EFFECTIVE LEGAL ASSISTANCE IN PRE-TRIAL DETENTION DECISION-MAKING

Regional handbook for lawyers
About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials’ work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel - the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: https://www.fairtrials.org/legal-experts-advisory-panel

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Introduction

The decision to order pre-trial detention is one that carries grave consequences for the defendant and places them at a significant procedural disadvantage. The very fact of being in custody adds significant hurdles to organising the defence.

The right to a lawyer is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights. The lawyer’s presence at the initial stages of the criminal process serves as a ‘gateway’ to other rights and helps prevent prejudice to the suspect’s defence. More generally, a lawyer’s presence at the early stages of criminal proceedings helps a suspect to understand the legal situation and the consequences of choices made at this crucial stage.

Following research across ten EU jurisdictions (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania, and Spain) on the practice of pre-trial detention decision-making and the use of alternatives to detention, in 2016, Fair Trials released the report entitled *A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU*. The report highlighted systemic failures resulting in the unjustified and excessive use of pre-trial detention.¹

The effective assistance of a lawyer is, in this respect, critical. The research shows that many suspects find it impossible to obtain timely and meaningful access to a lawyer while in detention. In some cases, due to variations in legal regimes and the complexities of securing legal aid appointments, defendants face judicial authorities in initial hearings on pre-trial detention without the assistance of a lawyer. Even where they are present, lawyers do not always provide a sufficient level of representation to safeguard the rights of their client.

The lack of effective legal assistance prior to and during detention hearings was identified as a key barrier to fair decision-making. Particular concerns included:

- Lawyers were not always present at detention hearings;
- The quality of legal assistance was compromised by lawyers’ limited time to prepare and/or poorly functioning legal aid systems;
- Legal barriers were observed in some jurisdictions, such as the defence not being permitted to adduce evidence at detention hearings; and
- Limited access to evidence prevented lawyers from informing and influencing the proceedings in relation to pre-trial detention.²

In order to support the effectiveness of the legal assistance that suspects or accused persons receive during the pre-trial stages, Fair Trials and four partners from Bulgaria, Italy, Hungary and Greece, started a new project in 2017 entitled “Effective Legal Assistance in Pre-Trial Detention Decision-Making” (EFPTD). The project partners are Bulgaria: Bulgarian Helsinki Committee (BHC); Greece: Centre for European Constitutional Law (CECL); Hungary: Hungarian Helsinki Committee (HHC); and Italy: Associazione Antigone (Antigone).

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² Ibid., pp. 4-5.
The EFPTD project focuses on addressing existing barriers to the effective participation of defence lawyers in the pre-trial decision-making process as they emerge through the current legal framework, judicial practice and the attitudes of the stakeholders involved in the process.

**Scope and objectives**

The handbook is structured in accordance with the different stages of pre-trial detention decision-making, from police custody to judicial review hearings of pre-trial detention orders.

Recognising the crucial role of lawyers in the pre-trial decision-making process, the objective of this handbook is to offer lawyers guidance on the relevant regional standards to address legal, procedural and cultural barriers to effective representation in the pre-trial detention decision-making process and encourage the use of alternatives to pre-trial detention.

**European regional standards**

For each stage of the pre-trial detention decision-making process, this handbook identifies applicable European standards, including:

- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings *(Access to a Lawyer Directive)*.
- Directive 2012/13/EU on the right to information in criminal proceedings *(Information Directive)*.
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings *(Interpretation Directive)*.
- Directive 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings *(Presumption of Innocence Directive)*.
For reference, national authorities and courts are obliged to apply the provisions of EU law, even if national law conflicts with it, as EU law has primacy. The effectiveness principle of the European Court of Justice (CJEU) and the *bona fide* principle stipulate that EU law should be implemented as quickly and effectively as possible. When a country does not transpose a directive or when the transposition is not consistent, directives are also directly applicable under certain conditions - which means that they can be invoked and relied upon directly and prevail over any conflicting national legislation.

The handbook also covers the EU Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings of 27 November 2013 (*Vulnerable Persons Recommendation*). EU Commission recommendations are not legally binding but constitute an expression of the EU Commission’s views on a specific topic and suggest a line of action for Member States.

Finally, where relevant, this handbook also refers to the jurisprudence of the European Court of Human Rights (ECtHR), the judicial body in charge of the interpretation of the European Convention of Human Rights (ECHR). The ECtHR’s rulings on the right to a fair trial and defence rights have had a significant impact on the development of the above-mentioned EU directives.

For further information on European standards, please refer to the EU law toolkits that Fair Trials has produced:

- The EU procedural rights directives (available at: [http://www.fairtrials.org/node/759](http://www.fairtrials.org/node/759));
- The online legal training on Access to a Lawyer (available at: [http://www.fairtrials.org/legal-training?access-to-a-lawyer](http://www.fairtrials.org/legal-training?access-to-a-lawyer)); and
- The online legal training on PTD (available at: [http://www.fairtrials.org/legal-training?pre-trial-detention](http://www.fairtrials.org/legal-training?pre-trial-detention)).

**Best practice examples to overcome practical barriers**

As part of the EFPTD project, the project partner countries have created national dialogue working groups to identify and discuss the existing practical barriers to the effective assistance of lawyers at each stage of the pre-trial detention decision-making procedure, and produced an action plan on how these may be addressed. The partners also held round table meetings between autumn 2018 and spring 2019 bringing together a broader range of criminal justice stakeholders to discuss the action plan.

Based on the outcomes of the discussions held as part of this dialogue, country-specific handbooks for lawyers were produced which outline practical recommendations on how to overcome legal, procedural and cultural barriers to effective representation in the pre-trial detention decision-making process in the project partner countries and encourage the

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3 Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Official Journal of the European Union, C 115, 09 May 2008: “the Treaties and the law adopted by the Union on the basis of the Treaties shall prevail over the law of the Member States”.


use of alternatives to pre-trial detention. This handbook draws on good practice examples identified in the four country-specific handbooks.

**Part 1 – At the police station after the arrest**

When it comes to ensuring effective legal assistance, what happens at the police station can have an immeasurable impact on the subsequent proceedings, and can be the determining factor between a person being acquitted or found guilty at trial. In *Salduz v. Turkey*, the ECtHR underlined “the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial”.

This section covers the two key moments where legal assistance is key during police detention:
- the first consultation with the client; and
- the “official” questioning by the police or another investigative authority.

1. **First consultation with client**

The first consultation with a client is a key opportunity to:

1. **Build trust with your client**

The initial meeting with a client is the opportunity to begin establishing an effective lawyer-client relationship. This includes explaining to the client who you are, why you are there, the confidentiality of your conversation and all your exchanges, the investigation and procedure. It is crucial to establish trust, explain what is going to happen, discuss fees and legal aid (if applicable), and inquire about the client’s objectives in relation to their defence strategy.

2. **Inform the client of their rights prior to questioning**

The first consultation is also the moment to inform your client about their procedural rights and of the charges against them. Although the police are obliged to provide this information under EU law, it should not be assumed that the client has already been informed by the police. Failure to inform – or insufficiently informing – clients of their rights (right to remain silent, right to an interpreter, right to have a third party notified of their arrest or detention, right to be assisted by counsel during the interrogation, etc.) means that they are unlikely to exercise those rights. It is crucial for the lawyer to inform the suspect of their rights in such a way as to ensure they understand them and are empowered to exercise them. The same goes for information on the reasons for the arrest or detention. The arrested person must understand why they were arrested prior to being interrogated by the police in order to be able to exercise their rights efficiently, in particular the right to remain silent.

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6 *Salduz v. Turkey*, App. no. 36391/02 (Judgment of 27 November 2008), § 54.
7 Information Directive, Article 3(1).
3. Obtaining information from the client

The first interview is also the opportunity for lawyers to gather as much information as possible from the client to be able to argue for their release. Information you obtain from a client at this stage should help formulate counter-arguments to the five legitimate grounds for pre-trial detention, generally understood to be: (1) the risk that the suspect will fail to appear for trial;\(^8\) (2) the risk the suspect will spoil evidence or intimidate witnesses;\(^9\) (3) the risk that the suspect will commit further offences;\(^10\) (4) the risk that the release will cause public disorder;\(^11\) or (5) the need to protect the safety of a person under investigation in exceptional cases.\(^12\) As pre-trial detention is, in principle, a measure of last resort,\(^13\) information obtained at this stage can help to identify more appropriate restrictions other than detention that could be imposed on your client to address the risks outlined above.

