

**Original citation:**

Hodgson, Jacqueline (2016) Criminal procedure in Europe's area of Freedom, Security and Justice : the rights of the suspect. In: Mitsilegas, Valsamis and Bergström, Maria and Konstadinides, Theodore , (eds.) Research Handbook in EU Criminal Law. Research Handbooks in European Law series . Cheltenham, UK: Edward Elgar Publishing, pp. 168-188. ISBN 9781783473304

**Permanent WRAP URL:**

<http://wrap.warwick.ac.uk/71089>

**Copyright and reuse:**

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions. Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

**Publisher's statement:**

This draft chapter that has been published by Edward Elgar Publishing in Research Handbook in EU Criminal Law edited by Mitsilegas, Valsamis and Bergström, Maria and Konstadinides, Theodore published in 2016.

Link to published version: <http://www.e-elgar.com/shop/research-handbook-on-eu-criminal-law>

**A note on versions:**

The version presented here may differ from the published version or, version of record, if you wish to cite this item you are advised to consult the publisher's version. Please see the 'permanent WRAP URL' above for details on accessing the published version and note that access may require a subscription.

For more information, please contact the WRAP Team at: [wrap@warwick.ac.uk](mailto:wrap@warwick.ac.uk)

# **Criminal Procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspect**

Professor Jacqueline Hodgson  
*School of Law, University of Warwick, UK*

*Research Handbook on EU Law* (2014) Bergström, M., Konstadinides, T. and Mitsilegas, V. (eds)

## **Introduction**

The EU's area of Freedom, Security and Justice concerns the free movement of citizens and their protection. In the field of criminal law and justice, it aims to strengthen police and judicial co-operation between Member States, whilst also respecting the human rights and fundamental freedoms of EU citizens.<sup>1</sup> Initially, measures focused on the functions of police investigation, prosecution and sentencing, but the Stockholm Programme for the period 2010-2014 set out a roadmap of EU priorities with a rather different emphasis. This was a Europe of rights, of justice and of protection for the vulnerable, including the protection of victims, but also the protection of the rights of suspects and accused persons in criminal proceedings.<sup>2</sup>

This chapter discusses the measures that have been put in place for the protection of suspects and accused persons, and the practical challenges of implementing universal safeguards across different systems of criminal justice. It begins with a brief account of the, often difficult, passage of procedural safeguards into EU legislation, before discussing the approach to protections provided by the European Convention on Human Rights (ECHR) and developed through the jurisprudence of the European Court of Human Rights (ECtHR). The right to a fair trial under Article 6 ECHR has been interpreted to include significant safeguards for suspects as well as accused persons at trial. The recent Directives also make provision for these safeguards – the right to legal assistance, the right to information,<sup>3</sup> the right to interpretation and translation – but in greater detail and more normative terms. This programme of procedural safeguards represents an important project, especially when set against the raft of police and prosecution co-operation measures. But it is also an ambitious and challenging project, the success of which will require Member States to take

---

<sup>1</sup> Originally under the EU's Third Pillar, this derives from the Treaty on the Functioning of the European Union (the TFEU), Part 3, Title V, Area of Freedom, Security and Justice.

<sup>2</sup> See also the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused persons – Strengthening the Foundation of the European Area of Criminal Justice* Brussels COM(2013) 820/2.

<sup>3</sup> This also reflects protections set out in Article 5 ECHR.

seriously the demands of incorporating universal safeguards into their own systems of criminal justice. The chapter goes on to evaluate the scope and potential impact of these Directives, drawing on the findings of a recent major empirical study conducted across four European jurisdictions: England and Wales, France, the Netherlands and Scotland. This provides a deeper understanding of the operation of due process safeguards in practice across different procedural traditions, and of how we might ensure that the current Directives are implemented effectively on the ground.

### **The development of procedural safeguards for suspects in the EU**

Prior to the Lisbon Treaty, police and judicial co-operation took place within the field of Justice and Home Affairs, which sat within the EU's third pillar. The measures available within this regime were not Regulations or Directives, but Conventions, Common Positions or Framework Decisions, subject to weaker democratic and judicial control and without direct effect. This is no longer the case as post Lisbon, criminal law and justice measures are part of the single legislative structure and so will be legislated as Directives. It has proved considerably easier to reach agreement on police and judicial co-operation measures on investigation, prosecution and sentencing, than on procedural safeguards. Measures are in place addressing matters ranging from countering terrorism, to sharing evidence, enforcing penalties and perhaps the most high profile measure of all – extradition through the European Arrest Warrant procedure. Historically, however, it had proved impossible to reach unanimous agreement on the rights and safeguards available to accused persons. Achieving consensus is now made easier, as post Lisbon, measures can be agreed by qualified majority voting, rather than requiring unanimity as before. Furthermore, as Directives or Regulations, both the EU and national implementing measures will now also be subject to the review of the European Court of Justice.

However, it should be noted that EU criminal justice does not aim to harmonise the laws of Member States. Rather, the focus is on intergovernmental cooperation through the principle of mutual recognition. This requires that national measures, including judicial decisions, should be recognised by all Member States and acted upon accordingly.<sup>4</sup> This is not without controversy; mutual recognition creates a form of 'extraterritoriality', in which national laws and procedures must be acted upon by states that have had no part in their enactment. This may include the investigation of matters that are not criminal in the state where the investigation is being carried out, or the recognition of procedures that may not be considered properly 'judicial' in the receiving state. Nonetheless, mutual recognition has been the success story of EU criminal justice and is consistently described as the 'cornerstone' of judicial cooperation in criminal matters.

---

<sup>4</sup> See Communication from the Commission to the Council and European Parliament *Mutual Recognition of Final Decisions in Criminal Matters*, COM (2000) 495 final, Brussels 26 July 2000.

Recognising that criminal justice legislation had centred on cooperation measures that had strengthened the powers of police, courts and prosecutors, the Commission made its first attempt to balance this with the enactment of common standards of protection for suspects in the 2003 Green Paper *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.<sup>5</sup> This focused on the key elements of the right to a fair trial: legal advice and assistance; the provision of interpreters; special protection for vulnerable suspects; consular assistance; and knowledge of the existence of rights. With the intention “not to duplicate what is in the ECHR but rather to promote compliance at a consistent standard”,<sup>6</sup> the Commission published the draft *Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union* in 2004. Lawyers and non-governmental organisations responded positively to the proposals, but they were not well received by many governments on the grounds that they breached the principle of subsidiarity, could result in the lowering of standards (which, it was said, had already been set by the ECHR), and that implementing common standards would be technically difficult. The legal basis for the measure was also contested. Article 31 (1) of the Treaty of the European Union, states that “Common action on judicial cooperation in criminal matters shall include:...(c) ensuring compatibility in rules applicable in the Member States as may be necessary to improve such cooperation”. Critics claimed that this did not provide sufficient legal justification to allow for the adoption of criminal procedural measures.<sup>7</sup> Furthermore, safeguards for suspects proved to be very much more difficult to agree upon than police cooperation measures in Europe. Neither the draft Framework Decision nor the later proposal for a non-binding agreement attracted sufficient support from Member States and both were eventually abandoned.

