

Legal Experts Advisory Panel



LEGAL EXPERTS ADVISORY PANEL

SURVEY REPORT:

ACCESS TO THE CASE FILE

MARCH 2015



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About LEAP

The Legal Experts Advisory Panel (“LEAP”) is a network of now over 140 criminal justice and human rights experts, bringing together (at the date of this publication) 109 defence practitioners from 103 firms, 18 NGOs and 14 academic institutions. It is coordinated by Fair Trials Europe and its Advisory Board, currently composed of 25 Members from 22 Member States. Members have in-depth knowledge of the EU’s diverse justice systems and a common commitment to human rights. LEAP

LEAP meets regularly to discuss criminal justice issues, identify common concerns, share examples of best practice and identify priorities for reform of law and practice. In the twelve months preceding this publication, LEAP met four times in three locations, including roundtable meetings, specialised litigation seminars and its Annual Conference, bringing together LEAP members from 21 Member States and representatives of all the EU institutions and Court of Justice of the EU.

Through briefings and direct meetings with policy-makers, LEAP participates actively in the discussions surrounding the negotiation of the directives proposed or adopted under the 2009 Roadmap for strengthening procedural rights. In parallel, LEAP members also work with Fair Trials to provide training, comparative expertise and litigation support to lawyers in the Member States.

About Fair Trials

Fair Trials is a human rights organisation based in London (Fair Trials International) and Brussels (Fair Trials Europe) which works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused. Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and others in their work to protect fair trial rights.

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INTRODUCTION

Background: LEAP's implementation work

1. LEAP participated actively in the negotiations which lead to the adoption of the three first directives adopted under the 2009 Roadmap for strengthening procedural rights in criminal proceedings (the 'Roadmap Directives'). As explained in its March 2014 report *Stockholm's Sunset*, LEAP is supporting further work by the EU on further measures, but its top priority is the implementation of the Roadmap Directives, with a view to ensuring their impact in practice.
2. In October 2014, LEAP met for a dedicated roundtable to develop an implementation strategy, summarised in its February 2015 paper, *Towards an EU Defence Rights Movement*.¹ The strategy focuses on the provision of training and litigation support, but also emphasises the need for cooperation with national governments and legislative bodies responsible for implementation, and the European Commission in its monitoring and enforcement of the Roadmap Directives.

Subject matter & objectives of this report

3. This report provides a snapshot of the situation in 14 Member States in relation to access to the case file – one of the four key issues of concern for LEAP in its EU Defence Rights Movement paper – following the expiry of the deadline for implementation of Directive 2012/13/EU on the right to information in criminal proceedings ('the Directive'). It identifies good and bad practice and areas where clarification of the Directive is needed from the CJEU.
4. Fair Trials hopes that the information collated in this paper will assist the EU Commission in recognising instances of implementation oversight in the various Member States; assist Member States which have not yet transposed the Directive and, for those Member States which have and which are covered by the survey, highlight certain areas of concern; enable lawyers to view their own system through a comparative prism and encourage courts to do the same; inform non-governmental organisations in their domestic advocacy efforts for implementation of the Directive; and provide a useful knowledge base for academics conducting research into the area.
5. We recognise that we are unable, in a study of this nature, to capture every subtlety of the national procedures and we are aware that laws adopted during the study or after may alter the position we present in our findings. As part of the ongoing implementation conversation, we are very happy to receive feedback on the report. For consistency, whilst acknowledging the variety of systems we have referred consistently to the 'suspect' at all different stages in all systems.

Structure of the report

6. The report first reviews the pre-existing principles relating to access to the case-file (Part A), before then reviewing the relevant provisions of the Directive, namely those of Article 7, together with our interpretation of them (Part B) which has informed the conduct of the survey. We then present the background and method of the survey (Part C), then offer country-by-country analysis (Part D), then a thematic analysis (Part E) and finally general findings (Part F). We conclude with recommendations to key actors and stakeholders.