4. Assessing specific needs/vulnerability of the client

The first consultation is also a key moment to assess the specific needs of the client – including whether they need an interpreter, if they are fit to be detained and/or interviewed or if they are showing signs of vulnerability (mental illness, drug addiction, physical problems). It is also the time to evaluate how the client was treated by the police. Fair Trials has found that in practice, the process of identification of specific needs/vulnerability relies heavily upon the lawyers.\(^14\)

1.1. Right to access a lawyer at the police station

<table>
<thead>
<tr>
<th>Summary</th>
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<td>• The suspect or accused person has the right to have their lawyer present during questioning at the police station and investigative or evidence-gathering acts which the suspect or accused person is required or permitted to attend, such as identification procedures or reconstruction of the events and on-site inspections.</td>
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<tr>
<td>• Under EU law, suspects or accused persons must be give the possibility to access a lawyer without undue delay.</td>
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<td>• Recent ECtHR jurisprudence allows for some delay of the right to access to a lawyer in certain circumstances, but this does not mean that such delay is acceptable under EU standards, which may be interpreted as enshrining a higher level of protection than the ECHR.</td>
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\(^8\) Smirnova v. Russia, App. nos. 46133/99 and 48183/99, (Judgment of 24 July 2003), § 59.
\(^9\) Ibid.
\(^10\) Muller v. France, App. no. 21802/93, (Judgment of 17 March 1997), § 44.
\(^12\) Ibid, § 108.
a. EU standards

The Access to a Lawyer Directive provides in Article 3(2) that suspects\textsuperscript{15} or accused persons have a right to consult with a lawyer prior to questioning by the police or another law enforcement or judicial authority. Article 3(2)(a) of the Access to a Lawyer Directive specifies that “suspects or accused persons shall have access to a lawyer without undue delay”. The precise point in the proceedings when this right is to be granted is the earliest of either: “before they are questioned by the police or by another law enforcement or judicial authority; (…)” or “without undue delay after deprivation of liberty”. There is, to date, no case-law from the CJEU clarifying this timing requirement. As Recital 53 of the Access to a Lawyer Directive refers to ECHR guidance, it is important to have regard to the jurisprudence of the ECtHR.

b. ECtHR standards

The ECtHR has recognised that the right of a person charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.\textsuperscript{16} In the Grand Chamber judgment of Beuze v. Belgium, the ECtHR explained that the aims pursued by the right of access to a lawyer include the following:\textsuperscript{17}

- Prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused;
- Counterweight to the vulnerability of suspects in police custody;
- Fundamental safeguard against coercion and ill-treatment of suspects by the police;
- Ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights.\textsuperscript{18}

Regarding the timing of the right to access a lawyer, a suspect should be granted access to legal assistance from the moment there is a “criminal charge” against them within the autonomous meaning of the Convention.\textsuperscript{19} In ECtHR case-law, a person acquires the status of a suspect, triggering the safeguards enshrined in Article 6 ECHR, “not when that status is formally assigned to them, but when the domestic authorities have plausible reasons for suspecting that person’s involvement in a criminal offence.”\textsuperscript{20}

The Access to a Lawyer Directive builds upon the case-law of the ECtHR which, in Dayanan v. Turkey, held as follows: “An accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned. Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. (…) Counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation

\textsuperscript{15} Note that the Access to a Lawyer Directive does not define the concept of “suspect”.

\textsuperscript{16} Salduz v. Turkey [GC], App. no. 36391/02 (Judgment of 27 November 2008), § 51; Ibrahim and Others v. the United Kingdom [GC], App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 255; Simeonov v. Bulgaria [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 112; Beuze v. Belgium [GC], App. no. 71409/10, ( Judgment of 09 November 2018), § 123.

\textsuperscript{17} ECtHR, Guide on Art. 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb) updated in 31 December 2018, p. 71.

\textsuperscript{18} Beuze v. Belgium [GC], App. no. 71409/10, (Judgment of 09 November 2018), §§ 125-130.

\textsuperscript{19} Simeonov v. Bulgaria [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 110.

\textsuperscript{20} Truten v. Ukraine, App. no. 18041/08, Judgment of 23 September 2016), § 66.
for questioning, support of an accused in distress and checking of the conditions of detention."\textsuperscript{21}

The Court in \textit{Beuze v. Belgium} concluded that “immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights.”\textsuperscript{22} It further held that “the right of access to a lawyer arises not only when a person is taken into custody or questioned by the police”,\textsuperscript{23} but “may also be relevant during procedural actions, such as identification procedures or reconstruction of the events and on-site inspections.”\textsuperscript{24}

Exceptionally, however, it is possible for access to a lawyer to be delayed. For the assessment of the compatibility of such restriction with the right to a fair trial, in \textit{Ibrahim and Others v. the United Kingdom} the ECtHR developed a two-step test:

1. Were there compelling reasons for the restriction?

Given the fundamental nature and importance of early access to legal advice, restrictions are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case.

For the assessment, it is relevant whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law.\textsuperscript{25} A general and mandatory restriction on access to a lawyer during the first questioning cannot amount to a compelling reason.\textsuperscript{26} \textsuperscript{27}

2. What is the prejudice caused by the restriction to the rights of the defence?

For the second step of the assessment, it is necessary to view the proceedings as a whole to determine whether there has been a breach of the right to a fair trial.\textsuperscript{28}

\textsuperscript{21} \textit{Dayanan v. Turkey} App. no. 7377/03, (Judgment of 13 October 2009), § 32.

\textsuperscript{22} \textit{Beuze v. Belgium} [GC], App. no. 71409/10, (Judgment of 09 November 2018), §§ 125-130.

\textsuperscript{23} \textit{Simeonovi v. Bulgaria} [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 111; \textit{Sirghi v. Romania}, App. no. 19181/09, (Judgment of 24 August 2016), § 44.

\textsuperscript{24} \textit{Ibrahim Öztürk v. Turkey}, App. no. 16500/04, (Judgment of 17 May 2009), §§ 48-49; \textit{Türk v. Turkey}, App. no. 22744/07, (Judgment of 05 December 2017), § 47; \textit{Mehmet Duman v. Turkey}, App. no. 38740/09, (Judgment of 23 January 2019), § 41.

\textsuperscript{25} \textit{Ibrahim and Others v. the United Kingdom} [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 258.

\textsuperscript{26} \textit{Beuze v. Belgium} [GC], App. no. 71409/10, (Judgment of 09 November 2018), §§ 142-144 and 160-165.

\textsuperscript{27} The ECtHR found compelling reasons when it has been convincingly demonstrated that there was an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular (\textit{Ibid.}, § 259; \textit{Simeonovi v. Bulgaria} [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 117); on the other hand, a general risk of leaks cannot constitute compelling reasons justifying a restriction on access to a lawyer (\textit{Ibrahim and Others v. the United Kingdom} [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 259); nor can compelling reasons exist when the restriction on access to a lawyer was the result of an administrative practice of the authorities(\textit{Simeonovi v. Bulgaria} [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 130).

\textsuperscript{28} \textit{Ibrahim and Others v. the United Kingdom} [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 262; \textit{Simeonovi v. Bulgaria} [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 118.
In this context, the Court also takes into account the privilege against self-incrimination and the duty of the authorities to inform a suspect of these rights. Where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the State to show that the proceedings as a whole were fair.

The Grand Chamber has held on several occasions that “when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors should be taken into account:

- Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity;
- The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule was applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
- The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- In the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
- Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;
- The weight of the public interest in the investigation and punishment of the particular offence in issue;
- Other relevant procedural safeguards afforded by domestic law and practice.”

The ECtHR’s Beuze judgment is important insofar as it emphasises the importance of the right of access to a lawyer in police detention, in particular during questioning and other investigative acts involving the suspect, as well as the right to access the case file. However, the decision also follows the two-step test developed in Ibrahim and Others, hence it does not rule out the possibility that in exceptional circumstances, evidence gathered in violation of a defendant’s right to access a lawyer may be used in court.

What does that mean for the right to access a lawyer in the EU? The current line of jurisprudence has triggered a discussion as to whether it constitutes a departure from the bright line rule in Salduz, towards a development where the access to a lawyer is not a right

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29 Ibrahim and Others v. the United Kingdom [GC], App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), §§ 266-273.
30 Beuze v. Belgium [GC], App. no. 71409/10, (Judgment of 09 November 2018), § 146.
31 Ibrahim and Others v. the United Kingdom [GC], App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 274; Beuze v. Belgium [GC], App. no. 71409/10, (Judgment of 09 November 2018), § 150; Sitnevskiy and Chaykovskiy v. Ukraine, App. nos. 48016/06 and 7817/07, (Judgment of 10 February 2017), §§ 78-80.
in itself anymore but a facet of a right to a fair trial.\textsuperscript{32} Also, based on \textit{Salduz}, the Access to a Lawyer Directive of the EU frames access to a lawyer as a right in itself. In the process of the transposition of the Directive, Member States have modified their legislation to ensure it is in line with their obligations under EU law.\textsuperscript{33} The ECHR's current line of jurisprudence may create different approaches between the Directive and the ECHR. This may lead to uncertainty and confusion, in particular since the Access to a Lawyer Directive refers to ECHR case law. However, it can be argued that the ECHR standards form just a baseline of the EU rules on access to a lawyer, which allows the EU to refrain from following this regression and to actually achieve higher protection.\textsuperscript{34} In such circumstances, it is critical to ask national courts to make a reference to the CJEU for clarification of the Directive's provisions.\textsuperscript{35}

1.2. Confidentiality of lawyer-client consultation

Summary

- The right to confidential communication between the client and their lawyer is enshrined in EU law and recognised by the ECHR.
- Communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law between a lawyer and their client.
- States should refrain from interfering with or accessing such communication and are required to ensure that arrangements are in place to protect the confidentiality of communications.
- The ECHR recognises that restrictions to the right to confidential communication are possible, provided they are justified by the existence of “compelling reasons” and are only permissible if the effect of such limitations does not prejudice the overall fairness of the proceedings.

\textsuperscript{32} Concurring Opinion of Judge Bratza; Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska; Concurring Opinion of Judge Zagrebelsky, joined by Judges Casadevall and Trümen.


To be in a position to give effective legal assistance you need the right setting and, crucially, a confidential space to talk to your client.

a. EU standards

Article 4 of the Access to a Lawyer Directive confers a right to confidentiality in respect of lawyer-client communications “in the exercise of the right of access to a lawyer provided for under th[e] Directive”. The communication covered by this provision includes “meetings, correspondence, telephone conversations and other forms of communication permitted under national law.”

