilt, must not refer to that person as being guilty (article 4 of the Directive).

The term '**public statements made by public authorities**' should be understood to be any statement concerning a criminal offence made by an authority involved in the criminal proceedings, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials. The ECtHR holds statements made by judges under stricter scrutiny

than those made by other investigative authorities involved in the criminal proceedings¹¹.

In accordance with ECtHR jurisprudence, the presumption of innocence governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution. Consequently, it also applies to the **reasoning** given in a judgment acquitting the accused in its operative provisions, which reflects an opinion that the accused is in fact guilty despite their acquittal for any reason (e.g. reasonable doubt)¹². The presumption of innocence may also be applicable to opinions offered in **parallel judicial proceedings**, provided that they have a link with the criminal proceedings and they imply a premature assessment of the accused person's guilt¹³.

The above is **without prejudice to acts of the prosecution** which aim to prove the guilt of the suspect or accused person, such as the indictment, to **judicial decisions** as a result of which a suspended sentence takes effect, provided that the rights of the defence are respected, and to **preliminary decisions of a procedural nature**, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence, such as decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty.

Furthermore, the obligation not to refer to suspects or accused persons as being guilty does not prevent public authorities from publicly disseminating information on the criminal proceedings where this is **strictly necessary for reasons relating to the criminal investigation**, such as when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence, or to the public interest, such as when, for safety reasons, information is provided to the inhabitants of an area affected by an alleged crime or when the prosecution or another competent authority provides objective information on the state of criminal proceedings **in order to prevent a public order disturbance**. The use of such reasons should be confined to situations in which this would be **reasonable and proportionate**, taking all interests into account. In any event, the manner and context in which the information is disseminated **should not create the impression that the person is guilty** before he or she has been proved guilty according to law¹⁴.

Directive standard 2 – Right not to be presented as being guilty

Suspected or accused persons **must not be presented as being guilty**, in court or in public, through the use of **measures of physical restraint** (article 5 of the Directive).

¹¹ Pandy v. Belgium, § 43.

¹² Cleve v. Germany, § 41.

¹³ Böhmer v. Germany, § 67; Diamantides v. Greece (no. 2), § 35.

¹⁴ See also Fatullayev v. Azerbaijan, § 159; Allenet de Ribemont v. France, § 38; Garycki v. Poland, § 69.

Such measures include handcuffs, glass boxes, cages and leg irons. Exceptionally, such measures **may be permitted on a case by case basis** for specific reasons relating to security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property, or relating to the prevention of suspects or accused persons from absconding or from having contact with third persons, such as witnesses or victims. In these cases, competent authorities do not need to issue a formal decision on the use of such measures.

Where feasible, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so as to avoid giving the impression that those persons are guilty.

The ECtHR awards special importance to the presentation of the accused within the court. In this regard, it has adjudicated that the degrading treatment of a defendant during judicial proceedings caused by confinement in an overcrowded glass cabin in breach of Article 3 of the Convention would be difficult to reconcile with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, and above all in the accused¹⁵. Nevertheless, security concerns in a criminal court hearing may involve, especially in a largescale or sensitive case, the use of special arrangements, including glass cabins.

Directive standard 3 – Burden of proof

The **burden of proof** for establishing the guilt of suspects and accused persons is on the prosecution (article 6 of the Directive). The ***in dubio pro reo* principle** (doubts should benefit the accused) is a specific expression of the presumption of innocence¹⁶.

This principle is, of course, without prejudice to any *ex officio* fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person¹⁷. Such **presumptions** should, nevertheless, be confined within reasonable limits, rebuttable and used only where the rights of the defence are respected¹⁸.

In accordance with ECtHR case law, the presumption of innocence is violated where the burden of proof is shifted from the prosecution to the defence¹⁹. However,

¹⁵ Yaroslav Belousov v. Russia, § 147.

¹⁶ See also Barberà, Messegué and Jabardo v. Spain, § 77; Tsalkitzis v. Greece (no. 2), § 60.

¹⁷ See also Falk v. the Netherlands (dec.); Salabiaku v. France, § 27; Janosevic v. Sweden, § 100.