Support for procedural safeguards for suspects was revived in 2009 with the adoption of the Stockholm programme, which set out the EU strategy in the area of freedom, security and justice for the period 2010-2014. It was recognised that mutual trust is an essential prerequisite for mutual recognition. If Member States are to cooperate in recognising and enforcing each other’s judgments and decisions, they must have confidence in the safeguards in place in one another’s jurisdictions. The way to do this is to ensure common minimum standards that, whilst stemming from ECHR guarantees, will go further and will be more effective. The programme contained a Roadmap setting out the way forward. This contained the same protections as the draft Framework Decision, with the addition of the right to review the grounds of detention.<sup>8</sup> However, rather than placing all the guarantees within a single instrument, the Roadmap set out an

---

<sup>5</sup> Brussels, 19.2.2003, COM(2003) 75f.

<sup>6</sup> *Draft Council Framework Decision, Explanatory Memorandum*, para 9.

<sup>7</sup> The press release stated that the final dividing line was whether the EU was competent to legislate for domestic proceedings, or only cross-border cases. Press Notice, Justice and Home Affairs Council, 12-13 June 2007.

<sup>8</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

incremental, step-by-step approach, with separate measures for each procedural protection.<sup>9</sup> This has proved to be more successful.

The first measure to be legislated was perhaps the least controversial: the Directive on the right to an interpreter and to the translation of documents during the investigation and the trial, which was approved in October 2010.<sup>10</sup> Then came the right to information in criminal proceedings, agreed in 2012,<sup>11</sup> and most recently, the Directive on the right of access to a lawyer, agreed in October 2013.<sup>12</sup> The right to legal assistance represents perhaps the greatest achievement, as this was the stumbling block preventing agreement of the original draft Framework Decision and subsequent compromise measures. The UK has exercised its rights under the JHA opt-in protocol to participate in and be bound by the first two Directives, but as yet, as not opted in to the third Directive on the right to legal assistance. The current programme also includes several more measures, which are at the draft stage. These address the presumption of innocence, safeguards for juveniles and vulnerable people, and the right to legal aid. The UK has stated that it will not opt in to any of these draft measures, as it does not wish the ECJ to be the highest court overseeing parts of our criminal procedure and it fears that important features of our criminal procedure will be lost through a ‘Europeanisation’ of criminal justice. Before going on to discuss these instruments in more detail, it is important to examine briefly the recent jurisprudence of the ECtHR, as this has changed the European legal landscape in relation to procedural safeguards and so formed an important backdrop to the Directives.

### **The protection of suspects under the ECHR**

It is well established that whilst Article 6 ECHR speaks of the right to a fair trial, these protections also extend to the suspect pre-trial: “if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to

---

<sup>9</sup> The Roadmap established a five year programme of legislation for minimum standards in respect of five key procedural rights: interpretation and translation (Measure A); information about procedural rights and about the suspected or alleged offence (Measure B); legal advice and legal aid (Measure C); communication with relatives, employers and consular authorities (Measure D); and special safeguards for vulnerable persons (Measure E).

<sup>10</sup> Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. Transposition date 27 October 2013.

<sup>11</sup> Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings. Transposition date 2 June 2014.

<sup>12</sup> Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. Transposition date 27 November 2016.

comply with them [...]”<sup>13</sup> Key guarantees for the suspect include the presumption of innocence;<sup>14</sup> the right to know the nature of the charges that form the basis of detention;<sup>15</sup> to have adequate time and facilities to prepare a defence;<sup>16</sup> to have access to legal assistance and for that legal assistance to be provided free when the interests of justice so require;<sup>17</sup> and to be provided with an interpreter if necessary.<sup>18</sup> Whilst these safeguards might appear straightforward and uncontroversial, their application poses a real challenge in practice. With 47 member countries of the Council of Europe, ECHR guarantees apply across a range of criminal legal procedures. Rights and responsibilities are divided up differently. In England and Wales, for example, as a broadly adversarial procedure, it is the defence lawyer who represents and protects the interests of the accused. There are important procedural protections in place both before and at trial, but the protection of the accused is the primary responsibility of the defence. In Belgium, France or the Netherlands, however, the public prosecutor has an important pre-trial role in overseeing the criminal investigation and ensuring the protection of the rights of the accused. This function is rooted in the inquisitorial model of criminal procedure, which places its trust in a centralized judicial investigation, rather than a party based procedure. Historically, the defence has enjoyed a diminished role within this model, as the interests of the accused are understood to be protected by a public interest oriented judge. The defence rights jurisprudence of the ECtHR, therefore, represents a greater challenge to those jurisdictions whose criminal processes are rooted in the inquisitorial tradition, making the universalization of procedural protections problematic beyond guarantees set out in fairly broad terms, and with a margin of appreciation that allows implementation to take account of these national differences.

The case of *Salduz v Turkey*<sup>19</sup> illustrates the important developments in the jurisprudence of the ECtHR, but also the challenges in setting a universal standard of protection across such a number and variety of criminal procedures. *Salduz v Turkey* guaranteed in the strongest terms the suspect’s right to custodial legal advice before and during police interrogation.<sup>20</sup>

...the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” ...Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a

---

<sup>13</sup> *Imbrioscia v Switzerland* 13972/88 [1993] ECHR 56, para 36.

<sup>14</sup> Article 6(2) ECHR.

<sup>15</sup> Article 6(3)(a) ECHR. Article 5 (2) ECHR also guarantees everyone arrested that they should be informed promptly and in a language that they understand, of the reasons for their arrest and any charge against them.

<sup>16</sup> Article 6(3)(b) ECHR

<sup>17</sup> Article 6(3)(c) ECHR.

<sup>18</sup> Article 6 (3)(e) ECHR.

<sup>19</sup> 36391/02 [2008] ECHR 1542.

<sup>20</sup> Some states, including the Netherlands, did not accept that this ruling extended to the right to have a lawyer present during the interrogation, but the subsequent cases of *Mader v Croatia* 56185/07 [2011] ECHR and *Sebalj v Croatia* 4429/09 [2011] ECHR put this beyond doubt.

suspect by the police...The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

As a result, many countries have reformed their criminal procedure in order to comply with the *Salduz* decision, but significant differences remain in the statutory provision made enabling suspects to receive legal assistance whilst in police custody. In Scotland, for example, the UK Supreme Court in *Cadder v HM Advocate* held that in denying suspects access to a lawyer, Scots law did not comply with *Salduz*.<sup>21</sup> Legislation was passed three days later, permitting suspects access to a lawyer before and during police interrogation. In France too, prior to *Salduz*, the suspect was allowed a 30-minute consultation with her lawyer, but not to have the lawyer present during interrogation. This was challenged in 2010 and held to be contrary to the constitution by the *Conseil Constitutionnel*. Other appeal court judgments followed, as well as the ECtHR decision in *Brusco/Moulin*. As a result, since the reform of April 2011, suspects in France may now have their lawyer present throughout the period of detention and questioning, including during the police interrogation. In the Netherlands, there was no general right to legal assistance for suspects detained for police questioning. In the wake of *Salduz*, a reform was legislated permitting suspects to have a 30-minute consultation with a lawyer, but the suspect is not allowed to have her lawyer present during the police interrogation.