¹ Available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

A. PRE-EXISTING STANDARDS ON ACCESS TO THE CASE FILE

7. Access to the case file questions arise in the case-law of the European Court of Human Rights ('ECtHR') relating to Articles 5(4) and 6(3)(a), (b) and (c) European Convention on Human Rights ('ECHR'). These are, essentially, the principles which the EU sought to codify (and possibly build upon) in Article 7 of the Directive. Some are well established, while others require clarification.

Access to the case file prior to initial questioning

8. The ECtHR arguably supports a right of access to documents prior to the first interrogation. Lawyers in France, relying on Article 6(3)(c) ECHR, have argued that the right of access to a lawyer as from the first police questioning established in *Salduz v. Turkey*² is ineffective without access to the case file. The *Sapan v. Turkey*³ judgment seemed to offer support for this position, though we are not aware of any senior national court decision taking that view to date. This does not address the situation of the unrepresented person, which has not been explored.

Access to the case file during the pre-trial phase

9. Article 6 violations are assessed by the ECtHR after conclusion of the criminal proceedings, so there is no Article 6 case-law concerning access to the case file at the pre-trial stage in isolation. However, in its case-law regarding Article 5(4) ECHR, the ECtHR appears to state a general view in acknowledging 'the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice'.⁴

Challenging pre-trial detention

10. Under Article 5(4), a person detained pre-trial must have access to a procedure meeting essential guarantees of a fair trial, including equality of arms, which requires that 'information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer'.⁵ Even if there is a legitimate reason for restricting access to the case file (see para. 9 above), this cannot be pursued at the expense of substantial restrictions on the rights of defence;⁶ the requirement is thus non-derogable.

Access to prepare for trial

11. The ECtHR has given a number of judgments under Article 6(3)(b) in relation to complaints that the failure to provide access to documents in a timely manner before trial has deprived the applicants of the 'time and facilities to prepare a defence'. It notes that 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, [are] important guarantees of a fair trial in criminal proceedings, absent which an infringement of equality of arms may arise'.⁷

² See [Salduz V Turkey](#) (Application no. 36391/02)

³ See [Sapan v. Turkey](#), Application No 44102/04

⁴ See, inter alia, [Chruściński v. Poland](#), App. no. 22755/04 (Judgment of 6 November 2007),

⁵ See, inter alia, [Garcia Alva v. Germany](#) App. no 23541/94 (Judgment of 13 February 2001), paragraph 42.

⁶ See, inter alia, [Dochnal v. Poland](#) App. no 31622/07 (Judgment of 18 September 2012), paragraph 87.

⁷ See, inter alia, [Beraru v. Romania](#), App. no 40107/04 (Judgement of 18 March 2014), paragraph 70.

B. ARTICLE 7 OF THE DIRECTIVE

The requirements of the provision

12. EU Member States' obligations regarding access to the case file are now articulated by Article 7 of the Directive, one of the provisions of the Roadmap Directives attracting the most optimism and discussion within LEAP and at Fair Trials' practitioner training events. A reminder of its text:

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall 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.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.'

13. Pending a ruling from the CJEU it is not completely clear what the provision requires, so we have set out our understanding of the main points as this was a key factor in setting the parameters for our conversations with the LEAP network.

Our interpretation of the provisions

Access to the case file upon arrest / prior to interrogation: CJEU clarification needed

14. Whether Article 7(1) introduces a requirement access to the case file from the point of arrest (i.e. prior to questioning) is a talking point. Template pleadings circulated in Spain point to the

word *detención* (police arrest) in the Spanish version, suggesting the right of access to the case file arises at the point of arrest itself. Others suggest the provision (only) articulates the equality of arms requirement in judicial procedures for the review of detention, and that it does not extend the right of access to the police phase. The CJEU will have to clarify the point but, for now, as the point is disputed, we chose to explore it with respondents in our survey.