Recital 33 highlights the importance of the confidentiality of the lawyer-client communication as “key to ensuring the effective exercise of the rights of the defence” and “an essential part of the right to a fair trial.” It further requires Member States to make arrangements to ensure the confidentiality of communications of people deprived of liberty: “Member States 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, Member States should ensure that arrangements for communication uphold and protect confidentiality.”

b. ECtHR standards

The ECtHR recognizes that the right to confidential communication with their lawyer “is part of the basic requirements of a fair trial in a democratic society and an important safeguard of the rights of the defence which follows from Article 6 para. 3 (c)” of the Convention.

In A.T. v. Luxembourg, the ECtHR confirmed that the right of access to a lawyer includes the right to a private consultation prior to questioning by the investigative judge: “[t]he Court emphasises the importance of a consultation between counsel and client before the first questioning by the investigative judge. It is at this point that crucial discussions can take place, even if this means no more than counsel reminding the person of their rights (...) Counsel must be able to provide assistance which is concrete and effective, and not only abstract by virtue of his presence (...).”

The right to confidential communication between defendant and lawyer may only be restricted in exceptional circumstances. In Sakhnovskiy v. Russia, the Grand Chamber held that “any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all

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36 Art. 6 para. 3 (c) ECHR: “Everyone charged with a criminal offence has the following minimum rights: [...] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require [...]”


39 Sakhnovskiy v. Russia[GC], App. no. 21272/03, (Judgment of 02 November 2010), § 102; Kempers v. Austria, App. no. 21842/03, (Judgment of 27 February 1997); or Lanz v. Austria, App. no. 24430/94, ( Judgment of 31 January 2002), § 52.
circumstances.”

Limitations to the right to confidential communication between a defendant and their lawyer should not deprive the former of a fair hearing and may be justified by the existence of “compelling reasons,” for example, to prevent a risk of collusion or due to the lawyer’s professional ethics or unlawful conduct. In a second step, the effect of such limitations on the overall fairness of the proceedings in the respective case must be evaluated.

1.3. Waiver of the right to a lawyer

Summary

- Clients may waive their right to a lawyer, but such waiver must be given voluntarily and without any doubt.
- Clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it must be provided to a suspect or accused person, orally or in writing.
- A waiver may be made in writing or verbally, but the circumstances of the waiver must be recorded by the authorities.
- A waiver may be revoked at any time during the criminal proceedings and has effect from the moment it is made.

Although suspects and accused persons have a right to a lawyer, they can also waive that right. EU law sets some fundamental safeguards around the waiver of the right to a lawyer.

40 Sakhnovskiy v. Russia [GC], App. no. 21272/03, (Judgment of 02 November 2010), § 102.
41 Limitations that have not been accepted by the ECtHR include the(tapping of telephone conversations between an accused and his lawyer (Zagaría v. Italy, App. no. 58295/00, (Judgment of 07 July 2008)), § 36); obsessive limitation on the number and length of lawyers’ visits to the accused (Ocalan v. Turkey [GC], App. no. 46221/99, (Judgment of 12 May 2005), § 135); lack of privacy in video-conference (Sakhnovskiy v. Russia [GC], App. no. 21272/03, (Judgment of 02 November 2010), § 104; Gorbunov and Gorbachev v. Russia, App. nos. 43183/06 and 27412/07, (Judgment of 01 June 2016), § 37); supervision of interviews by the prosecuting authorities (Rybachy v. Poland, App. no. 52479/99, (Judgment of 13 April 2009), § 58); surveillance by the investigating judge of detainee’s contacts with his defence counsel (Lanz v. Austria, App. no. 24430/94, (Judgment of 31 January 2002), § 52); supervision of communication between the accused and the lawyer in the courtroom (Khodorkovskiy and Lebedev v. Russia, App. nos. 11082/06 and 13772/05, (Judgment of 25 October 2013), §§ 642-647), and impossibility to communicate freely with a lawyer due to threat of sanction (M v. the Netherlands, App. no. 2156/10, (Judgment of 25 October 2017), § 92). See ECtHR, Guide on Art. 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), updated in 31 December 2018, p. 77.
42 Öcalan v. Turkey [GC], App. no. 46221/99, (Judgment of 12 May 2005), § 133.
43 Moroz v. Ukraine, App. no. 5187/07, (Judgment of 18 September 2017), §§ 67-70.
45 Ibrahim and Others v. the United Kingdom [GC], App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), §§ 256 and 257.
a. EU standards

For a waiver to be valid under EU law, it must meet the following three cumulative conditions:

- **The waiver must be given voluntarily and without any doubt**: Article 9(1)(a) and (b) of the Access to a Lawyer Directive require that “(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and (b) the waiver is given voluntarily and unequivocally.” Recital (39) suggests that “[s]uspects or accused persons should be able to waive a right granted under this Directive provided that they have been given information about the content of the right concerned and the possible consequences of waiving that right. When providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition.”

- **The circumstances of the waiver must be recorded**: a waiver can be made either in writing or orally. However, Article 9(2) sets out an obligation for it to “be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.”

- A waiver may be revoked at anytime during the criminal proceedings and has effect from the moment it is made. The suspect or accused person must be informed about this possibility, in line with Article 9(3), “suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.” Recital (41) clarifies that “[w]here a suspect or accused person revokes a waiver in accordance with this Directive, it should not be necessary to proceed again with questioning or any procedural acts that have been carried out during the period when the right concerned was waived.”

The possibility to waive the right to a lawyer is restricted with respect to vulnerable persons. The **Vulnerable Persons Recommendation** suggests that “[i]f a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived.”

b. ECtHR standards

In the **ECtHR**'s case law, the standard of a waiver of the right to access to a lawyer is that of a “**knowing and intelligent waiver**”. This implies that a suspect is aware of their rights, including the right of access to a lawyer. Given the fundamental significance of the right to a lawyer for the fairness of a trial, the ECtHR requires “special protection of the knowing and intelligent waiver standard” and **additional safeguards** “when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected”. In **Simeonov v. Bulgaria**, the Court held that a suspect cannot be found to have waived their

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46 Ibrahim and Others v. the United Kingdom [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 272; Pishchalnikov v. Russia, App. no. 7025/04, (Judgment of 24 December 2009), § 77.

47 Ibrahim and Others v. the United Kingdom [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 272; Rodionov v. Russia, App. no. 9106/09, (Judgment of 11 March 2019), § 151.

48 Pishchalnikov v. Russia, App. no. 7025/04, (Judgment of 24 December 2009), § 78.
right to legal assistance if they have not promptly received information about this right after arrest.\(^{49}\)

In cases where a defendant made an explicit request to access a lawyer, an earlier (valid) waiver will no longer be considered valid.\(^{50}\) A waiver of the right to access to a lawyer when a suspect was subjected to inhuman and degrading treatment by the police cannot be considered valid.\(^{51}\)

For the ECtHR it is “the trial court’s duty to establish in a convincing manner whether or not the applicant's confessions and waivers of legal assistance had been voluntary” and that any “flaw was rectified during the subsequent trial and whether the proceedings as a whole can be considered as fair”.\(^{52}\) A failure to examine the circumstances surrounding a suspect’s waiver would be “tantamount to depriving the applicant of the possibility of remedying a situation contrary to the requirements of the Convention.”\(^{53}\) Where a waiver of the right of access to a lawyer satisfies the ECHR’s standard, there will be no doubt as to the overall fairness of the criminal proceedings.\(^{54}\)

1.4. Notification of rights

Summary

- EU law recognises that suspects or accused persons must be aware of their rights to be in a position to exercise their defence rights. As such, suspects or accused persons must be given a written “Letter of Rights” promptly upon arrest or detention.
- EU law specifies that suspects and accused persons must be allowed to keep the Letter of Rights in their possession throughout their detention.
- In addition to fair trial rights (e.g. the right to access to a lawyer, the right to interpretation, the right to remain silent, etc.), the Letter of Rights must also contain basic information about the possibility of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.
- Suspects or accused persons must receive the Letter of Rights in a language that they understand. In the absence of such, they must be informed of their rights orally in a language that they understand.

It is fundamental that suspects and accused persons are aware of their rights in pre-trial detention in order to be in a position to exercise them and challenge the pre-trial detention order.

\(^{49}\) Simeonov v. Bulgaria [GC], App. no. 21980/04, (Judgment of 12 May 2017), § 128.

\(^{50}\) Artur Parkhomenko v. Ukraine, App. no. 40464/05, (Judgment of 16 May 2017), § 81.

\(^{51}\) Turbylev v. Russia, App. no. 4722/09, (Judgment of 06 January 2016), § 96.

\(^{52}\) Türk v. Turkey, App. no. 22744/07, (Judgment of 05 December 2017), §§ 53-54; Rodionov v. Russia, App. no.9106/09, (Judgment of 11 March 2009), § 167.

\(^{53}\) Ibid.

\(^{54}\) Sklyar v. Russia, App. no. 45498/11, (Judgment of 11 December 2017), § 26.
a. EU standards

Upon arrest or detention, Article 4(1) of the Information Directive provides that suspects or accused persons must be given a “letter of rights” containing the information outlined above and that they can keep throughout their detention: “suspects or accused persons […] are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.” Equally, as stipulated in Article 4(3), a letter of rights must “contain 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.”

EU law does not however set out the consequences of the failure to provide such a letter of rights, this is left up to national law.