The safeguard of “access to a lawyer” has not been implemented in a uniform fashion. In effect, the Dutch reform implementing *Salduz* puts in place safeguards that were considered insufficient by the French. England and Wales, France and Scotland all provide a legal right for the lawyer to be present during the interrogation of the suspect, but the Netherlands does not, save in the case of juveniles and serious crime. There are also other differences: France and the Netherlands restrict the lawyer-client consultation prior to interrogation to 30 minutes, whilst in Scotland and England and Wales there is no time restriction. There are also differences in the amount of information from the case file that suspects and lawyers are provided with, and the extent to which lawyers may intervene during the police interrogation of the suspect.

In addition to the national differences that continue within the margin of appreciation, there are other limitations in relying upon the ECtHR for universal standards protecting the rights of suspects. Ensuring that Convention rights are implemented, and implemented effectively, is policed to a large extent by the ECtHR in Strasbourg. Citizens of a signatory state who believe that a Convention right has been breached may bring their case before the ECtHR. The Court’s approach is a practical one. In determining whether the applicant’s rights under the Convention have been breached, the Court has made clear that the ECHR is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>22</sup> The existence of rights on paper, but which are routinely denied or are unenforceable, will not satisfy the Court. However, in addition to allowing for a margin of appreciation between jurisdictions, the

---

<sup>21</sup> *Cadder v HM Advocate* [2010] UKSC 43.

<sup>22</sup> *Salduz v Turkey* 36391/02 [2008] ECHR 1542, para 55.

Court takes a broadly holistic approach in determining whether there has been a Convention breach. In practice, for example, the Court will determine whether, overall, there has been a breach of Article 6. It will consider the process as a whole and breaches of the Convention early on in the process may be 'remedied' by subsequent compliance, resulting in a fair trial overall. This can serve to undermine the protections of the Convention. However, this was one of the ways in which *Salduz* was exceptional: the right to a lawyer as from the first interrogation was treated as a fundamental and freestanding right, the breach of which would, in principle, irretrievably prejudice the rights of the defence. Subsequent compliance with Article 6 by providing the accused with a lawyer and allowing her to challenge her statements made to the police, will not make good that initial breach and will not make the trial fair under Article 6 ECHR.

The ECHR and its development through the interpretation of the ECtHR provides important baseline guarantees, but it does not set out to provide the degree of uniformity that is required for mutual trust between states. Decisions turn on the particular facts of a case and are made after criminal proceedings have been brought. It is, of course, necessary to take account of procedural differences, but not to the extent that this becomes a barrier to the adoption of measures. For example, France characterizes its criminal process as centering on judicial supervision. This is regarded as a key safeguard, defining the investigative phase as a search for the truth carried out by a public interest driven judicial officer. As a result, the right to legal assistance during the initial period of police detention and questioning has been resisted as unnecessary. When finally the lawyer came to have some role, this was kept to a minimum, regarded as of peripheral importance in an inquisitorially rooted procedure, in contrast to the more obvious role that the lawyer might be assigned in the party-driven process of an adversarially rooted procedure such as that in England and Wales.

### **Current EU procedural safeguards for suspects**

The current programme of procedural safeguards is designed to ensure the protection of individuals' rights in more detailed and in more normative ways than is possible under the ECHR, strengthening the right to a fair trial across the EU. There are limitations in the ECtHR's ability to ensure uniform application of ECHR guarantees: there is a substantial backlog of cases; mechanisms for ensuring compliance with ECtHR decisions are weak; the Court takes a holistic approach in general, rather than upholding individual fair trial rights; and the margin of appreciation doctrine can result in procedural differences undermining the uniform application of safeguards. The effectiveness of fair trial rights is also limited by the *ex post* nature of the application process. A system of EU protections, on the other hand, allows citizens to rely on specific procedural safeguards more immediately, rather than at the close of the case against them. If necessary, national courts may now also ask the ECJ for a preliminary ruling on a relevant issue. Since the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has become legally binding, creating a set of principles,



rights and freedoms similar to those expressed in the ECHR, which can be used by the ECJ and by national courts when interpreting EU law.<sup>23</sup>

The scope of the current Directives providing procedural safeguards for suspects, recognizes the need for safeguards to be in place in the early stages of investigation and questioning. There has been much discussion over the point at which ECHR guarantees under Article 6 apply pre-trial. The ECtHR has interpreted the point of 'charge' to be the "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". This definition also corresponds to the test of whether "the situation of the [suspect] has been substantially affected."<sup>24</sup> All three of the current Directives apply from the time that the person is made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, up until the end of the criminal proceedings.<sup>25</sup> The scope of the Directive on access to a lawyer is further clarified by the addition of the words: "and irrespective of whether [the suspect] is deprived of liberty."<sup>26</sup> This means that suspects who are not formally arrested, but are assisting the police as 'volunteers', will also be entitled to legal assistance.

This is more than mere semantics. In France, for example, the formal procedure for the detention and questioning of suspects is the *garde à vue*, through which the police may deprive a suspect of her liberty for up to 48 hours with the authorization of the public prosecutor (the *procureur*). A separate procedure exists, whereby a person is questioned as a volunteer. This *audition libre* means that the suspect is technically free to leave at any time and the period of questioning may not exceed four hours. However, because the person is free to leave, she is not deprived of her liberty and so is not entitled to legal assistance under French law. The French Minister of Justice is in the process of reforming this procedure and has made it clear that the person questioned – who is in practice a suspect, but is detained under a different procedure to avoid the regulation imposed by the *garde à vue* – must be provided with access to a lawyer in order to comply with the new Directive. This will have a huge impact. Whilst there are some 380,000 instances of *garde à vue* each year, there are more than twice as many *audition libre* procedures, which are estimated at 800,000 each year.

All three Directives also apply to European Arrest Warrant proceedings and in the case of the legal assistance Directive, legal advice is offered in both the country where the arrest is carried out and the one where the warrant is issued. The Directives are also inter-connected. For example, the Directives on the right

---

<sup>23</sup> If Member States have not fulfilled their obligations to, for example, transpose a Directive, the European Commission may bring a case before the ECJ and a financial penalty may be imposed.

<sup>24</sup> See *Eckle v Germany* ECtHR 15 July 1982, 8130/78, para 73.