Access to the case file to enable effective judicial review of arrest/detention

15. What is clear is that Article 7(1), at the least, articulates as EU law the requirement in the case-law of the ECHR based on Article 5(4) ECHR (para. 10 above) and requires access to those documents necessary to ensure equality of arms in the judicial challenge to the lawfulness of arrest / detention. Consistently with the case-law, this requirement knows no derogation: while Article 7(4) provides grounds for restricting access to material evidence, it states specifically that this applies only to the broader access to the case file under Article 7(2) and (3) (as to which, see paras. 16 and 17 below), which are themselves ‘without prejudice to [Article 7(1)]’.

The pre-trial stage: access as a rule, subject to reviewable derogations

16. Fair Trials’ understanding is that Article 7(2) expresses the broader view that access to the whole file is necessary to ensure equality of arms. As indicated by Article 7(3), the right of access to all material evidence under Article 7(2) is expressed as applying ‘at the latest’ upon submission of the merits of the accusation to a court, which implies it may be restricted prior to that point. Article 7(4) recognises the possibility of limiting such access to protect the life or rights of another person, or where access could undermine a pending investigation (presumably the instant one) or national security. The possibility of restricting access to the case file pre-trial, where justified, as reflected in the ECHR case-law appears to be reproduced in the Directive.

Judicial remedies for restrictions on access, including at the pre-trial stage

17. In accordance with 7(4) of the Directive, there should be a judicial remedy in respect of failure to provide access to the case file, a requirement implicitly present in Article 8(2) of the Directive and Article 47 of the Charter). Since this requirement applies (in line with the Directive’s scope) throughout the criminal proceedings. Thus – by accident or design – the Directive creates a right to judicial review of (pre-trial) restrictions on access to the case file, irrespective of the person being detained. Whereas in the Article 6 ECHR case-law restrictions on access to the may be ‘remedied’ by providing, on completion of the investigation, sufficient opportunity to prepare for trial, the Directive may be invoked to challenge the restriction at the time it is applied.

Provision of access to the case file to prepare for trial

18. Article 7(3) requires that access be provided to all material evidence ‘upon the submission of the merits of the accusation to a court’, showing a clear line is drawn when the case is actually sent for trial at which the full file must be provided. Though the requirement to enable the ‘effective exercise of the rights of defence’ may have pre-trial application it certainly requires a sufficient opportunity to consult the file and prepare the case for trial, consistently with the ECHR’s requirement for adequate time and facilities to prepare a case (see para. 11 above). This remains subject to possible restrictions under Article 7(4), i.e. some evidence (witness identities, perhaps) may be withheld even at trial, again subject to judicial review.

C. APPROACH TO THE SURVEY

Status quo ante, 2013

19. In 2013, Fair Trials held a series of six meetings with 56 practitioners from 25 Member States to discuss the situation of defence rights falling within the scope of the Roadmap Directives, under a series entitled ‘Advancing Defence Rights’. This background gave us an initial impression of the sorts of problems which, it was hoped, implementation of the Directive might address.

20. One of the issues most commonly identified by practitioners was the problem arising from lack of or restricted access, at the pre-trial stage, to the evidence uncovered by investigative authorities. There were a number of key findings from the meetings:

- Access to any part the case file at the point of questioning was rarely provided, to either the suspect or their counsel, in any of the jurisdictions represented, with the result that lawyers mostly advised clients not to speak until they had seen the file.
- In several Member States, though the of principle was full access to the case file in the pre-trial phase, powers to restrict access to the case file on certain grounds – in particular linked to the needs of the investigation – were routinely applied.
- In some Member States, due to the application of such derogations over long periods of time, access to the case file was routinely not granted until just before or after indictment. This limited the defence’s ability to argue against detention and organise defence strategy during the pre-trial stage.
- Problems were also reported in relation to the first court hearing following arrest, with insufficient time to review the evidence made available shortly before this (if indeed it was made available at all). This made it difficult to prepare an effective challenge to detention at this stage, even if no substantive restrictions on access to the case file were in place.
- When access to the case file is provided, there are difficulties in terms of the manner in which access is provided. In some cases, only the lawyer can hold a copy of the file; in others, access can be provided to the client but problems arise due to the limited time to consult files before trial, costs associated with obtaining copies and the difficulties of consulting clients upon the content of the file in prison. These practical restrictions may reduce ability of the suspects and their representatives to mount an effective defence.⁸