¹⁸ Salabiaku v. France, § 28; Radio France and Others v. France, § 24; Västberga Taxi Aktiebolag and Vulic v. Sweden, § 113; Isir v. Belgium, § 30; Zschüschen v. Belgium (dec.), § 22; Janosevic v. Sweden, § 101; Falk v. the Netherlands (dec.).

¹⁹ Telfner v. Austria, § 15.

the defence may be required to provide an explanation after the prosecution has made a *prima facie* case against an accused²⁰.

It should be stressed that exoneration from criminal liability does not preclude the **establishment of civil liability** to pay compensation arising out of the same facts on the basis of a less strict burden of proof²¹.

This provision does not imply an obligation for MS to put in place a strictly adversarial criminal justice system, but permits States to maintain systems with inquisitorial characteristics, whereby judges and competent courts are also charged with seeking both **inculpatory and exculpatory evidence**, provided that they comply with the Presumption of innocence Directive and with other relevant provisions of EU and international law.

Directive standard 4 – Right to remain silent and to not incriminate oneself

Suspects and accused persons have the **right to remain silent** in relation to the criminal offence that they are suspected or accused of having committed and to **not incriminate themselves** (article 7 of the Directive).

The rights to remain silent and the right not to incriminate oneself apply to **questions relating to the criminal offence** that a person is suspected or accused of having committed, and not, for example, to questions relating to the identification of a suspect or accused person. It means that when asked to make statements or answer questions, suspects and accused persons **should not be forced to produce evidence or documents or to provide information** which may lead to self-incrimination.

The Directive awards special importance to ECtHR case law in relation to the right to remain silent and the right to not incriminate oneself (preamble 27). In accordance with this case law, the *privilege* (sic) against self-incrimination **does not preclude the use of incriminating statements** made by a suspect or accused person **but only protects them against the obtaining of evidence by coercion or oppression**²². The Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6 ECHR:

- (a) where a suspect is obliged to testify under threat of sanctions and either testifies as a result²³ or is sanctioned for refusing to testify²⁴;
- (b) where physical or psychological pressure is applied to obtain real evidence or statements²⁵; and

²⁰ *ibid.*, § 18; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, §§ 63-67

²¹ *Ringvold v. Norway*, § 38; *Y v. Norway*, § 41; *Lundkvist v. Sweden* (dec.).

²² *Ibrahim and Others v. the United Kingdom* [GC], § 267.

²³ *Saunders v. the United Kingdom* [GC], *Brusco v. France*.

²⁴ *Heaney and McGuinness v. Ireland*; *Weh v. Austria*.

²⁵ *Jalloh v. Germany* [GC]; *Gäfigen v. Germany* [GC].

- (c) where the authorities use subterfuge to elicit information that they were unable to obtain during questioning²⁶.

The exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and **should not, in itself, be considered to be evidence** that the person concerned has committed the criminal offence concerned. Nevertheless, remaining silent in situations which clearly call for an explanation may still be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution²⁷. In order to determine whether the inferences drawn from a suspect or accused person's silence infringe the rights enshrined in the Directive, all the circumstances of the case should be examined, in particular the weight attached to such inferences by the national court, the degree of compulsion inherent in the situation, and the existence of adequate procedural safeguards.

The right to remain silent is **not absolute**²⁸. To determine whether the essence of the right has been violated, courts must examine the following elements:

- (a) the nature and degree of compulsion;
- (b) the existence of relevant procedural safeguards; and
- (c) the use to which any material so obtained is put²⁹.

The right to not incriminate oneself is **not strictly confined to statements which are directly incriminating**. It extends, for instance, to testimonies, obtained under compulsion, which appear to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, which may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility³⁰. Nevertheless, it **does not prevent the use of evidence** which may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and which has an existence independent of their will, such as material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood or urine samples and bodily tissue for the purpose of DNA testing³¹.

²⁶ Allan v. the United Kingdom; contrast with Bykov v. Russia [GC], §§ 101-102.

²⁷ John Murray v. the United Kingdom [GC], § 47.

²⁸ John Murray v. the United Kingdom [GC], § 47; Ibrahim and Others v. the United Kingdom [GC], § 269.

²⁹ Jalloh v. Germany [GC], § 101; O'Halloran and Francis v. the United Kingdom [GC], § 55; Bykov v. Russia [GC], § 104; Ibrahim and Others v. the United Kingdom [GC], § 269.