<sup>25</sup> Article 1(2) Directive on the right to interpretation and translation; Article 2(2) Directive on the right to information; Article 2(4) Directive on the right of access to a lawyer.

<sup>26</sup> Article 2(1) of the Directive.

to interpretation and translation and on access to a lawyer are made more effective by the obligation to inform suspects of these rights under the Directive on the right to information. A restriction on the scope of the Directives, however, is that in minor offences such as routine traffic cases that are sanctioned by authorities other than a court and where there is a right of appeal to a criminal court – they apply only to the appeal court proceedings.<sup>27</sup> The right to legal assistance, however, applies also to these minor offences where the suspect has been deprived of their liberty.<sup>28</sup>

The three Directives adopted so far will make important changes in the criminal procedures of Member States once implemented. For example, suspects will not only have rights, but they will be informed what they are with a Letter of Rights, rather than relying on ad hoc types of information; and those rights will, hopefully, be more meaningful and effective. However, there are still significant challenges to the effective implementation of these measures. Before discussing these, I will consider briefly the scope of the three Directives.

#### (i) Interpretation and translation

The right to interpretation and translation is a fundamental fair trial guarantee. It is impossible for a suspect or accused person to understand the charges against them, to mount a defence or to participate in the investigation or trial, if they do not speak or read the relevant language. The Directive on the right to interpretation and translation provides that suspects and accused persons who do not understand the language of the proceedings must be provided with interpretation, free of charge,<sup>29</sup> during police interrogation,<sup>30</sup> for communication with their lawyer<sup>31</sup> and at trial.<sup>32</sup> They must also be provided with a written translation of documents that are essential for them in exercising their right of defence<sup>33</sup> – including the detention order, indictment, judgment<sup>34</sup> and any other documents that are “essential to ensure that [the suspected or accused person is] able to exercise their right of defence and to safeguard the fairness of the proceedings.”<sup>35</sup> The competent authorities decide which documents are ‘essential’ and the suspect or accused person or their lawyer may submit a request to this effect.<sup>36</sup> Passages of documents which may be ‘essential’, but which “are not relevant for the purposes of enabling suspected or accused

---

<sup>27</sup> Art. 2(3) Directive on the right to interpretation and translation; Art 2(2) Directive on the right to information; Art 2(4) Directive on the right of access to a lawyer.

<sup>28</sup> Art. 2(4) Directive on the right to a lawyer.

<sup>29</sup> Art. 5 – this is whatever the final outcome of the proceedings. This is also the case under ECtHR case law e.g. *Luedicke, Belkacem and Koç v Germany* ECtHR 28 November 1978, 6210/73; 6877/75; 7132/75, para 40.

<sup>30</sup> Art. 2(1).

<sup>31</sup> Art. 2(2).

<sup>32</sup> Art. 2(1).

<sup>33</sup> Art. 3(1).

<sup>34</sup> Art. 3(2).

<sup>35</sup> Art. 3(4).

<sup>36</sup> Art. 3(3).

persons to have knowledge of the case against them” need not be translated.<sup>37</sup> In order to ensure that these rights are effectively administered, the Directive requires the Member State to put in place a mechanism to ascertain whether an interpreter is needed.<sup>38</sup> The kinds of interpreter envisaged include foreign language interpreters, but also, for example, sign language interpreters.<sup>39</sup> States must also establish a register of appropriately qualified interpreters and translators,<sup>40</sup> and they are bound by a requirement of confidentiality concerning any interpretation or translation carried out.<sup>41</sup>

#### (ii) The right to information

The Directive on the right to information provides that all suspects and accused persons must be informed of their rights orally and if arrested, through a Letter of Rights in a language that they understand. The provision of this type of information is crucial: suspects must know of their rights if they are to understand how to exercise them; they must know of the reason for arrest and the nature of any accusation, if they are to be able to challenge it in law; and they must have access to the evidence against them if they are to mount a defence. The minimum rights that must be communicated in simple and accessible language, orally or in writing, are the right of access to a lawyer; any entitlement to free legal advice and the conditions for obtaining such advice; the right to be informed of the accusation; the right to interpretation and translation; the right to remain silent.<sup>42</sup> These rights are as defined in national law. If arrested or detained a written Letter of Rights must be provided in simple and accessible language, to be retained by the suspect. In addition to the rights set out above, this should also contain information about the right of access to the materials of the case; the right to have consular authorities and one person informed; the right of access to urgent medical assistance; the maximum length of time the person may be deprived of their liberty before being brought before a judicial authority;<sup>43</sup> basic information about the possibility of challenging the lawfulness of the arrest, obtaining a review of detention or requesting provisional release.<sup>44</sup> Again, this refers to rights as defined by national law.

The Directive mandates the provision of information about the rights, rather than the content of the rights themselves, with the exception of the right to information about the accusation, including to case materials. As with the right to interpretation and translation, the criteria for the provision of information about the accusation is that it should be provided promptly and in such detail “as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.”<sup>45</sup> Suspects or accused persons should be

---

<sup>37</sup> Art. 3(4).

<sup>38</sup> Art. 2(4).

<sup>39</sup> Art. 2(3).

<sup>40</sup> Art. 5(2).

<sup>41</sup> Art. 5(3).

<sup>42</sup> Art. 3(1).

<sup>43</sup> Art. 4(2).

<sup>44</sup> Art. 4(3).

<sup>45</sup> Art. 6(1).

informed of the reasons for their arrest or detention and the criminal act they are suspected or accused of having committed.<sup>46</sup> This need not be done in writing, but should be provided before the first official interview with the police.<sup>47</sup> Detail of the accusation, including the legal classification of the offence and the nature of the accused's participation, must be provided by the latest on submission of the merits of the accusation to the court.<sup>48</sup> It should be noted that the ECtHR has made clear that merely reciting the legal basis of arrest and detention does not constitute the provision of information in a language that the suspect understands.<sup>49</sup>

Provision is also made for access to the case materials in order that the lawfulness of the arrest or detention may be challenged.<sup>50</sup> Access to evidence for and against the suspect or accused person must be provided in order to safeguard the fairness of the proceedings and to prepare the defence,<sup>51</sup> and, reflecting the case law of the ECtHR,<sup>52</sup> in time to allow the effective exercise of the rights of the defence.<sup>53</sup> Where further material evidence comes into the possession of the competent authorities, access must be granted in sufficient time for it to be considered. Details of the accusation and access to the evidence must be free of charge.<sup>54</sup>

### (iii) The right to legal assistance

The Directive on the right of access to a lawyer proved to be the most difficult of the three to agree upon and had been the stumbling block to agreement in earlier attempts at procedural safeguards. First proposed by the European Commission in June 2011, it required eight trilogues before final agreement was reached in October 2013. It sets out the suspect or accused person's right to legal assistance and is preceded by a long and detailed recital. Consistent with *Salduz v Turkey*, the Directive provides suspects with a right of access to a lawyer from the very first stage of police questioning "in such a time and such a manner so as to allow the persons concerned to exercise their rights practically and effectively."<sup>55</sup> It requires the suspect to have adequate confidential meetings with the lawyer prior to any police or judicial questioning,<sup>56</sup> and permits the

---

<sup>46</sup> Art. 6(2).