The Access to the case file questionnaire, 2014-15

21. In June 2014, Fair Trials distributed a questionnaire on access to the case file to members of the LEAP Advisory Board in order to assess the situation following the passing of the implementation deadline. The purpose of the project was to assess whether the requirements of the Directive had been met, where practitioners felt concerns lay in practice and where further interpretation of the Directive by the CJEU might be required.

⁸ See [Vilnius Communiqué](#), [Paris Communiqué](#), [Amsterdam Communiqué](#), [London Communiqué](#), [Budapest communiqué](#)

22. The questionnaire (see Annex B) comprised nine questions asking respondents to outline the law and practice in their Member States. We focused on the four main stages of criminal proceedings prior to trial, based upon our reading of the ECtHR case-law and the Directive and earlier concerns raised by LEAP members: the police station or upon arrest or charge, the first determination of pre-trial detention, during the investigation and prior to trial itself. LEAP having always historically raised concerns about pre-trial justice, we did not, in this questionnaire, focus upon the withholding of information (e.g. witness identity) at the actual trial.
23. This survey is based upon responses from 17 Member States.⁹ The responses are also supplemented with information collected in person at the LEAP Annual Conference in February 2015. It was not necessarily possible to go into the same level of detail for every response; thus, the fact that a country is not listed in a specific paragraph does not of itself mean that the issue is inapplicable in that jurisdiction.

D. COUNTRY-BY-COUNTRY FINDINGS

24. **BE (BELGIUM)** – The initial arrest / questioning stage is provided for by Articles 28 or 47 of the *Code d’instruction criminelle* (‘CIC’), depending on the procedure; they provide for information about the charges but not the underlying evidence. Though this means the investigating judge will take the first decision on detention without the defence having had sight of the file, there is a court hearing Article 21 § 3 of the Law of 20 July 1990 on pre-trial detention ensures there is access (in certain cases a copy or electronic copy is granted) at latest on the day before the first appearance in court where the lawfulness of the detention will be reviewed. During the investigation, Article 21a CIC (where the investigation is led by a prosecutor) or Article 61b (where the investigation is led by a judge), as both amended by a law entering into force on 10 February 2013, entitle interested parties including the suspect to make a reasoned request for access to or a copy of the file. Access to or a copy of the file may be refused if this is ‘required by the needs of the investigation’, where access would cause a danger for third persons or violate the right to privacy, or where there is no legitimate reason for seeking access. In practice, access is usually granted when requested and the legal framework is respected. Upon conclusion of a judge-led investigation, under Article 127 CIC, the file is deposited with the court’s registry as from the first sitting of the chamber which decides whether the investigation reveals sufficient evidence to tried; if the case is prosecutor-led, the file will be made available usually 15 days before the sitting. In practice, access to the case file at this stage is not a problem.
25. **BG (BULGARIA)** – Police arrest without prior charges is regulated by the Act on the Ministry of Internal Affairs, Article 74 of which requires officers to provide the grounds of the arrest but not underlying evidence. If charges are pressed or where arrest is carried out further to a prior charge, Article 219 of the Criminal Procedure Code (‘CPC’) provides that the charge must include a description of the charge and its legal basis together with evidence on which it is based – unless this will obstruct the investigation. Under Article 55 CPC, the suspected person has a right throughout to find out on what ground he is charged, obtain access to the case file and make extracts; however, in practice, these right are only applied at the end of the investigation when there is a specific right to acquaintance with the full materials (Article 228 CPC). Prior to that,

⁹ Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, United Kingdom.

extensive application is made of the ‘obstruction of the investigation’, including whether the person is detained. Objections can be made, though these are not often successful. Practically, the defence lawyer must go to ‘extraordinary efforts,’ to physically get access to the case file during the investigative stage, particularly prior to the first determination of pre-trial detention. Once the investigation is closed, access is unrestricted and, although there is no provision for making copies of the file, this is not a problem in practice. Measures had not been taken as of October 2014 to implement the Directive.