³⁰ See also Ibrahim and Others v. the United Kingdom [GC], § 268.

³¹ See also Saunders v. the United Kingdom [GC], § 69; O'Halloran and Francis v. the United Kingdom [GC], § 47.

Informing the suspect or accused person of their rights to remain silent and to not incriminate themselves, in accordance with the provisions of Directive 2012/13/EU on the right to information in criminal proceedings, is of pivotal importance (Presumption of innocence Directive preamble 31, 32). In accordance with ECtHR case law, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel³².

Directive standard 5 – Right to be present at the trial

Suspects and accused persons have the **right to be present at their trial** (article 8 of the Directive).

A trial which may result in a decision on the guilt or innocence of a suspect or accused person may be held *in absentia* and enforced against this person if:

- (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance and does not, nevertheless, appear in court; or
- (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by them or by the State.

Informing a suspect or accused person of the trial should be understood to mean **summoning him or her in person** or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial. Informing the suspect or accused person of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he or she does not appear at the trial. When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should, where appropriate, also be paid to the **diligence** exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive information addressed to him or her.

Competent authorities in the MS should be allowed to **exclude a suspect or accused person temporarily from the trial** where this is in the interests of securing the proper conduct of the criminal proceedings. This could, for example, be the case where a suspect or accused person disturbs the hearing and must be escorted out of the court room on order of the judge, or where it appears that the presence of a suspect or accused person prevents the proper hearing of a witness.

³² Stojkovic v. France and Belgium, § 54.

Where a suspected or accused person was **not present at their trial** and the conditions laid down in the Directive were not met, if a new trial is not held, they have the right to another legal remedy that allows the **merits of the case** to be determined anew, including the presentation of new evidence.

In accordance with ECtHR case law, the use of a **video link** in the proceedings is not, as such, incompatible with the right to be present at one's trial if it serves a legitimate aim and the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 ECHR. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for³³.

Directive standard 6 – Right to a new trial

Suspects or accused persons who were not present at their trial, and where the conditions laid down in Article 8(2) were not met, have the **right to a new trial**, or to another legal remedy, which allows a fresh determination of the merits of the case, including the examination of new evidence, and which may lead to the original decision being reversed (article 9 of the Directive).

If, for reasons beyond their control, suspects or accused persons are unable to be present at the trial, they should have the possibility to request a new date for the trial within the time frame provided for in national law. Where MS provide for the possibility of holding trials in the absence of suspects or accused persons but the conditions for taking a decision in the absence of a particular suspect or accused person are not met because the suspect or accused person **could not be located** despite reasonable efforts having been made, for example because the person has fled or absconded, it should nevertheless be possible to take a decision in the absence of the suspect or accused person and to enforce that decision. In that case, MS should ensure that when suspects or accused persons are **informed of the decision**, in particular when they are apprehended, they should also be informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy. Such information should be provided in writing. The information may also be provided orally on condition that the fact that the information has been provided is noted in accordance with the recording procedure under national law.

³³ Marcello Viola v. Italy, §§ 63-67; Saknovskiy v. Russia [GC], § 98.

Procedural safeguards for children suspects or accused persons

The Directive on Procedural safeguards for children who are suspects or accused persons in criminal proceedings ([Directive \(EU\) 2016/800](#)) establishes procedural rights for children (persons under the age of eighteen) involved in criminal proceedings and EAW proceedings, as well as for children who were not initially but became suspects or accused persons in the course of questioning by the police or by another law enforcement authority. The Directive **complements Directives 2012/13/EU on the Right to information and 2013/48/EU on Access to a lawyer** and should be read in conjunction with those.

The Directive may also apply to persons who were children when they became subject to the proceedings but have subsequently reached the age of 18, if appropriate in light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. MS may decide not to apply this Directive when the person concerned has reached the **age of twenty-one**.

The Directive applies until the final determination of the question whether the child has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.