<sup>47</sup> Recital 28.

<sup>48</sup> Art. 6(3).

<sup>49</sup> *Nechiporuk and Yonkalo v Ukraine* ECtHR 21 April 2011, 42310/04, para 209.

<sup>50</sup> Art. 7(1).

<sup>51</sup> Art. 7(2).

<sup>52</sup> See e.g. *Natunen v Finland* ECtHR 31 March 2009, 21022/04, para 42.

<sup>53</sup> Art. 7(3). These requirements may be derogated from by judicial authority if access may lead to "a serious threat to the life or fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest" under Art. 7(4).

<sup>54</sup> Art. 7(5). This has not been the case in all states e.g. Belgium.

<sup>55</sup> Art. 3(1). Access to a lawyer is provided from whichever is the earliest: before questioning; on carrying out investigative or evidence-gathering acts; when deprived of liberty; in due time before appearing at court – Art. 3(2).

<sup>56</sup> Art. 3(3)(a); Art. 4.

lawyer to be present and to participate effectively during such questioning.<sup>57</sup> The lawyer's participation must be in accordance with national law, but the Directive makes clear that the lawyer may not be constrained to a passive presence during the interrogation: national procedures must not "prejudice the effective exercise and essence of the right concerned"<sup>58</sup> and the lawyer may "ask questions, request clarification and make statements."<sup>59</sup> It will be interesting to see how the precise scope of the provisions that make reference to national law will be defined. For example, in France, lawyers may ask questions or seek clarification, but this must be done at the end of the interrogation. Arguably, this is not 'effective participation' and may give rise to challenge if not reformed. The Directive also makes provision for those arrested to contact and communicate with a family member<sup>60</sup> and if arrested abroad, to receive consular assistance.<sup>61</sup> And if the suspect is permitted to be present at identity parades, confrontations or reconstructions of the scene of the crime, the lawyer may also attend.<sup>62</sup>

The Directive goes further than the jurisprudence of the ECtHR by making provision for access to a lawyer during other investigative acts such as house searches, where there is no significant deprivation of liberty, provided the person has been told that they are suspected of committing a criminal offence. It is also significant that if suspected of an offence, the person is entitled to legal assistance even where there is no deprivation of liberty. This means that those people who are in fact suspects, but are asked to submit to questioning on a voluntary basis must also benefit from legal assistance.

Unsurprisingly, there are provisions for derogations from some of these provisions during the pre-trial stage, for 'compelling reasons' as set out in the ECtHR jurisprudence, but in more detailed form. The right to legal assistance and to have a lawyer present during the interrogation can be derogated from temporarily where geographical remoteness would result in unreasonable delay in the lawyer attending;<sup>63</sup> where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or when immediate action is required to prevent substantial jeopardy to the criminal proceedings.<sup>64</sup> Derogation cannot be based on the nature or seriousness of the offence – such as in all terrorism cases, for example.<sup>65</sup> Derogation must be justified by the particular circumstances of the case,<sup>66</sup> must be proportionate and not go beyond what is necessary, be strictly limited in time and must not prejudice the overall fairness of the proceedings.<sup>67</sup> They must be reasoned and

---

<sup>57</sup> Art. 3(3)(b).

<sup>58</sup> Art. 3(3)(b).

<sup>59</sup> Recital 25.

<sup>60</sup> Arts. 5 and 6.

<sup>61</sup> Art. 7.

<sup>62</sup> Art. 3(3)(c).

<sup>63</sup> Art. 3(5).

<sup>64</sup> Art. 3(6).

<sup>65</sup> Art. 8.

<sup>66</sup> Art. 3(6)

<sup>67</sup> Art. 8(1).

authorized by a judicial authority on a case-by-case basis, going further than the requirements of the ECtHR jurisprudence.<sup>68</sup>

(iv) Proposed directives on the presumption of innocence, procedural safeguards for children, and the right to legal aid.

There are currently three draft Directives that aim to contribute further to the promotion of the right to a fair trial in criminal proceedings throughout the EU. They concern the presumption of innocence;<sup>69</sup> measures for the protection of children<sup>70</sup> and vulnerable persons;<sup>71</sup> and on provisional legal aid.<sup>72</sup> All build on the three Directives already enacted and seek to promote the application of the Charter.

The presumption of innocence draft measure addresses the right not to be presented as guilty by public authorities before final judgment; the importance of the burden of proof falling on the prosecution and any reasonable doubt being in favour of the accused; the right to silence and the privilege against self-incrimination; and the right to be present at one's own trial. It reflects the jurisprudence of the ECtHR in broad terms – though it goes further in some respects. For example, in Articles 6 and 7 it stipulates that those exercising their right to silence should not have this used against them nor should this be used as a corroboration of facts.

The proposed Directive on procedural safeguards for children suspected or accused in criminal proceedings sets out several rights and obligations, taking account of a variety of international legal standards and obligations, but also addresses issues around the treatment of children subject to criminal proceedings. This includes the way that they should be questioned, how their evidence should be recorded and the necessity for all criminal justice personnel to be trained. This approach and level of detail recognizes that procedural rights must extend beyond bureaucratic protections if they are to be effective. Criminal justice systems are designed to deal with adults for the most part and this proposal takes seriously the challenge of adapting procedures to the particular needs of children as vulnerable suspects. It is interesting that many countries are more comfortable with considering child victims and witnesses as 'vulnerable' but once accused, the status of 'suspect' trumps that of 'child'.

---

<sup>68</sup> Art. 8(2).

<sup>69</sup> Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2.

<sup>70</sup> Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822/2.

<sup>71</sup> C(2013) 8178/2. This is the least developed and so is not discussed here.

<sup>72</sup> Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 and 2013/0409 (COD).

One potential shortcoming that might be highlighted is the proposed Directive's strict application to criminal proceedings. Whilst this must be the primary objective, it should be recognized that in juvenile justice, some jurisdictions deal with children suspected of criminal acts through non-criminal proceedings. In Poland and Belgium, for example, juveniles who are suspected of committing a criminal offence are not dealt with through the criminal procedure route.<sup>73</sup> Whilst the objective may be to avoid stigma and to engage in a more preventive or educational approach, the sanctions remain punitive and procedural safeguards are equally necessary. The explanatory memorandum makes clear, however, that the proposed Directive will not apply in these instances.<sup>74</sup>

The proposed Directive and includes a mandatory right to a lawyer;<sup>75</sup> the right to an assessment to determine if special measures are required for the proceedings;<sup>76</sup> the right to a medical examination;<sup>77</sup> and a stipulation that detention should be for the shortest appropriate period of time.<sup>78</sup> It requires that all questioning of children should be recorded (and video-recorded where the offence is a serious one) and that the "length, style and pace of interviews should be adapted to the age and maturity of the child questioned."<sup>79</sup> Recognising the very different challenges posed by children as vulnerable individuals subject to a repressive criminal process, Article 19 of the proposed Directive requires criminal justice personnel to be trained in the particular needs of children of different age groups, including the legal rights of children, appropriate interview techniques, child development and psychology, pedagogical skills and communication. It also requires care to be taken to ensure that proceedings are adapted to the needs of children. Those providing restorative justice services should be trained to ensure that they treat children in a respectful, impartial and professional manner.