In practice, a letter of rights may not be available in a language that your client understands. In this respect, Article 4(4) of the Information Directive sets out the requirement for a letter of rights to “be drafted in simple and accessible language (…)” and that suspects or accused persons are to receive the letter “in a language that they understand”. Where this is “not available in the appropriate language”, Article 4(5) requires that “suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.”

b. ECtHR standards

In its jurisprudence on Article 6(1) and (3)(c) ECHR, the ECtHR has on several occasions commented more generally on the provision of information to suspects about their rights. In particular, this has been the case with regard to the right to remain silent and the right to legal assistance and its case-law concerning the ‘waiver’ of these rights. As explained in the previous subchapter on waivers, the Court considers a waiver to be valid only when it is done knowingly. More specifically it held that “[a] waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (…).”

In Ibrahim and Others v. the United Kingdom, the ECtHR held that “[i]n order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them. This is implicit from the Court’s application of the ‘knowing and intelligent waiver’ standard to any purported waiver of the right to counsel.” The ECtHR went on to clarify that “a failure to notify will make it even more difficult for the Government to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair.”

55 Saman v. Turkey, App. no 35292/05, (Judgment of 5 April 2011), § 32.
56 Ibrahim and Others v. the United Kingdom [GC], Appos. nos. 50541/08, 50571/08, 50573/08 and 40351/09, (Judgment of 13 September 2016), § 272.
57 Ibid., § 273.
In *Beuze v. Belgium*, the Grand Chamber reiterated “that the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused’s position.” 58

With regard to the right to interpretation, the ECtHR has stated that the notification of this right must happen when “charged with a criminal offence. This notification should be done in a language the applicant understands.” 59

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**Good practice: Italy**

The Italian national action plan drawn up under the EF-PTD project recommends the introduction of more guarantees, including judicial remedies in case of violations in relation to the actual delivery (in written form) of the Letter of Rights, and the actual knowledge and comprehension of the right to silence by the suspect/accused person.

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**1.5. Vulnerability of the client**

**Summary**

- The ECtHR requires that vulnerable persons must be able to effectively participate in criminal trials. This right is understood as active involvement, entailing the rights “to be present, the right to hear and follow the proceedings”.
- EU law requires that the particular needs of vulnerable suspects or accused persons must be taken into account when providing information about their rights, as well as in the application of the rights to access of a lawyer and to legal aid.
- EU law recommends that Member States provide vulnerable suspects or accused persons with access to:
  a. Systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty;
  b. Assistance of legal representative to assist that person at the police station and during court hearings;
  c. Information of specific procedural rights, in particular relating to the right to information, the right to medical assistance, the right to a lawyer, the respect of privacy and, where appropriate, the rights related to pre-trial detention;
  d. Reasonable accommodation in case of deprivation of liberty before their conviction. The state shall take all steps to ensure that this is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person.

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As a lawyer, you are in a unique position to identify factors that make your client vulnerable. What can you do if your client appears to have mental disability or impairment? What can you do if you do not consider that your client is fit for interview? The particular needs of vulnerable suspects or accused persons must be taken into account and appropriate steps must be taken to ensure their rights are guaranteed.

a. EU standards

This is recognised in EU law. Article 3(2) of the Information Directive requires Member States to ensure that information about the suspect’s or accused person’s rights is provided in a way that takes “into account any particular needs of vulnerable suspects or vulnerable accused persons.” Also, Recital 27 of the Interpretation Directive stresses that suspects or accused persons may be “in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice.” With view to this, “[t]he prosecution, law enforcement and judicial authorities should [...] ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.”

Similarly, Article 13 of the Access to a Lawyer Directive sets out an obligation for Member States to “ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application” of the Directive. Recital 51 of the Access to a Lawyer Directive points out the importance of “[t]he duty of care towards suspects or accused persons who are in a potentially weak position” for the fair administration of justice. To facilitate the effective exercise of their rights under the Directive, “[t]he prosecution, law enforcement and judicial authorities should [...] tak[e] into “account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to have a third party informed upon deprivation of liberty, and [...] tak[e] appropriate steps to ensure those rights are guaranteed”.

Furthermore, Article 9 of the Legal Aid Directive obliges Member States to “ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.” Recital 18 of the Legal Aid Directive specifies that “Member States should lay down practical arrangements regarding the provision of legal aid” which “could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.”

In addition, the Vulnerable Persons Recommendation provides advice with regard to the following aspects:

- **Medical Assistance:** “Vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty”

- **Assistance of legal representative:** “The legal representative or an appropriate adult who is nominated by the vulnerable person or by the competent authorities to assist that person should be present at the police station and during court hearings”

- **Right to information:** “Vulnerable persons and, if necessary, their legal representative or an appropriate adult should be informed of the specific procedural rights referred to in this Recommendation, in particular those relating to the right to information, the right to medical assistance, the right to a lawyer, the respect of privacy and, where appropriate, the rights related to pre-trial detention”
• **Deprivation of liberty:** “Member States should take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty.”

However, EU law does not give guidance to EU Member States on the steps and processes to follow.

**b. ECtHR standards**

The first sentence of Article 5 § 1 ECHR sets out a positive obligation for states “to refrain from active infringement of the rights in question, but also to take appropriate steps to provide effective protection against an unlawful interference with those rights to everyone within its jurisdiction.” In the ECtHR's case law, “[t]he State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.” A key principle in the ECtHR’s jurisprudence with regard to vulnerable persons in criminal trials is the **principle of effective participation.** This principle goes beyond mere representation of a suspect but rather is understood as active involvement, entailing the rights “to be present, the right to hear and follow the proceedings”.

For the ECtHR, effective participation “presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.”

In the case of **Vaudelle v. France**, concerning a person with mental difficulties, the ECtHR required “the national authorities to take additional steps in the interest of the proper administration of justice”, so to enable the person to be informed in detail of the nature and cause of the accusation against him.

With regard to the **review of detention**, the Court has held that “[t]he automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer.”

A review under Article 5 § 4 “is equally important to persons detained in a mental institution

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60 **El-Masri v. the former Yugoslav Republic of Macedonia**[GC], App. no. 39630/09, (Judgment of 13 December 2012), § 239.
61 **Storck v. Germany**, App. no. 61603/00, (Judgment of 16 June 2005), § 102.
64 **S.C. v. the United Kingdom**, App. no. 60958/00, (Judgment of 15 June 2004), § 29.
66 **McKay v. the United Kingdom**[GC], App. no. 543/03, (Judgment of 03 October 2006), § 34; **Ladent v. Poland**, App. no. 11036/03, (Judgment of 18 March 2008), § 74.
1.6. Information regarding the charges before the first questioning

Ensuring that a suspected or accused person is provided with sufficient information about the nature and the cause of the accusation is crucial to safeguard the fairness of the criminal proceedings, and to ensure they may effectively exercise their defense rights, as soon as they are entitled to according to national law. Information should be provided irrespective of how national laws qualify the proceedings according to which the suspect has been deprived of their liberty. It is crucial that the client and/or the lawyer are informed of the charges before the police interview takes place.

a. EU standards

EU law requires Member States to guarantee access to information before the first formal police interview takes place. The Information Directive in Article 6(2) puts Member States under the obligation to “ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.” To understand the scope of the provision, it is helpful to refer to Recital 27 which states that “[p]ersons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings.” However, precise timing of the disclosure is not specified, leaving this up to national procedure.

Further, Recital 28 of the Information Directive gives some guidance on the information that needs to be provided: “[t]he information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given

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promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed 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.”

b. ECHR standards

In terms of the content of the information that needs to be provided, the ECHR case-law is an important source of standards. In Fox and others v. the United Kingdom, the ECHR held that “by virtue of paragraph 2 (...) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph.”69 The accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order “to prepare an adequate defence”.70,71

Moreover, in Kamasinski v. Austria72 it ruled that the defendant has the “right to be informed not only of the “cause” of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed.”73 In the case of a reclassification of the charge, the ECHR requires that the accused be duly and fully informed of any changes in the accusation, including changes in its “cause”, and be provided with adequate time and facilities to react to them and organize his defense on the basis of any new information or allegation.74 It does not consider it enough for the prosecution to refer to the abstract possibility that a court might arrive at a different conclusion as regards the qualification of an offence.75

In Pélissier and Sassi v. France, the Grand Chamber held that the Convention did “not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.”76 The information provided to the client upon arrest is crucial for checking the legality of a pre-trial detention order, which must be based on reasonable suspicion of the person having committed an offence. The ECHR reiterated that “reasonable suspicion must exist at the time of the arrest and initial detention, in cases of prolonged detention it must also be shown that the suspicion persisted and remained reasonable throughout the

69 Fox and others v. the United Kingdom, App. no 12244/86, (Judgment of 30 August 1990), § 40.
71 The ECHR found the required detailed information to exist where the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned (Brozicek v. Italy, App. no. 10964/84, (Judgment of 19 December 1989), § 42).
73 Mattoccia v. Italy, § 61; Bäckström and Andersson v. Sweden (dec.); Varela Geis v. Spain, § 54.
74 I.H. and Others v. Austria, § 34.
75 Pélissier and Sassi v. France[GC], App. no. 25444/94, (Judgment of 25 March 1999), § 53; Drassich v. Italy, § 34; Giosakis v. Greece(no. 3), § 29.
detention.”