Table 3 – Procedural safeguards for children directive standards

Directive standard	Description	Directive article
1	Right to information	4
2	Right to have the holder of parental responsibility informed	5
3	Right of assistance by a lawyer	6
4	Right to an individual assessment	7
5	Right to a medical examination	8
6	Right to audiovisual recording of questioning	9
7	Limitation of deprivation of liberty and alternative measures	10, 11
8	Specific treatment in the case of deprivation of liberty	12
9	Timely and diligent treatment of cases involving children	13

<u>10</u>	Right to protection of privacy	14
<u>11</u>	Right to be accompanied by the holder of parental responsibility	15
<u>12</u>	Right to appear in person and to participate in the trial	16
<u>13</u>	Training of law enforcement, justice officials, and other professionals	20
<u>Derogations</u>	Derogations permitted under this directive apply to the right of assistance by a lawyer and the right to an individual assessment	6, 7

Directive standard 1 – Right to information

Children have the **right to information** about their rights in accordance with Directive 2012/13/EU and about general aspects of the conduct of the proceedings (article 4 of the Directive).

The information must be provided as follows:

- (a) **promptly** when children are made aware that they are suspects or accused persons, in respect of: the right to have the holder of parental responsibility informed; the right to be assisted by a lawyer; the right to protection of privacy; the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings; the right to legal aid;
- (b) **at the earliest appropriate stage in the proceedings**, in respect of: the right to an individual assessment; the right to a medical examination, including the right to medical assistance; the right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention; the right to be accompanied by the holder of parental responsibility during court hearings; the right to appear in person at trial; the right to effective remedies; or
- (c) **upon deprivation of liberty** in respect of the right to specific treatment during deprivation of liberty.

Information must be given in writing, orally, or both, in **simple and accessible language**.

In accordance to ECtHR case law, the authorities must take steps to ensure that the child has a broad understanding of the nature of the investigation and the stakes,

including the significance of any potential penalty as well as his rights of defence and, in particular, his right to remain silent³⁴.

Directive standard 2 – Right of the child to have the holder of parental responsibility informed

Children have the right to have the **holder of parental responsibility** provided, as soon as possible, with all the information mentioned above proceedings (article 5 of the Directive).

This information is provided to **another appropriate adult**, nominated by the child and accepted as such by the competent authority, in cases where providing that information to the holder of parental responsibility:

- (a) would be contrary to the child's best interests;
- (b) is not possible because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown;
- (c) could, on the basis of objective and factual circumstances, substantially jeopardise the criminal proceedings.

Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate and provide the information to another person. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.

Directive standard 3 – Assistance by a lawyer

Children have the right to be **assisted by a lawyer** for the effective exercise of their defence rights proceedings (articles 6, 18 of the Directive).

Assistance by a lawyer is to be understood in the same sense as the right of access to a lawyer enshrined in Directive 2013/48/EU. Such assistance must be guaranteed **without undue delay**, as defined in the Access to a lawyer Directive. The rights to **privacy and confidentiality** of meetings, assistance and **effective participation** of a lawyer during questioning, and assistance by a lawyer during identity parades, confrontations, and reconstructions of the scene of a crime also apply to children suspects and accused persons. Children also have the **right to legal aid** under the conditions laid out in national law and in accordance with the Legal aid Directive.

³⁴ Blokhin v. Russia [GC], 195.

Directive standard 4 – Right to an individual assessment

Children have the right to an **individual assessment** to ensure that their specific needs concerning protection, education, training and social integration are taken into account in the course of the criminal proceedings (article 7 of the Directive). This assessment serves to establish the **individual characteristics and circumstances** of the child, taking into account their personality and maturity, economic, social and family background, and any specific vulnerabilities they may have, with a view to promote the child's ability to understand and participate in the proceedings³⁵.

The assessment must be carried out at the **earliest appropriate stage of the proceedings** and, in any case, **before the child's indictment**, unless such indictment is in the child's best interests and the individual assessment is available at the beginning of the trial hearings before a court.

Individual assessments must be carried out by **qualified personnel** with the **close involvement of the child** and, where appropriate, the holder of parental responsibility or another adult, and/or a specialised professional. The assessment must be **updated** every time there is a significant change in the elements forming its basis. An individual assessment which has been carried out with regard to the same child in the recent past could be used if it is updated.

The **extent and detail** of an individual assessment may be made dependent on the **circumstances of the case**, taking into account the seriousness of the alleged criminal offence and the measures that could be taken if the child is found guilty of such an offence.