---

<sup>73</sup> See further D. De Vocht, M. Panzavolta, M. Vanderhallen and M. Van Oosterhout 'Procedural safeguards for juvenile suspects in interrogations: a look at the Commission proposal in light of a comparative study' *forthcoming*.

<sup>74</sup> "In certain Member States children who have committed an act qualified as an offence are not subject to criminal proceedings according to national law but other forms of proceedings which may lead to the imposition of certain restrictive measures (for instance protection measures, education measures). Such proceedings do not fall within the scope of this Directive." Explanatory Memorandum, para. 16.

<sup>75</sup> Article 6. This is already the case in some countries, though it may depend on age and offence seriousness. See further D. De Vocht, M. Panzavolta, M. Vanderhallen and M. Van Oosterhout 'Procedural safeguards for juvenile suspects in interrogations: a look at the Commission proposal in light of a comparative study' *forthcoming*.

<sup>76</sup> Article 7.

<sup>77</sup> Article 8.

<sup>78</sup> Article 10.

<sup>79</sup> Article 9

The final draft measure is the proposal for a Directive on provisional legal aid for suspects and accused persons deprived of liberty.<sup>80</sup> All the procedural protections enacted or proposed are interlinked, but this proposed Directive is inextricably connected to the right to legal assistance, and recognizes the particular vulnerability of suspects. Without basic financial provision to pay for legal assistance, especially during the first hours of detention, the right to custodial legal advice loses much of its effectiveness, as suspects will not be able to take up their right to a lawyer. This is likely to impact on the suspect's understanding and exercise of her other rights, most notably the right not to incriminate oneself. More generally, the proposed Directive notes the connection between legal aid provision and the effective exercise of defence rights.<sup>81</sup>

Although recognising the importance of legal aid in the exercise of the right to a lawyer, the match with the Directive on the right to legal assistance is incomplete. Whilst the Directive provides suspects who are not deprived of their liberty with the right to a lawyer, the proposed Directive applies only to those who are deprived of their liberty. It relates to the provision of emergency legal aid for those detained in custody, until such time as a full decision is made, which might be while the person is still detained. This means that if the final decision is to refuse legal aid, a person detained and questioned by the police may not have legal aid and so may not have a lawyer simply because they cannot afford one. It should also be noted, that in contrast to the costs of interpretation and translation, legal aid costs may be recovered, even if the person is ultimately acquitted or not proceeded against.<sup>82</sup> This signals a very different value attached to the right to legal assistance. This difficulty is amplified in the case of children – for whom legal assistance is mandatory under the proposed Directive, as discussed above. Only the children's assets will be taken into account, but under these proposals, the cost of mandatory legal assistance (whether desired or not by the suspect) may be recovered from a child who has been detained and questioned and then not proceeded against.

### **Putting EU procedural safeguards into practice**

Like ECHR guarantees, the implementation of EU procedural safeguards must also overcome the challenge of delivering universal safeguards across a wide range of criminal procedural traditions. The differences in the allocation of roles, rights and responsibilities between criminal justice actors means that the Directives will not have the same impact across the various criminal procedures that exist within the EU. For example, as discussed above, procedures

---

<sup>80</sup> This is accompanied by a Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, which seeks to foster convergence as regards eligibility for legal aid, as well as encouraging Member States to take action to improve the quality and effectiveness of legal aid services and administration. The proposal will also strengthen safeguards protecting those involved in proceedings conducted by the European Public Prosecutor's Office.

<sup>81</sup> Explanatory Memorandum, para 28.

<sup>82</sup> Recital 12, 13.



characterised by judicial supervision will typically relegate the defence to a diminished role compared with party-driven accusatorial procedures. But there are also many things that Member States share in common in the ways in which they respond to legal change. Research demonstrates that there are various factors that enhance or inhibit the reception of legal reforms in criminal justice, from the availability of financial and human resources, to training and existing occupational cultures. In this final section, I draw on the findings of several empirical studies in order to explore some of the features likely to impact on the reception and effectiveness of the defence rights contained in the recent Directives.

The most recent study to be conducted is *Inside Police Custody*, a comparative empirical study funded by the European Commission.<sup>83</sup> Carried out between 2011 and 2013, it examined the procedural safeguards in place in four EU countries (England and Wales, France, the Netherlands and Scotland) with specific reference to the protections set out in the Roadmap. Researchers were based with lawyers and with police custody officers, observing cases, speaking informally with police, lawyers and suspects, and recording case file information. The aim of the study was to gather information on the daily practices of police and lawyers as they went about their work – seeing what they do and which factors facilitate or constrain them in their tasks. Police officers were observed as they booked in suspects, read them their rights and organized the attendance of interpreters, lawyers and appropriate adults. Lawyers were observed in private consultation with the suspect as well as discussing the case and access to materials with the police. In both police and lawyer observations, researchers were present during the interrogation of suspects. Observations took place in both large and small sites and were followed up by interviews with police and lawyers. Most data was recorded in a field diary, but standardized information was also collected in a case pro-forma, allowing us to set qualitative findings against quantitative data. In total, researchers spent 78 weeks (1.5 researcher years) carrying out observations; 84 interviews were conducted with police and lawyers; and 384 case pro formas were completed.<sup>84</sup>

The findings of *Inside Police Custody* reinforce those of earlier empirical studies of criminal justice, highlighting the differences and commonalities between jurisdictions at different stages of the reform process.<sup>85</sup> In particular, the studies illustrate the antipathy of police and prosecutors towards suspects' rights at the early stages of the reform process. Across both adversarial and inquisitorial

---

<sup>83</sup> The study 'Procedural rights of suspects in police detention in the EU: empirical investigation and promoting best practice' JUST/2010/JPEN/AG/1578 was funded by the European Commission, published as *Inside Police Custody* J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova and T. Spronken (Intersentia) 2014.

<sup>84</sup> For a detailed account of the research methodology, see Blackstock et al. (2014) Chapter 2.