26. **CZ (CZECH REPUBLIC)** – The Criminal Procedure Code (‘CPC’) of the Czech Republic remained unchanged following the transposition deadline of the Directive and a single provision, Article 65 CPC, regulates access to the case file at all stages of the proceedings. Article 65(1) provides the right of the accused and their counsel to access the file and ‘to make excerpts and notes therefrom, and to have duplicates of the files and the parts thereof made at their own expense.’ However, 65(2) gives the prosecutor the power to refuse access if they have ‘serious reasons’ for doing so; such ‘serious reasons’ are not clearly defined which leads to abuse. If this derogation is applied, the suspect will usually decide to remain silent during the investigation until the file has been seen. Once the investigation is concluded, access to the case file poses no problem.
27. **DE (GERMANY)** – There were no changes made to the criminal law to transpose the Directive as it was felt that the legislation in place was already in conformity with its provisions. While there is no provision for access to the case file at the point of arrest, Article 147 gives the defence the right to inspect the files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence. This access may be refused, in whole or in part, if the prosecutor deems that the access may ‘endanger the purpose of the investigation’. In the case of the accused being held in pre-trial detention there is a specific provision, Article 147(2), which provides that ‘information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.’ The main issue faced by the lawyer is getting practical access to the case file, and although the provisions give counsel the right to inspect the evidence this is sometimes limited to only the digital file. There have been cases reported where the files handed over have been encrypted and so require expensive software packages to be bought so as to access them, but also examples of cases where courts have gone to great lengths to ensure effective access, e.g. by supplying a computer for a detainee to consult a large volume of documentation. Access to the case file was not considered to be a major problem.
28. **EE (ESTONIA)** – Section 34(1) of the Code of Criminal Procedure (‘CCP’), which was amended to implement the Directive, regulates access to the case file at the pre-trial stage. The suspect can *request* access to evidence which is needed for clarifying the content of the allegation, or which is necessary to challenging an arrest warrant. Both these rights of access can be restricted by the prosecutor on grounds relating to the life of another person or the interests of the investigation. These derogations can be applied in respect of the material necessary to challenging an arrest warrant, which Estonian lawyers believe to be plainly incompatible with Article 7(1) of the Directive. In practice, the defence frequently does not have access to the necessary documents prior to trial, including those needed to challenge detention. Such restrictions are subject to review by a prosecutor and ultimately the court, though there are no reported challenges yet.

Once the investigation is complete, under Section 224 CCP, the full file is provided in electronic form, with the option to request paper copies. Trial preparation on the basis of the electronic copies can be difficult when there is a need to liaise with clients in prison.