Directive standard 5 – Right to a medical examination

Children who are deprived of liberty have the **right to a medical examination** without undue delay with a view, in particular, to assessing their general mental and physical condition (article 8 of the Directive). The medical examination must be as **non-invasive** as possible and must be carried out by a **physician or another qualified professional**.

The results of the medical examination serve to determine whether the child has the capacity to be subject to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against them.

Directive standard 6 – Audiovisual recording of questioning

Children have the right to have their questioning by the police or other law enforcement authority **audio-visually recorded** where this is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not (article 9 of the Directive).

³⁵ See also ECtHR V. v. the United Kingdom [GC], §§ 85-86.

If an audiovisual recording of a questioning was planned but an insurmountable **technical problem** rendered it impossible, authorities must make every reasonable effort to resolve the issue. They may nevertheless proceed with questioning if it is not appropriate to postpone it and, in accordance with the best interests of the child.

Directive standard 7 - Limitation of deprivation of liberty and alternative measures

Deprivation of liberty, in particular detention, must be imposed only as a measure of last resort and only for the shortest appropriate period of time, taking into account the age and individual situation of the child and the particular circumstances of the case. Alternative measures should be available (articles 10, 11 of the Directive).

The detention must be based on a reasoned decision and be periodically reviewed by a court.

Directive standard 8 – Specific treatment in the case of deprivation of liberty

Children deprived of their liberty are entitled to **specific treatment** in accordance with their best interests (article 12 of the Directive).

This treatment includes:

- (a) holding children separately from adults, unless it's in their best interests not to do so;
- (b) ensuring that their health and their physical and mental development is maintained;
- (c) ensuring their right to education and training;
- (d) ensuring the effective and regular exercise of their right to family life;
- (e) ensuring access to programmes that foster their development and their reintegration into society; and
- (f) ensure respect for their freedom of religion or belief.

Children who are deprived of liberty should be able to **meet with the holder of parental responsibility** as soon as possible, where such a meeting is compatible with investigative and operational requirements.

Directive standard 9 – Timely and diligent treatment of cases

Criminal proceedings involving children should be treated as a matter of **urgency** and with **due diligence** (article 13 of the Directive). The particular characteristics of the child, including any special needs they may have must be taken into account.

Directive standard 10 – Right to protection of privacy

The **privacy of children** during criminal proceedings must be protected. MS must ensure that court hearings involving children can be held in the absence of the public (article 14 of the Directive).

Directive standard 11 – Right of the child to be accompanied by the holder of parental responsibility during the proceedings

Children have the **right to be accompanied by the holder of parental responsibility** or another appropriate adult during court hearings in which they are involved in (article 15 of the Directive).

Directive standard 12 – Right of children to appear in person at, and participate in, their trial

Children must have the **right to be present at their trial**, participate effectively, be heard, and express their views (article 16 of the Directive).

Directive standard 13 – Training

MS must ensure that that staff of law enforcement authorities and of detention facilities who handle cases involving children, receive **specific training** to a level appropriate to their contact with children with regard to children's rights, appropriate questioning techniques, child psychology, and communication in a language adapted to the child.

Without prejudice to judicial independence and differences in the organisation of the judiciary across the MS, and with due respect for the role of those responsible for the training of judges and prosecutors, MS must take appropriate measures to ensure that judges and prosecutors who deal with criminal proceedings involving children have specific competence in that field, effective access to specific training, or both (article 20 of the Directive).

Derogations

Derogations are permitted to MS in relation to **assistance by a lawyer** and the right to an **individual assessment**, provided that they are **compatible with the child's best interests**.

With regards to the right to be assisted by a lawyer, the same derogations allowed to MS under the Access to a lawyer Directive are also permitted in cases involving children as suspects and accused persons.

With regards to the right to an individual assessment, MS may derogate from the obligation to carry it out on a case by case basis, taking into account, *inter alia*, the seriousness of the alleged criminal offence and the measures that could be taken if the child is found guilty of it. In that context, all relevant elements should be taken

into consideration, including whether or not the child has, in the recent past, been the subject of an individual assessment in the context of criminal proceedings or whether the case concerned may be conducted without an indictment.