<sup>85</sup> Hodgson, J. *French Criminal Justice* (2005); McConville, M., Hodgson, J., Bridges, L. and Pavlovic, A. *Standing Accused* (1994); McConville, M., Sanders, A. and Leng, R. *Case for the Prosecution* (1991). These were also major qualitative empirical studies, with extended periods of observations across sites.

traditions, there is a general anxiety that measures reinforcing the rights of the suspect will necessarily be antithetical to the interests of the investigation. Over time, as due process safeguards become embedded within the criminal process, this anxiety lessens. The police learn that suspects will continue to answer their questions during interrogation and that investigations are not constrained unduly by the exercise of defence rights. Ultimately, some will even come to recognise the value of these safeguards as guarantees of system integrity and of evidential credibility. The challenge is to ensure that reforms do not take place in a vacuum. New procedures need to take account of existing practices and anticipate the practicalities and the hurdles of implementation. This means that slightly different reforms may be needed, depending on the existing procedures and occupational cultures in place.

### **A suspect focused approach**

Whilst the Directives and national criminal procedures speak of the suspect's right to a lawyer, to an interpreter etc., this is not always reflected in practice. In the case of interpretation, for example, this is often seen as something designed to facilitate the effectiveness of the police investigation, rather than to ensure that the suspect has understood the process and can communicate effectively with their lawyer, as well as with the police. In France and the Netherlands, the need for an interpreter was determined by a police assessment of whether it was necessary for the interrogation, not whether the suspect may need interpretation to understand her rights, or to communicate effectively with her lawyer. Without proper thought for how processes will play out in practice, the spirit of suspects' rights can be undermined and lost completely.

Bureaucratic considerations can also work to undermine the objective of procedural safeguards. In a number of jurisdictions, including France and the Netherlands, the lawyer is required to attend the police station within two hours. Otherwise, the police may begin the interrogation of the suspect without a lawyer being present. The police are often not ready to question the suspect until three or four hours after arrest and there may be good reason for the lawyer taking a little longer than two hours, yet, the interests of the suspect are overridden and she will be denied access to a lawyer. There is no requirement that the suspect be interrogated within two hours of arrest, there are no penalties to discipline the organization of police investigations. Yet, perhaps the most important right of the suspect can be denied on purely bureaucratic grounds.

The importance of ensuring that suspects' rights are implemented in a way that promotes, rather than undermines the objective of the procedural safeguard can also be seen in the rules around lawyer-client consultations. The Directive gives the suspect the right to a private consultation, but does not set out the parameters of this. In several jurisdictions the consultation is limited to 30 minutes, making it difficult to achieve the kind of defence preparation envisaged by the Directive. In England and Wales, suspects who have been arrested before are likely to call the firm of lawyers who have represented them in the past. This firm will have biographical information about the suspect and is likely to represent them after police detention has ended. This is not the case in many

other countries. In France and the Netherlands, for example, suspects are most likely to be attended by duty lawyers. They have no prior knowledge of the suspect and representation at the police station is likely to be a one-off transaction; a different lawyer will represent the accused at court. Thirty minutes is a relatively short time to gather some basic biographical information and details of any previous criminal history; to establish a basic relationship of trust between lawyer and client; and to gather case related information to determine how to proceed, whether to answer questions and so on.

Similar observations might be made in relation to the lawyer's role during interrogation. Under the Directive, the suspect's right for her lawyer to participate in the police interrogation is according to national law, with the broad provision that it must not prejudice the effective exercise of the right concerned. Given the range of possibilities in how the lawyer's role may be interpreted, it is important that the spirit of the Directive is respected and that this is not used as a way to minimize the impact or effectiveness of the rights provided. This is illustrated by the different ways in which the *Salduz* decision was interpreted: the right legal assistance was satisfied by a 30 minute consultation in the Netherlands, but this was considered insufficient in France and the right to be present during the interrogation was introduced. If the lawyer's participation is limited to asking questions or seeking clarifications at the end of the interrogation (as is the case in France) this greatly reduces the impact of the lawyer's presence. As lawyers in France told us: "we are just decorative, like a vase on the table."<sup>86</sup> Bearing in mind the *Salduz* line of jurisprudence, it is unlikely that the suspect's right for their lawyer to "participate effectively" in police questioning will be satisfied by requiring the lawyer to say nothing until the end of the interrogation.

### **The need for clear and precise legal regulation**

One way of ensuring that rights are implemented effectively, is through clear legal regulation setting out roles, responsibilities and entitlements in sufficiently precise terms. If the suspect does not know of or understand her rights, she cannot exercise them. The Letter of Rights is an example of good practice in this respect. In countries such as France and the Netherlands, we observed that there was no set text by which suspects were informed of their rights, resulting in the information being given in inconsistent ways.<sup>87</sup> At the other end of the scale, Scotland had a very rigid text setting out the suspect's right to a lawyer.<sup>88</sup> The language and structure of the text was difficult to understand and police officers felt constrained by having to read it out verbatim. For their part, suspects were bemused and irritated by the repetitious and confusing nature of the information given. Police discretion in the administration of rights can prevent the process being a routine series of boxes to be ticked, and enables officers to adapt the information so that young/drunk/vulnerable suspects

---

<sup>86</sup> iFranCityLaw3 quoted in *Inside Police Custody* (2014) p338.

<sup>87</sup> See *Inside Police Custody* (2014) chapter 5.

<sup>88</sup> The SARF (Solicitor Access Recording Form) – see *Inside Police Custody* (2014) chapter 5.

better understand it; but too much discretion, exercised in the wrong way, risks undermining the process of informing the suspect.

We also observed some uncertainty in the administration of the suspect's right to an interpreter. England and Wales and Scotland displayed multi-lingual posters enabling police officers to identify the language spoken by the suspect and the Letter of Rights was also available in different languages. However, it was clearly difficult for officers to determine the level of the suspect's language ability and in France and the Netherlands, there was often a tendency to try to get by without an interpreter where possible. This might involve an attempt to use simpler language or for the police to try to conduct the interrogation in the suspect's language. Suspects, sometimes encouraged by their lawyers, often did not want the additional trouble of waiting for an interpreter and so went along with whatever ad hoc arrangements were made. The situation was better in England and Wales and in Scotland, where a specific officer independent of the investigation is responsible for administering the suspect's rights.

Other good practices observed in *Inside Police Custody* include having some mechanism in place to ensure that suspects have been properly informed – whether it be CCTV or the review of a senior officer. Finally, suspects also require some time to decide whether or not they wish to exercise their rights, especially the right to legal assistance. The provision of written information is good practice, but suspects also require some time to read it.

### **Occupational cultures and training**

Perhaps the most challenging hurdle, is that police, lawyers, prosecutors and judges must see the value of rights if they are to enforce and apply them effectively. Legal reforms are more effective if those administering them are trained, informed and 'buy into' the ethos of reform. Without this, reforms are less effective and legal actors may even actively work to undermine them.