29. **EL (GREECE)** – The Directive was transposed in February 2014 in Law Nr. 4236/2014 which amended the Criminal Procedure Code ('CPC') of 1950. Article 101 CPC governs access to the case file at all relevant stages, as the case may be combined with other provisions. There is a right to receive a copy upon request, at the person's request. Articles were inserted by the implementing law – possibly raising an issue of regression – providing that exceptions could be on the basis of risk to life and health and the public interest including the protection of the investigation or national security. It was not clear whether this derogation was *created* by the implementing law, which would amount to regression prohibited by the Directive. The application of these derogations is reviewable by a prosecutor, then a three-judge chamber. In practice, a person deprived of liberty will have access to documents which are essential to challenging the lawfulness of detention. No issue was reported in relation to trial preparation.
30. **ES (SPAIN)** – No provision is made for access to documents upon arrest prior to the judicial phase. There has been significant activity of LEAP members in relation to access to the case file at the police stage, with lawyers invoking the Directives, the Spanish police actively refusing to apply them directly pending the adoption of new legislation, and the courts declining to apply the directives directly. Though the situation will be addressed by a law due for adoption by the end of 2015, the lack of application of the Directive in the meantime is problematic. Once the judicial phase is in course, Article 302 of the Criminal Procedure Law provides for access to the whole case file during the investigation, unless part of the proceedings is declared 'secret'. The judge, upon the request of the prosecutor, is able to declare the investigation secret for renewable 30 day periods. In practice, this power (*secreto de sumario*) is often renewed over lengthy periods of time. It must, however, be lifted at least 10 days before the end of the pre-trial phase. This derogation currently makes no distinction for the purposes of a person detained pre-trial (*prisión provisional*). One version of the draft law proposed by the lower chamber of parliament would have amended Article 302 in line with Article 7(1) of the Directive, but the legislative situation was changing and it was not clear what the text would do.
31. **FR (FRANCE)** – Law n° 2014-535 of 27 May 2014 modified the Code of Criminal Procedure ('CCP') in order to implement the Directive. Article 63-4-1 CCP, as amended, and that where a person is placed under police custody, the person or their lawyer may consult the formal documents relating to the detention – this does not provide a right of consultation of the underlying evidence. After this, under Article 393, upon the first appearance before the prosecutor who will decide whether to prosecute, the lawyer or the person not assisted by a lawyer may consult the case file; under Article 394, these continue to have the right of access to the case file until trial, which will be between 10 days and two months later. In the (relatively few) cases that a judge-led investigation is carried out, Article 116(5) CCP provides for access to the case file upon the first appearance before that judge. Thereafter, under Article 114 CCP, the file is at the permanent disposal of lawyer; the lawyer must request permission of the judge to provide a copy to the client, and this is often refused; however, the unrepresented suspect has a right to a copy. No derogations to the right of access were mentioned. It follows from the above that, in all cases, at the point at which decisions relating to detention will be taken by the judge of

freedoms, the person or their lawyer will have had access (legally speaking) to the file. There were, however, problems reported in practice at the pre-trial stage, notably due to the large size of files which made their consultation at the initial stages difficult. Depending on the type of procedure, different articles make provision for consultation or provision of a copy of the file when the case is sent for trial at the correctional tribunal.

32. **HR (CROATIA)** – Access to the case file is regulated by one provision which is applicable at all stages of proceedings. In theory, according to Article 184 of the law on Criminal Proceedings, the suspect and their lawyer ‘have the right to access the case file after the accused is interrogated, if the interrogation is completed before the decision on conducting the investigation is being brought.’ However, there are wide derogations provided for under Art 184(a) which are frequently used, though their application is limited in time to 30 days. There is never any access to the case file at the point of arrest prior to questioning and police often do not acknowledge that they even have a file available. Article 184(a) guarantees a detained person access to the parts of the case file which establish a ‘grounded suspicion’, that they committed the offence, and any evidence related to the ‘circumstances on which the decision to order or prolong pre-trial detention is being made’. The storage of the file causes huge problems for the defence as it is kept locked in the office of the State Attorney’s Deputy. The lawyer may have to wait hours until the office hands over the file, and as the deputies do not work in the afternoon, there is a very small window of time when the lawyer must be physically present to get the file.
33. **HU (HUNGARY)** – The legislature took steps to implement the Directive with amendments to the Code of Criminal Proceedings (‘CCP’) taking effect 1 January 2014. No provision is made for the provision of access to evidence at the point of arrest prior to questioning. The pre-trial phase in general is regulated by Article 186 CCP, which provides the suspect and their lawyer a guaranteed access to expert opinions and minutes of investigative acts at which they are present; access to other documents is at the discretion of the investigative authority, ‘provided that [such access] does not pose a threat to the interests of the investigation’. Further to recent amendments a formal decision has to be issued on refusal of access to documents, which may be challenged with eight days though the impact is not yet known. Specific provision is made for the situation of a person detained pre-trial by Article 211, which provides for a right to the prosecutor’s motion for detention and a copy of materials on which it is based. In practice, prior to the 2014 amendments, detention motions made reference to general evidence which could not be challenged, leading to several findings of violation of Article 5 ECHR by the ECtHR. However, data is not yet available as to the effect of the new amendments.
34. **IE (IRELAND)** – There is no concept of the ‘case file’ as such,¹⁰ and in the absence of a consolidated criminal procedure code the rules relating to the disclosure of evidence from a variety of sources. At the point of arrest, there is no requirement for the suspect to receive anything other than the reasons for their arrest, though the basis for the allegation will become clear in the questioning (NB: inferences may be drawn from the suspect’s silence in this interview). Thereafter, a principle of full disclosure applies, requiring prosecutors to disclose evidence to the defence. In simple cases disposed of on a summary basis, this may be a fairly