Legal aid

The Legal aid Directive ([Directive \(EU\) 2016/1919](#)) sets out common minimum rules concerning the right to legal aid for suspects, accused persons and requested persons, and should be read in conjunction with the Directives on Access to a lawyer and Procedural rights for children suspects and accused persons. Legal aid is defined as funding provided by an EU MS, which allows individuals who do not have the resources to cover the costs of criminal proceedings and EAW proceedings to have access to a lawyer.

This Directive **does not apply** where suspects or accused persons, or requested persons, have **waived their right of access to a lawyer** in accordance with the Access to a lawyer Directive, and have not revoked their waiver, or where MS have applied the **temporary derogations** in accordance with Article 3(5) or (6) of the Access to a lawyer Directive, for the time of such derogation.

Table 4 – Legal aid directive standards

Directive standard	Description	Directive article
1	Right to legal aid in criminal proceedings	4
2	Right to legal aid in EAW proceedings	5
3	Conditions for the application of means and merits tests	4
4	Standards for the decisions regarding granting legal aid	6
5	Training and right to have the legal aid lawyer replaced	7
Derogations	No derogations stipulated	-

Directive standard 1 – Legal aid in criminal proceedings

Suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have a right to legal aid **in criminal proceedings** when the interests of justice so require (article 4 of the Directive).

Persons entitled to legal aid are the following:

- (a) suspects and accused persons in criminal proceedings who are:
 - i. deprived of liberty;

- ii. required to be assisted by a lawyer in accordance with EU or national law and cannot afford it; or
 - iii. required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following: identity parades, confrontations, reconstructions of the scene of a crime;
- (b) persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.

Directive standard 2 – Legal aid in European arrest warrant proceedings

Requested persons **in EAW proceedings**, who lack sufficient resources to pay for the assistance of a lawyer have a right to legal aid (article 5 of the Directive).

Requested persons have a right to legal aid:

- (a) **from the executing MS**, upon arrest until they are handed over to the issuing MS, or until the decision not to surrender them becomes final;
- (b) **from the issuing MS**, when they exercise this right to assist their lawyer in the executing MS, in accordance with EU rules on the right of access to a lawyer, in so far as legal aid is necessary to ensure effective access to justice.

This right may be subject only to a **means**, and not a merits, **test** based on the same criteria used in national criminal proceedings.

Directive standard 3 – Means and merits tests standards

Means and merits tests performed by the MS authorities to determine whether legal aid is to be granted must respect the conditions laid down in the Directive (article 4 of the Directive). Where national law provides for the performance of such tests, the decision on whether or not to grant legal aid must be reached in accordance with the criteria set out therein.

EU countries may apply a **means test** to assess if the person lacks sufficient resources to pay for legal assistance; a **merits test** to assess whether providing legal aid would be in the interest of justice; or **both**.

- Where a MS applies a **means test**, all relevant and objective factors may be taken into account, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that MS.
- Where a MS applies a **merits test**, the following must be taken into account:
 - (a) the seriousness of the criminal offence;
 - (b) the complexity of the case;
 - (c) the severity of the sanction at stake.

In any event, the merits test criteria are deemed to have been met in the following situations:

(a) where a suspect or an accused person is brought before a competent court or judge in order **to decide on detention** at any stage of the proceedings within the scope of this Directive; and

(b) **during detention.**

If the conditions of the above tests are met, the authorities must grant legal aid **without undue delay** and — at the latest — before the person concerned is questioned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts are carried out.

Directive standard 4 – Decisions regarding the granting of legal aid

Decisions on whether or not to grant legal aid and on the assignment of lawyers must be made, **without undue delay**, by a competent authority.

Suspects, accused persons, and requested persons must be **informed in writing** if their request for legal aid is refused (article 6 of the Directive).

Directive standard 5 – Quality of legal aid services and training

The Directive provides that MS must take measures to ensure that *staff* (sic) involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings are provided with **adequate training**. Where such decisions are reached by members of the judiciary, this provision should be without prejudice to judicial independence and with due respect for the role of those responsible for the training of judges and prosecutors.

Suspects, accused persons and requested persons must have the right, upon their request, to have the lawyer providing legal aid services assigned to them **replaced**, where the specific circumstances so justify (article 7 of the Directive).