When suspects in England and Wales were first provided with a statutory right to custodial legal advice under section 58 Police and Criminal Evidence Act 1984, the police were opposed to this and engaged in various rights-avoidance strategies to discourage suspects from taking up their rights. Typically, the suspect might be told that they did not need a lawyer if they had nothing to hide, or that the interview was a 'quick in and out' which would be delayed if a lawyer was called, or their rights were simply read too quickly and incomprehensibly.<sup>89</sup> The primary objective of most suspects is to end the period of detention and to secure their release from police custody. They are, therefore, particularly vulnerable to any suggestion that might expedite this – and unlikely to do anything that might delay their release.<sup>90</sup> Identical ploys were observed in

---

<sup>89</sup> Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (London: Lord Chancellor's department). More recently see Skinns

<sup>90</sup> This was observed in all jurisdictions in *Inside Police Custody* and also in England and Wales in Kemp, V. "'No Time for a Solicitor': Implications for Delays on the Take-up of Legal Advice." *Criminal Law Review*, no. 3 (2013): 184-202 and Skinns, L. (2009) "'I'm a Detainee; Get me Out of Here'" 49 (3) BJ Crim 399.

France, in the years following the introduction of lawyers into the police station in 1993 and then expanded in 2000.<sup>91</sup> Some years down the line, the police in France and in England and Wales are less concerned about the presence of lawyers, now that they have seen that it does not inhibit their investigations to any significant degree. In the Netherlands, however, where lawyers have only recently been allowed into the police station, we observed officers exhibiting the same hostility observed in the 1980s in England and Wales, and the 1990s in France.

Whilst the aims of the suspect may well oppose those of the police at one level, officers must nevertheless accept the legitimacy of defence rights and understand the ways in which they can ensure the credibility and reliability of procedures, rather than always seeing the defence role as in opposition to that of an effective investigation. Without this, officers are liable to try to undermine defence safeguards by dissuading suspects from requesting a lawyer – for example claiming that it will delay proceedings, or failing to explain that assistance is free of charge.<sup>92</sup>

Perhaps less obviously, lawyers too must consider the challenges posed by the new procedural safeguards and in particular, how they should train and organize themselves in order to provide the kind of effective defence advice envisaged in the *Salduz* jurisprudence and now in the Directive on legal assistance. Again, the experience of similar reforms in England and Wales is instructive. Lawyers failed to grasp the importance of providing custodial legal advice and focused on payment more than on quality. Advisers who were not legally qualified, trained or experienced were sent to police stations and suspects were unaware that these were not qualified lawyers.<sup>93</sup> Suspects were poorly served and eventually an accreditation scheme was introduced, linking guarantees of quality with the lawyers' access to public funding. Whilst lawyers in the Netherlands and France are not delegating work to unqualified staff, duty lawyer schemes are staffed by a wide range of lawyers, many of whom have no criminal expertise or experience. This would not be acceptable in any other area of law and it illustrates the relatively low value ascribed to police station advice work. If the suspect's rights are to be protected, the defence lawyer must possess sufficient expertise and skill to engage actively in the defence of the accused. This means training lawyers in police station work (which is very different from court and office work) and ensuring that duty schemes are not staffed by lawyers with no experience in criminal work. Lawyers must embrace police station advice work

---

<sup>91</sup> Hodgson, J. (2002) "Suspects, Defendants and Victims in the French Criminal Process: the Context of Recent Reform" *International & Comparative Law Quarterly* 51(4) 781-815; Hodgson, J. (2004) "The detention and interrogation of suspects detained in police custody in France: a comparative account" *European Journal of Criminology* 1(2) 163-99; Hodgson, J. *French Criminal Justice* (2005)

<sup>92</sup> See further the Training Framework on the Provision of Suspects' Rights developed from the findings of Inside Police Custody (Blackstock e.a. 2014 pp463-510 and published separately by the same authors, together with M. Vanderhallen).

<sup>93</sup> McConville and Hodgson *Custodial Legal Advice and the Right to Silence* (1993); McConville, Hodgson, Bridges and Pavlovic *Standing Accused* (1994).

as the beginning of the defence case, even when in practice, another firm or lawyer may subsequently represent the accused. This means preparing the suspect for interrogation,<sup>94</sup> but also going beyond this and checking the legality and conditions of detention, for example, as well as the welfare of the suspect and the need for any additional social or medical safeguarding. Shifting the culture of lawyering cannot be seen in isolation: in order to play this role effectively, lawyers also need to be adequately funded and to have sufficient knowledge of the case against their client to provide meaningful advice and support.

## **Conclusion**

The detention and interrogation of the suspect is perhaps the most important moment during the criminal investigation, as it is here that evidence that can be used at trial will be gathered. The three Directives that have been agreed upon represent an important development in procedural protections for suspects, building on the jurisprudence developed by the ECtHR. This will help to address some of the limitations of the ECHR regime, which provides baseline guarantees that are dynamic in their interpretation by the ECtHR, but which develop only on a case-by-case basis. It is also significant that EU measures are agreed upon by a majority of Member States and are preceded by an impact assessment, building in greater planning and consensus than is possible through a single court decision. Their application to European Arrest Warrant proceedings is also key, as part of the rationale of this programme of due process guarantees is to ensure that police and judicial co-operation around investigation and prosecution measures is matched by mutual trust in the treatment of citizens, wherever they are dealt with in the EU.

Each Directive is important in its own right, but they are part of a programme of measures that are inter-connected. The availability of legal aid, of an interpreter where needed, and the right to information are all key, for example, in ensuring that the right to a lawyer is effective in practice. As noted above, however, the rights do not knit together completely – there are holes in their coverage. Child suspects may find themselves compelled to receive legal advice but then be required to pay for this, even if they did not want it and no proceedings are brought against them. The right is recognised of all those questioned as a suspect – whether or not deprived of their liberty – to receive legal advice; but the right to immediate legal aid is not recognized for those questioned as a suspect, who are not also deprived of their liberty.

The impact and reception of these new measures is as yet unclear. Member States are in the process of implementation, but it is likely that some details will be litigated through preliminary rulings before the ECJ. For example, in countries such as France, where the role of the lawyer during the interrogation of the suspect is restricted, national procedures may be challenged as failing to

---

<sup>94</sup> Scottish lawyers took less than 15 minutes to speak to the suspect (on the telephone); the average time spent in consultation with the suspect was 20 minutes in France, 21 minutes in the Netherlands and 26 minutes in England and Wales. *Inside Police Custody* (2014) p313.

meet the Directive's requirement to allow the lawyer to participate effectively. Participation must be in line with national law, but if this prejudices the effective exercise of the right concerned, it may still be challenged.

In order to make the safeguards effective in practice as well as on paper, Member States will have to take seriously the need for training, ensuring that those responsible for implementing rights and safeguards are able to do this in an informed and meaningful way. It is also important that rights are not implemented in a superficial and bureaucratic manner, but in a way that seeks to ensure that they are understood and are effective in practice.<sup>95</sup>

---

<sup>95</sup> For further discussion of the Directive see E. Cape and J. Hodgson, 'The right of access to a lawyer at police stations: Making the European Union Directive work in practice' (2014) 4 *New Journal of European Criminal Law*, 450.