2. Assistance during police interview

The official questioning by police or another investigating authority is a critical step in the criminal procedure, where statements obtained during questioning are later used in court, and in particular in the pre-trial decision-making process. This is why persons who face the risk of pre-trial detention need to be able to require that a lawyer be present during the interview.

In this context, the lawyer has an important and active role to take:
- First, the lawyer can encourage the police to release the client and not to request detention.
- Second, if the police want to proceed with detention, the lawyer can start preparing a defensive strategy for the judicial phase of the pre-trial detention decision-making process, to argue for alternatives to PTD.

2.1. Presence of the lawyer during the questioning by the police

Summary

- The suspect or accused person has the right to have their lawyer present during questioning at the police station and investigative or evidence-gathering acts which the suspect or accused person is required or permitted to attend, such as identification procedures or reconstruction of the events and on-site inspections.
- Under EU law, suspects or accused persons must be given the possibility to access a lawyer without undue delay.
- Recent ECtHR jurisprudence allows for some delay of the right to access to a lawyer in certain circumstances, but this does not mean that such delay is acceptable under EU standards, which may be interpreted as enshrining a higher level of protection than the ECHR.

a. EU standards

The right of a suspect or accused person to request the presence of his or her lawyer during the police interrogation is enshrined in Article 3(3)(b) of the Access to a Lawyer Directive, which specifies that the right of access to a lawyer includes the right for a suspect or accused person’s lawyer to be present during questioning.

Also, Recital 25 of the Access to a Lawyer Directive emphasises that “Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings”. It further clarifies that “[s]uch 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”. During such questioning “the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law”.

b. ECHR standards

The EU law standard in this respect builds upon the fundamental case of *Salduz v. Turkey*, in which the ECHR held that “Article 6 § 1 [of the Convention] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (…) The rights of the defence will in principle be irrevocably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”

The ECHR recognises that the lawyer’s mere presence constitutes a check on police physical or verbal aggression. More generally, a lawyer’s role during police interview includes ensuring that his or her client’s rights are respected.

More recently, the jurisprudence of the ECHR has evolved in this respect. For more detail, please see above, section b. of chapter 1.1. (Right to access a lawyer at the police station).

2.2. Participation of a lawyer during interrogation

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| - Lawyers must be able to provide assistance which is concrete and effective.  
- This requires not only that the lawyer be permitted to be present, but also that the lawyer is allowed actively to assist the suspect during the questioning by the police and to intervene to ensure respect of the suspect’s rights. |

The lawyer’s role during questioning of a suspect or accused person is not to be limited to mere physical presence. Police interviews are likely to be intimidating for anybody. The lawyer should ensure that his or her client understands the questions asked and, if not, ask for clarifications or rephrasing of questions.

a. EU standards

The lawyer’s “effective participation” during the questioning is enshrined in Article 3(3)(b) of the Access to a Lawyer Directive which seeks to “ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned”.

Therefore, national law determines what “effective participation” entails. Some guidance is provided in Recital 25 of the Directive which explains that the lawyer may, “[d]uring

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76 *Salduz v. Turkey*, App. No. 36391/02 (Judgment of 27 November 2008), § 55.
questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing [...], inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.”

b. ECtHR standards

Along these lines, the ECtHR, in *A.T. v. Luxembourg*, emphasized that “counsel must be able to provide assistance which is concrete and effective, and not only abstract by virtue of his presence (...).”

In *Soytémiz v. Turkey* the ECtHR stressed that the right to be assisted by a lawyer requires not only that the lawyer is permitted to be present, but also that they are allowed to actively assist the suspect during, inter alia, the questioning by the police and to intervene to ensure respect for the suspect’s rights. It held that “the right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as assistance of a lawyer is equally important at this moment of the questioning.” The ECtHR further found police to be “under an obligation to refrain from or adjourn questioning in the event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect. The same considerations also hold true in case the lawyer has to – or is requested to – leave before the end of the questioning of the police and before the reading out and the signing of the statements taken.”

2.3. Interpretation services for clients who do not speak your language

**Summary**

- If a suspect or accused person does not speak or understand the language of the criminal proceedings, they must be provided with interpretation without delay to be able to understand the proceedings and to inform their lawyer of any point that should be made in their defence.
- Interpretation must be provided during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.
- Costs for interpretation and translation must be borne by the state, irrespective of the outcome of the proceedings.
- Suspects or accused persons must have the right to challenge the lack of access to interpretation services and to complain about the quality.
- The quality must be sufficiently high for the suspect or accused person to have knowledge of the case against them and that they are able to exercise their right of defence.
- Defendant can waive the right to an interpreter.

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a. EU standards

Article 2(1) of the Interpretation Directive requires Member States to provide interpretation services without delay during the criminal proceedings, including police questioning: “suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.” In this context, the CJEU in its preliminary ruling in Covaci interpreted Article 2(1) and (2) of the Interpretation Directive as referring to the oral interpretation of oral statements. It further stated that a suspect in criminal proceedings called upon to make oral statements (e.g. before the court or to his legal counsel) should be entitled to do so in his own language.81

Additionally, Article 2(5) of the Interpretation Directive sets out a right for suspects or accused persons to challenge the lack of access to interpretation services: “to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.” However, the challenge is in accordance with procedures in national law, and the Interpretation Directive does not specify what remedy can be obtained.

As concerns the costs, Article 4 of the Interpretation Directive stipulates that Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 (right to interpretation) and 3 (right to translation of essential documents), irrespective of the outcome of the proceedings. Article 2(8) of the Interpretation Directive sets out the requirement for the interpretation to “be of a quality sufficient to safeguard the fairness of the proceedings”. In particular it has to “ensur[e] that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.” The quality assessment, however, is left to the Member States, with no guidance at hand to ensure a uniform standard throughout the EU.

Good practice example: Italy

The Italian National Action Plan developed under the EF-PTD project suggests the review of the modalities to test an accused person’s knowledge and comprehension of the Italian language. Also, it recommends the establishment of the mandatory video recording of the interpretation during the proceedings as well as an introduction of judicial remedies in order to contest the competence and quality of the work of the interpreter. Furthermore, it proposes the introduction of judicial remedies to challenge a negative decision regarding the possibility to benefit from translation or interpretation, and a review of judicial remedies regarding the translation of documents, in order to provide more legal protections and guarantees. Finally, the action plan suggests the introduction of a specific register in which translators and interpreters with specific knowledge in the legal field must be enrolled, and the introduction of a rule on the recusal (substitution request) of the interpreter was identified as an important issue.

b. ECtHR standards

It is established in the case law of the ECtHR that “an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court’s language in order to have the benefit of a fair trial.”  

In terms of timing, the ECtHR has held that it is “important for the suspect to be aware of the right to interpretation, which means that he must be notified of such a right when “charged with a criminal offence”. This “notification should be done in a language the applicant understands.” An interpreter “should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right”. Initial “defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole.”

For the ECtHR, the “obligation to appoint an interpreter arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if they are neither a national nor a resident of the country in which the proceedings are being conducted. It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant’s competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made.”

It is not considered sufficient if the accused’s lawyer knows the language used in court but not the accused. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.

82 Baytar v. Turkey, App. no. 45440/04, (Judgment of 14 January 2015), § 49.
83 Vizgirda v. Slovenia App. no. 59868/08, (Judgment of 28 November 2018), §§ 86-87.
84 Baytar v. Turkey, App. no. 45440/04, (Judgment of 14 January 2015), §§ 50, 54-55.
85 Vizgirda v. Slovenia App. no. 59868/08, (Judgment of 28 November 2018), § 81.
86 Kamasinski v. Austria, App. no. 9783/82, (Judgment of 19 December 1989), § 74; Cuscani v. the United Kingdom, App. no. 32771/96, (Judgment of 24 December 2002), § 38.
In practical terms, it is up to the judge “to reassure himself that the absence of an interpreter would not prejudice the applicant’s full involvement in a matter of crucial importance for him.”\(^87\) Whereas the ECtHR acknowledges that “the conduct of the defence is essentially a matter between the defendant and his counsel”, “the ultimate guardians of the fairness of the proceedings” is the trial judge.\(^88\)

It is possible to waive the right to an interpreter; however, this must be the accused’s decision, not their lawyer’s.\(^89\)

In terms of costs, it is important to note that the ECtHR requires free assistance of an interpreter for translation or interpretation “of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court’s language in order to have the benefit of a fair trial.”\(^90\) This does not only include oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.\(^91\) The costs of interpretation “cannot be subsequently claimed back from the accused.”\(^92\)

In the ECtHR’s jurisprudence, “an interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter’s conduct must not be of such a nature as to impinge on the fairness of the proceedings.”\(^93\)

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**Good practice example: Italy**

By amendment of the law, the right to linguistic assistance in consultations with a lawyer has been extended to consultations before an interrogation; in order to present a request or information during the procedure,\(^94\) and for consultations upon pre-trial detention, arrest or stop\(^95\). Also, an obligation to translate in writing a series of fundamental acts\(^96\) has been amended and assistance of an interpreter/translator is now always the responsibility of the State, even if the accused is convicted.

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\(^{87}\) *Cuscani v. the United Kingdom*, App. no. 32771/96, (Judgment of 24 December 2002), § 38.

\(^{88}\) Ibid., § 39; *Hermi v. Italy*[GC], Application no. 18114/02, (18 October 2006), § 72; *Katritsch v. France*, § 44.

\(^{89}\) *Kamasinski v. Austria*, App. no. 9783/82, (Judgment of 19 December 1989), § 80.