¹⁰ We will nevertheless refer to ‘access to the case file’, it being understood that for these cases we are referring to the provision to the defence of evidence which is or could be in the possession of the prosecution.

basic exercise, as there may not be formal witness statements to disclose and these cases attract less procedural protection than trials on indictment. In relation to cases tried on indictment, the law requires full disclosure, extending to all materials collected during the investigation, even those which do not assist the prosecution and might assist the defence. Thus, disclosure will often include large amounts of irrelevant security camera footage, phone records, statements etc. which will not be relied upon against the suspect. A recording of a police interview will not, however, be disclosed without a court order. Judicial review proceedings may be brought in respect of failure to disclose important evidence, e.g. where it has been lost or not obtained, seeking the discontinuance of proceedings. There is only very limited use of public interest immunity certificates, allowing the withholding of sensitive information (such as the identity of witnesses), and only in a specialised court (the Special Criminal Court). Though prosecutors comply with this duty, disclosure often happens late rather than early, which is considered to pose a problem in relation to the requirements in Article 7 of the Directive for access to be provided 'in due time' to exercise defence rights. As a result, it will be difficult to challenge detention at the early stages and successful challenges will often happen later than the first determination, after evidence has been provided and its admissibility decided.

35. **LT (LITHUANIA)** – Article 181 of the Criminal Procedure Code applies to all stages of the criminal proceedings and states that the suspect or his counsel can access the case file at any stage of the pre-trial investigation. The documents have to be requested in writing by the suspect or the defence counsel, and the request must be decided upon by the prosecutor within seven days of receiving it. Prosecutors have the power to refuse access, and to limit the defence's ability to take extracts and copies, if such access may hinder the 'success of the pre-trial investigation.' In practice, refusals from the prosecutor are very prevalent and access is frequently totally or partially denied. There are no specific provisions for when a person is detained pre-trial and access to the case file is still routinely refused in these cases. There is the option to appeal the decision not to grant access to the prosecuting judge, but our respondent reported that such appeals are often unsuccessful. A reform pending before the *Seimas* since December 2012 will reform the access to the part of the file which is the basis of the motion for pre-trial detention.
36. **LU (LUXEMBOURG)** – Article 85 of *Code d'instruction criminelle* ('CIC') provides that (1) following the first interrogation, the suspect, their counsel or the civil party may receive communication of the elements of the file, and (2) communication of the case file elements may be requested in any case by means of a written request addressed by the person or their counsel to the investigating judge. As a result, since the investigating judge takes a first decision as to detention at this point, this is done without the defence having had sight of the file; there is, of course, an immediate review by a court, at which point the file will have been seen, but the latter may defer to some extent to the investigating judge. Proposed law no. 6758 which will provide for access to the case file prior to interrogation by the investigating judge. However, access to the case file is not provided prior to questioning by police and the proposed law will not address this. It was, in the present situation, desirable to advise silence until the file had been seen though this could be met with complaints that it was obstructionist to the administration of justice. Once the first interrogation is complete access is given 'in the sense of being able to consult the file' but it may not be removed from the chambers of the investigating judge; while some lawyers take photographs of each page, there is currently no provision made for obtaining a copy, paper or electronic, at the pre-trial stage. There are no substantive derogations on the

right of access to the case file. Once the case is sent for trial, there is full access to the case file and copies can be made and shared with the suspect, including if the latter is in prison.