\(^{90}\) *Luedicke, Belkacem and Koç v. Germany*, Appps. nos. 6210/73; 6877/75; 7132/75, (28 November 1978), § 48; *Ucak v. the United Kingdom*(dec.); *Hermi v. Italy*[GC], App. no. 18114/02, (Judgment of 18 October 2006), § 69.

\(^{91}\) *Kamasinski v. Austria*, App. no. 9783/82, (Judgment of 19 December 1989), § 74; *Hermi v. Italy*[GC], § 70; *Baytar v. Turkey*, § 49.

\(^{92}\) *Luedicke, Belkacem and Koç v. Germany*, Appps. nos. 6210/73; 6877/75; 7132/75, (28 November 1978), § 46.

\(^{93}\) *Ucak v. the United Kingdom*(dec.), App. no. 44234/98, 24 January 2002.

\(^{94}\) Italian Criminal Procedure Code, Article 143, paragraph 1.

\(^{95}\) Ibid., Article 104, paragraph 4-bis.

\(^{96}\) Ibid., Article 143, paragraph 2.
Part 2 - Before the judicial authority deciding on pre-trial detention

Part 2 of the manual seeks to address the role of the lawyer in the judicial phase of the pre-trial detention decision-making process, either in resisting a request for a pre-trial detention order, or in challenging a pre-trial detention order (e.g. a review of a pre-trial detention order) in particular by seeking alternatives to pre-trial detention.

An initial hearing evaluating the validity of arrest and deciding whether suspects and accused people will be held in pre-trial detention as a preliminary matter should happen as promptly as possible following arrest. A prompt initial hearing is important for a host of human rights-related reasons (for example, the vulnerability of recently arrested individuals to mistreatment). However, the speed with which this initial hearing must be held often makes it difficult for defendants to fully enjoy the procedural rights which will ensure that a decision to detain or release a suspect pre-trial is effective and lawful (for example, the ability to examine the evidence and consult with a lawyer).

Given the long-term implications of initial decisions to detain, a substantive detention hearing (Section 2) could be required to be held shortly after the initial hearing, on a de novo basis, to evaluate the lawfulness of detention after the suspect has had time to access a lawyer, review the evidence, and obtain interpretation and translation where necessary. In both cases, the lawyer will have a critical role.

1. Resisting an order for pre-trial detention

Pre-trial detention is, in principle, a measure of last resort. The best way to ensure that pre-trial detention is, in practice, used as a measure of last resort is to require judges to state publicly in their decisions why all available alternatives are not sufficient to ensure that the defendant will appear at court and refrain from further offences or interference with the investigation.

a. EU standards

Measure F of the Stockholm Programme of December 2009,97 incorporating the procedural rights “Roadmap”98, provided for the adoption of “A Green Paper on the Right to Review of the Grounds for Pre-Trial Detention”. Concrete legislative measures in this regard have not yet been adopted.

Although there are no EU rules with respect to PTD in national proceedings, it is interesting to note that the EU has adopted measures in relation to alternatives to PTD in a cross-border context, in particular due to the fact that criminal courts often order the detention of non-residents because they are perceived as a flight risk.

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To counter this disadvantage faced by non-resident defendants at the pre-trial stage, the European Supervision Order Framework Decision⁹⁹ (the “ESO”) was adopted in 2009. For more details on this tool, please see section a. in chapter 2.2. below.

b. ECTHR standards

According to the ECTHR, the court imposing the pre-trial detention order must also have the authority to release the suspect¹⁰⁰ and must be a body independent from the executive and from both parties of the proceedings.¹⁰¹

In the ECTHR case-law, lawful grounds for ordering pre-trial detention are considered to be:

- the risk that the suspect will fail to appear for trial;
- the risk the suspect will spoil evidence or intimidate witnesses;
- the risk that the suspect will commit further offences;
- the risk that the release will cause public disorder; or
- the need to protect the safety of a person under investigation in exceptional cases.¹⁰²

For the ECTHR, “a person may be detained only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.”¹⁰³

The ECTHR has repeatedly emphasised the presumption in favour of release¹⁰⁴ and clarified that the State bears the burden of proof to show that a less intrusive alternative to detention would not serve the respective purpose.¹⁰⁵ The ECTHR considers “the reasoning of the decision ordering a person’s detention […] a relevant factor in determining whether the detention must be deemed arbitrary”.¹⁰⁶ Hence “the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness”.¹⁰⁷ “[E]xtremely laconic” decisions which lack reference to the respective legal provisions do not provide “sufficient protection from arbitrariness”.¹⁰⁸ In order to meet the required criteria, a detention order must provide sufficient reasons and should not use stereotypical wording.¹⁰⁹

For the extension of pre-trial detention the ECTHR has ruled that it “is incumbent on the authorities […] to establish the persistence of reasons justifying continued pre-trial detention”¹¹⁰ and the “burden of proof in these matters should not be reversed by making

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¹⁰⁴ Michalko v. Slovakia, App. no. 35377/05, (Judgment of 21 December 2010), § 145.
¹⁰⁶ S., V. and A. v. Denmark [GC], Appps. nos. 35553/12, 36678/12 and 36711/12, (Judgment of 22 October 2018), § 92.
¹⁰⁸ Khudoyarov v. Russia, App. no. 6847/02, (Judgment of 8 November 2005), § 157.
¹¹⁰ Merabishvili v. Georgia[GC], App. no. 72508/13, (Judgment of 28 November 2017), § 234.
it incumbent on the detained person to demonstrate the existence of reasons warranting his release.”

Lawyers have a crucial role in verifying that the request for pre-trial detention is based upon solid evidence, and if not, challenging the grounds on which the pre-trial detention order is being requested.

1.1. Right to be represented by a lawyer

When a person is detained prior to trial, their ability to participate in the preparation of their defence is dramatically impaired. The role of the lawyer is crucial to counter the prosecuting authority’s arguments for pre-trial detention and/or to prepare for an effective challenge of a pre-trial detention order. Defendants should not appear unrepresented at pre-trial detention hearings unless they have specifically, knowingly and intelligently waived the right to a lawyer.

Yet in 2016, Fair Trials released the report entitled A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU. The report highlighted systemic failures resulting in the unjustified and excessive use of pre-trial detention. In particular, the research identified in several jurisdictions entrenched procedural bias by the courts towards the prosecution, partially as a result of the insufficient time and resources allocated to pre-trial detention hearings. This can make lawyers less inclined to dedicate time and effort at the pre-trial stage, despite the impact on their client’s liberty and the ultimate outcome of the case.

For more information on the right to access to a lawyer and assistance by a lawyer in the proceedings, please see above, subsections 1.1. (Right to access to a lawyer at the police station), 2.1. (Presence of the lawyer during the questioning by the police) and 2.2. (Participation of a lawyer during interrogation).

1.2. Access to the case file

Summary

- EU law requires that national authorities make available to the arrested person or to the lawyer the documents related to the specific case in their possession which are essential to challenging effectively the lawfulness of the arrest or detention.
- The ECHR specifies that access to case file and use of note must be unrestricted and include, if necessary, the possibility of obtaining copies of relevant documents.
- A failure to provide access the file may affect the overall fairness of the proceedings.

111 Bykov v. Russia[GC], App. no. 4378/02, (Judgment of 10 March 2009), § 64.
Beyond information about charges, lawyers will need access to the case file as quickly as possible to review what inculpatory evidence is on file and start developing a defence strategy. This is important with regard to challenging pre-trial detention, for example, to show that pre-trial detention is not justified because the necessary evidence has already been gathered from co-defendants or witnesses, and that there no longer would be a possibility for the client to tamper with it; or more generally question the existence of a reasonable suspicion that the person committed the offence to justify the need for pre-trial detention.

The lawyer will need to take steps to access the case file in order to prepare a defence. Depending on the level of access, the case file will usually include at least the reasons and the circumstances of the arrest, sometimes also the criminal record of the person. In the context of pre-trial detention, prior access to the case file is important as it not only helps to challenge the legality of the arrest, but also may provide arguments for the lawyer to argue there is a lack of reasons to order or uphold pre-trial detention.

a. EU standards

Article 7(1) of the Information Directive stipulates that, at any stage of the criminal proceedings where a person is arrested or detained, Member States are obliged 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.” Recital 30 further explains that “[d]ocuments and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR.”

This provision is made without derogation and aims to ensure that defendants have the necessary information to challenge prosecutorial requests for pre-trial detention. However, questions with regard to the timing of access to the case file, the bearing of costs as well as issues concerning a process for access, etc., are all left to the Member States’ national procedures, which can significantly influence the effectiveness of this right in practice.

b. ECtHR standards

Article 6 § 3 (b) is of relevance for the accused’s access to the case file and the disclosure of evidence, “and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1.”

In the case-law of the ECtHR, “unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents” are considered important guarantees of a fair trial. The Court has considered it to constitute a breach of the principle of equality of arms when the accused has limited access to his case

113 Rowe and Davis v. the United Kingdom [GC], App. no. 28901/95, (Judgment of 16 February 2000), § 59; Leas v. Estonia, App. no. 59577/08, (Judgment of 06 March 2012), § 76.
file or other documents on public-interest grounds.\textsuperscript{114} Non-disclosure of evidence to the defence may additionally breach the right to an adversarial hearing.\textsuperscript{115}

The Grand Chamber, in \textit{Öcalan v. Turkey}, has held that “[i]n this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice. [R]espect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions.”\textsuperscript{116}

The ECtHR does not require the accused to be granted direct access to the case file but considers it enough “for him to be informed of the material in the file by his representatives.”\textsuperscript{117} The Court “further considers that respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions.”\textsuperscript{118} In cases where an accused person conducts their own defence, a denial to access the case file constitutes an infringement of the rights of the defence.\textsuperscript{119}

More recently in \textit{Beuze v. Belgium}, the ECtHR recognised that failure to access the file may affect the overall fairness of the proceedings:
“depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings:
(1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation; and
(2) the non-participation of the lawyer in investigative actions, such as identity parades or reconstructions.”\textsuperscript{120}

\begin{center}
\textbf{Good practice example: Greece}
\end{center}

The accused is given an overview of the content of the case file by the investigating judge, as soon as s/he appears before them to give their official statement. The accused and/or their lawyer also have the right to study the case file and to make copies of all documents.\textsuperscript{121} Essential documents, including all decisions resulting in deprivation of liberty, documents containing the charges and all decisions on the charges, may be translated free of charge if the accused does not understand the Greek language.\textsuperscript{122} The Greek framework and judicial practice allow broad access to the case file and seldom impose restrictions to this right.

\textsuperscript{114} \textit{Beraru v. Romania}, App. no. 40107/04, (Judgment of 18 March 2014), § 70; \textit{Matyjek v. Poland}, App. no. 38184/03, (Judgment of 24 April 2007), § 65; \textit{Moiseyev v. Russia}, App. no. 62936/00, (Judgment of 09 October 2008), § 217.
\textsuperscript{115} \textit{Kuopila v. Finland}, App. no. 27752/95, (Judgment of 27 April 2000), § 38.
\textsuperscript{116} \textit{Öcalan v. Turkey}[GC], App. no. 46221/99 (Judgment of 12 May 2005), § 140.
\textsuperscript{117} \textit{Kremzow v. Austria}, App. no. 12350/86, (Judgment of 21 September 1993), § 52.
\textsuperscript{118} \textit{Öcalan v. Turkey}[GC], App. no. 46221/99 (Judgment of 12 May 2005), § 140.
\textsuperscript{119} \textit{Foucher v. France}, App. no. 22209/93, (Judgment of 18 March 1997), §§ 33-36.
\textsuperscript{120} \textit{Beuze v. Belgium}[GC], App. no. 71409/10, (Judgment of 09 November 2018), § 135.
\textsuperscript{121} Greek Criminal Procedure Code, Article 101.
\textsuperscript{122} \textit{Ibid}, Article 236A.
1.3. Putting forward alternatives to pre-trial detention

Summary

- Pre-trial detention must only be used as a measure of last resort.
- Decisions on pre-trial detention must be individualised and evidence-based.
- Decisions on pre-trial detention must refer to arguments and evidence from both prosecution and defence.
- Both the prosecution and defence must be permitted to suggest individualised alternatives to pre-trial detention.
- Alternatives must always be the least restrictive means necessary to ensure the purpose for which any restrictions were deemed necessary.

a. EU standards

In 2009, the European Supervision Order Framework Decision\textsuperscript{123} (the “ESO”) was adopted to counter the disadvantage faced by non-resident defendants at the pre-trial stage of being more likely to be perceived as a flight risk. The instrument allows the court to rely on the authorities of other Member States to supervise the defendant, thus removing one of the main avoidable causes of pre-trial detention of non-residents. Since 1 December 2012 its provisions were due to be transposed into national law.

The European Supervision Order Framework Decision aims “at enhancing the right to liberty and the presumption of innocence in the European Union”. It has the objective to promote, “where appropriate, [...] the use of non-custodial measures as an alternative to provisional detention, even where, according to the law of the Member State concerned, a provisional detention could not be imposed \textit{ab initio}”\textsuperscript{124}.

The tool is designed to provide an effective alternative to pre-trial detention and to address, primarily, (i) the situation where a non-resident defendant is kept in detention pending trial because the court finds that there is a flight risk, often because the defendant has no community ties to the trial state; but also (ii) the situation where a non-resident defendant is granted temporary release but cannot leave the trial state, meaning prolonged separation from his/her state of residence.

With regard to non-resident defendants, the ESO Framework Decision applies to supervision measures issued as an alternative to ‘provisional’ detention\textsuperscript{125} and has the purpose to ‘ensure the due course of justice, and in particular, that the person will be available to stand trial’.\textsuperscript{126} It is important to note that the ESO Framework Decision does not confer a ‘right’ on a person to the use of a non-custodial measure as an alternative to custody in criminal proceedings. This is governed by the national law of the trial state.\textsuperscript{127} But it is a measure that defence practitioners can apply for in the context of cross-border proceedings.

\textsuperscript{124} ESO Framework Decision, Recital 4.
\textsuperscript{125} ESO Framework Decision, Article 1.
\textsuperscript{126} Ibid, Article 2(1)(a).
\textsuperscript{127} Ibid, Article 2(2).
The ESO Framework Decision covers the following core supervision measures:\textsuperscript{128}

- An obligation to inform the authorities of a change of residence;
- An obligation not to enter certain places (in either Member State);
- An obligation to remain at a specified place (with possible curfew requirements);
- An obligation regarding leaving the territory of the executing Member State;
- An obligation to report at specific times to a specific authority;
- An obligation to avoid contact with specific persons.

In addition, the ESO Framework Decision lists several other supervision measures which Member States can accept, or decline, to monitor:\textsuperscript{129}

- Restrictions on professional activity;
- Obligation not to drive a vehicle;
- Financial security;
- Addiction treatment;
- Avoiding contact with specific objects, which perhaps refers to computers in high-tech crime cases.

The underlying assumption is that the defendant will voluntarily attend court dates in the issuing Member State. However, if a breach of supervision measures leads to the issuing of an arrest warrant, Article 21 provides that the defendant is to be surrendered in accordance with the EAW Framework Decision.

Crucially, the ESO’s effectiveness depends on courts making use of it. We encourage practitioners to ask courts to consider the ESO where appropriate. For further guidance please see: https://www.fairtrials.org/wp-content/uploads/ESO-guide.pdf.

b. ECtHR standards

The ECtHR has emphasised that pre-trial detention should be imposed only where alternatives are not available. In \textit{Ambruszkiewicz v Poland}, the Court stated that the “detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.”\textsuperscript{130}

Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,\textsuperscript{131} and the authorities must also consider whether the “accused’s continued detention is indispensable.”\textsuperscript{132} In \textit{Idalov v. Russia}, the Grand Chamber held that “[w]hen deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.”\textsuperscript{133}

One such alternative is to release the suspect within their state of residence subject to supervision. States may not justify detention with reference to the non-national status of the

\textsuperscript{128} Ibid., Article 8(1).
\textsuperscript{129} Ibid., Article 8(2).
\textsuperscript{130} \textit{Ambruszkiewicz v. Poland}, App. no. 38797/03, (Judgment of 4 May 2006), § 31.
\textsuperscript{131} \textit{Ladent v. Poland}, App. no. 11036/03, (Judgment of 18 March 2008), § 55.
\textsuperscript{132} Ibid.
\textsuperscript{133} \textit{Idalov v. Russia} [GC], App. no. 5826/03, (Judgment of 22 May 2012), § 140.
suspect, but must consider whether supervision measures would suffice to guarantee the suspect’s attendance at trial. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account.\footnote{Mangouras v. Spain, App. no. 12050/04, (Judgment of 28 September 2010), § 79.}

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**Good practice example: Hungary**

The new Criminal Procedure Code widens the possibilities of alternative coercive measures as well as the ‘variability’, providing greater leeway to judges to tailor and individualise their decision. The new CCP merges the prohibition of geographic ban with house arrest under the new legal term ‘criminal supervision’. This also contains the measures of expulsion from public spaces and obligatory reporting. When the court renders its decision, it has to decide on the compulsory and the optional conditions (e.g. obligatory reporting while being under criminal supervision) of the criminal supervision.\footnote{Detailed explanatory memorandum of Draft Bill T/1397.} This change supports the prosecutors and the judges to request and order more varied forms of supervision than before, and provides lawyers with more arguments for alternatives to detention.

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**Good practice example: Italy**

The Italian national action plan suggests launching campaigns to establish protected homes to reduce the overuse of pre-trial detention. The availability of a domicile was found to often play an important role for judges when deciding whether alternative measures to detention could be taken. The establishment of “protected homes” in which to spend the period of the trial would lead to a great reduction in the incidence of pre-trial detention.

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**2. Judicial review of pre-trial detention orders**

The last section of this manual covers the role of the lawyer to obtain the release of his or her client by challenging/requesting a review of a pre-trial detention order. Once pre-trial has been ordered, it is an uphill battle for the defendant to obtain release. The burden of persuading review courts that defendants should be released is often effectively shifted to the defendant, contrary to standards established by the ECtHR.\footnote{Please see section b on ECtHR standards below.}

The lawyer will have to counter the prosecutor/investigative judges’ argument that pre-trial detention is lawful. Defendants do not always have access to adequate legal assistance or sufficient access to case materials essential to challenging detention. Even where access was sufficient, lawyers may not have enough time to study the material prior to a hearing. Judges tend to credit the arguments of the prosecution over those of the defence. In some
cases, pre-trial detention may be used for unlawful ends, such as in order to coerce a confession or for punitive purposes.\textsuperscript{137}

Human rights standards set out certain limited grounds for imposing pre-trial detention, but judges sometimes rely on unlawful grounds, such as exclusive or primary reliance on the nature of the offences, or findings of flight risk based on suspect justifications such as lack of fixed residence or foreign nationality. Reasoning can be formulaic and does not engage with the specific evidence in each case. In such cases, it is important for lawyers to seek a judicial review of pre-trial detention orders. Depending on strategy and local procedure, it may also be an opportune moment to raise any violations of rights during detention.

As indicated above, access to the case file is crucial to prepare the defence in pre-trial proceedings, in particular, to assess whether there are grounds for reasonable suspicion. It is important to question in review hearings whether steps were taken, for example, to secure the evidence which the detained was supposed to be kept from interfering with, and which served as basis for ordering pre-trial detention. Also, it serves as an important source of information with regard to the progress of investigation by the authorities in charge of it and could serve as basis for arguing for the release of the detained. This section seeks to give recommendations to lawyers on what to do if the lawyer is not given access to the file or to a limited portion of it, if access to the file is granted late, or if the lawyer cannot take copies of the file.

2.1. The right to review the decision on pre-trial detention

<table>
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<tr>
<th>Summary</th>
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<tr>
<td>• Regular judicial reviews of the maintenance of pre-trial detention must take place at reasonable intervals.</td>
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<td>• All parties, including the defence, must be able to initiate a review.</td>
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<td>• The authorities remain under an ongoing duty to consider whether alternative measures can be used instead of detention.</td>
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a. EU standards

Article 12 of the Access to a Lawyer Directive obliges states to ensure that “suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive”.

The provision is phrased in broad terms which would benefit from interpretation by the CJEU. Though Article 12(1) does not refer specifically to a judicial remedy, Article 47 of the Charter of Fundamental Rights of the European Union\textsuperscript{138} requires an effective remedy before an impartial tribunal. Effective judicial protection is a general principle of the EU

\textsuperscript{137} Fair Trials, A measure of last resort?, p. 1.
legal order and it simply cannot be asserted that such an issue could be resolved other than by access to a court capable of delivering an effective remedy.

In terms of the type of remedy the court must offer, Article 12(2) points clearly to the use of evidence obtained in breach of the right of access to a lawyer, showing that remedies must be applied in the context of ‘the assessment of statements’ made by the suspect or accused, or of evidence obtained by the breach. The most typical context to which this refers is the decision making as to the merits of the accusation. It seems relatively clear from the wording of Article 12(2) that the provision is pointing to systems of remedies which relate to the admission of evidence. Despite there being no direct requirement to ensure the challenge of a pre-trial detention order in EU law, this can be drawn from the requirement of an effective remedy in the Access to a Lawyer Directive.

b. ECtHR standards

Pre-trial detention must be subject to regular judicial review, which all stakeholders (defendant, defence lawyer, judicial body, and prosecutor) must be able to initiate. A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured. This might require access to the case file, which has now been confirmed in Article 7(1) of the Right to Information Directive. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention. Previous decisions should not simply be reproduced.

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains, and continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.” The authorities remain under an ongoing duty to consider whether alternative measures could be used.

According to ECHR standards, review of pre-trial detention (as opposed to a defendant’s right to immediately appeal a judicial decision to detain) must occur automatically (without

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139 The CJEU interprets Article 47 of the EU Charter as requiring that: ‘The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, Unibet, C 432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, DEB, C 279/09, EU:C:2010:811, paragraphs 29 to 33).’ - CJEU judgment of 28 February 2018, Associação Sindical dos Juízes Portugueses (C-64/16), para. 35.
142 Rakevich v. Russia, App. no. 58973/00, (Judgment of 28 October 2003), § 43.
144 Wolch v. Poland, App. no. 27785/95, (Judgment of 19 October 2000), § 127.
146 Michalko v. Slovakia, App. no. 35377/05, (Judgment of 21 December 2010), § 145.
147 Ibid.
148 McKay v. UK, App. no. 543/03, (Judgment of 3 October 2006), § 42.
the defendant having to apply for it) at “reasonable intervals” in order that “the detainee should not run the risk of remaining in detention long after the time when his deprivation of liberty has become unjustified.”

The ECtHR also gives guidance on the length of pre-trial detention orders. Although it does not set a maximum duration of detention pending trial, it does indicate that the trial must take place within a “reasonable” time according to Article 5(3) ECHR, and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed. Whether this has happened must be determined by considering the individual facts of the case. The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.

In case of unlawful detention, Article 5(5) ECHR enshrines the right to compensation for victims of arrest or detention in contravention of the provisions of Article 5 ECHR. The right to compensation “presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Court” and is “a direct right to [preliminary financial] compensation” before the national courts. The right to compensation must “not be construed as affording a right to compensation of purely pecuniary nature, but should also afford such right for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5”.

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**Best practice example: Hungary**

A positive development is that the new Criminal Procedure Code introduces a hearing for the second instance court deciding on pre-trial detention:

‘Article 408 (3): In case of the rejection of a motion aimed at ordering a pre-trial detention – including when the court orders a criminal supervision or a restraining order instead of a pre-trial detention – the prosecution, the defendant or the defence counsel shall request the court while filing a legal remedy to decide the appeal on a hearing. The defendant shall be advised of this right while filing a legal remedy.’

‘Article 481 (4): In the case of Article 480 (3), the regional court shall hold a hearing. The regional court may hold a hearing without a motion aimed at the meeting. […] The absence of the defendant shall not prevent the hearing. The prosecutor participating at the hearing shall be working at the prosecutor’s office filing a motion aimed at ordering the pre-trial detention.’ This recent change in law is a positive development and remains to be observed in its practical application.

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150 McKay v. the United Kingdom, App. no. 543/03, (Judgment of 3 October 2006), § 34.
151 Abdulkhakov v. Russia, App. no. 14743/11, (Judgment of 2 October 2012), § 209.
154 PB v. France, App. no. 38781/97, (Judgment of 1 August 2000), § 34.
155 With regard to pre-trial detention, the relevant provision is subparagraph 1 (c) of Article 5 ECHR.
157 A. and Others v. the United Kingdom [GC], App. no. 3455/05, (Judgment of 19 February 2009), § 229; Storck v. Germany, App. no. 61603/00, (Judgment of 16 June 2005), § 122.
2.2. Presentation of suspects and accused persons in pre-trial detention hearing

**Summary**

- Court officials are not allowed to present the defendant as being guilty and measures of physical restraint (handcuffs, glass boxes, cages and leg iron) may only be used if required in the light of the particular circumstances of each case.

The presentation of suspects and accused persons in hearings on pre-trial detention can have a significant influence on everyone present in a court room, evoking guilt or a security risk where restraining measures are used. Although remedies for violations are not specified, it is important for lawyers to be aware of these standards and to invoke them where there are violations, as this can impact the defence’s position when challenging PTD in court.

**a. EU standards**

EU law sets out specific measures to preserve the presumption of innocence,\(^\text{159}\) including:

- Court officials are not allowed to present the defendant as being guilty.
- Measures of physical restraint (handcuffs, glass boxes, cages and leg iron) may only be used if required by the particular circumstances of each case.
- These include cases where the defendant:
  - poses a security risk;
  - is likely to abscond; and/or
  - will attempt to contact third persons.

The defendant must not be wearing prison clothes in court or in public when this would give the impression that they are guilty. Article 5 of the Presumption of Innocence Directive requires that Member States “take appropriate measures to ensure that suspects and accused persons are not presented as being guilty through the use of measures of physical restraint” in court or in public.

As further explained in Article 6(2) and Recital 20 of the Directive, measures such as handcuffs, glass boxes, cages and leg irons should only be adopted on a case-specific basis. This means that measures of physical restraint should be avoided unless their use is required to prevent suspects or accused persons from harming themselves or others; damaging any property; from absconding; or from having contact with third persons or witnesses. This should be interpreted as imposing a requirement of an assessment of the particular circumstances of each case. Only when it has been determined that in a particular case there is a real security risk posed by the defendant, or it has been proven that there are strong reasons to believe that the defendant is likely to abscond or will attempt to contact third persons, could the decision to adopt such measures be justifiable.

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\(^{159}\) Presumption of Innocence Directive, Articles 4 and 5.
b. ECtHR standards

The Presumption of Innocence Directive builds on the jurisprudence of the ECtHR which has confirmed that the use of a dock, metal cages or glass boxes during legal proceedings undermines the rights of the accused person.\textsuperscript{160}

In *Svinarenko and Slyadnev v. Russia* the Grand Chamber reiterated that “keeping a handcuffed defendant in a metal cage during his public trial amounted to his degrading treatment, which also affected the fairness of his trial” and pointed out that “their exposure in a cage during hearings in their case would convey to their judges, who were to take decisions on the issues concerning their criminal liability and liberty, a negative image of them as being dangerous to the point of requiring such an extreme physical restraint, thus undermining the presumption of innocence.” Measures of confinement in the courtroom may have a negative impact on other fair trial considerations as well, “notably an accused’s rights to participate effectively in the proceedings” and “to receive practical and effective legal assistance”. The Grand Chamber concluded that it could not find any “convincing arguments to the effect that, in present-day circumstances, holding a defendant in a cage […] during a trial is a necessary means of physically restraining him, preventing his escape, dealing with disorderly or aggressive behaviour, or protecting him against aggression from outside. Its continued practice can therefore hardly be understood otherwise than as a means of degrading and humiliating the caged person.”\textsuperscript{161}

\textsuperscript{160} *Ramishvili and Kokhireidze v. Georgia*, App. no. 1704/06, (Judgment of 27 January 2009), paragraph 100.