37. **PL (POLAND)** – The response related to the current law but reforms will take effect in July 2015. Access to the case file is regulated by Article 156 § 5 of Criminal Procedure Code of 1997, as amended ('CPC') for all stages of the proceedings. Since 2 June 2014 the article has provided: 'if there is no need to secure the proper course of the preparatory proceedings or the protection of important interests of States (...) parties, defence counsels, attorneys and legal representatives are allowed to make copies or photocopies or may be issued certified copies of case files only with the consent of the authority conducting preparatory proceedings'. The pre-June 2014 versions of these exceptions were routinely applied, including in the cases of detained persons, limiting both the ability to participate in pre-trial proceedings and to challenge detention. It is too soon to assess new practice. Article 156 § 5a now specifically caters for the situation of a detained person, providing that the suspect and his lawyer must be provided, as soon as possible, with access to the case files containing the evidence referred to in the prosecutor's motion for detention. This provision is relatively new and has not yet had the impact. However, the general power to restrict access to the case file still applies in respect of other evidence. Restrictions on access can be challenged by interlocutory appeal before a senior prosecutor. Provision of access on completion of the investigation is regulated by Article 321 CPC. Access is usually provided to the hard copy of the file; copies can be made upon request.
38. **PT (PORTUGAL)** – There have been no amendments to the Code of Criminal Procedure code ('CPC') as a result of the Directive, with Article 86 and Article 89 as they stand regulating access to the case file during the investigative stage. The CPC provides that the suspect, their lawyer and any interested third party can access to the case file, make copies and take extracts throughout the entire procedure. Article 89(2) & (3) provide wide derogations to these provisions and allow the public prosecutor to declare part or the entire proceedings 'secret.' This power means they can refuse access to the case files they believe access 'can harm the course of the investigation or the rights of the procedural participants or victims'. Article 194(6) relates to coercive measures and requires that the person be provided with a description of the evidence substantiating the imposition of the measure – provided this will not seriously harm the investigation, the possibility of manifestation of the truth or the life and health of other persons. In practice, there is generally access but when secrecy is applied in more serious cases, challenging detention is problematic. After a formal accusation has been brought there is full access to the case files and which may usually be taken to the lawyer's office, for a limited time, in order to be copied.
39. **RO (ROMANIA)** – Access to the case file is governed by Article 94 of the new Criminal Procedure Code ('CPC') effective from February 2014. It provides for a right of access to consult the file and take notes, and to obtain photocopies at the suspect's expense. The right of consultation may be restricted, by reasoned decision, for reasons relating to the criminal investigation, though this is limited to 10 days from the initiation of criminal action. In the case of a detained person, the person has the automatic right to the full file. Prosecutors issued a document describing how they would approach the question of copies, stating that a copy would generally be made available subject to possible redactions of information relating to third parties.

40. **UK (UNITED KINGDOM – NB: ENGLAND & WALES ONLY)** – There is no concept of the ‘case file’ as such;¹¹ rather, provision is made for provision of evidence by the prosecution to the defence. Upon arrest of a suspect, their lawyer will be told what evidence forms the basis for the suspicion, including, occasionally, evidence such as security camera footage. Presently, this information is not given to a person without a lawyer, and guidance from a senior body clearly excludes this, ostensibly in order to protect the person’s right to silence by avoiding their asking questions about the evidence. Thereafter, if a decision to charge is made, Part 10 of the Criminal Procedure Rules 2013 requires the Crown Prosecution Service (‘CPS’) to provide ‘initial details of the prosecution case’; this includes a summary of the evidence and/or statements, documents or extracts supporting the prosecution case or, combinations of these and the suspect’s previous convictions. These documents must be provided at the latest at the beginning of the day of the first hearing, at which a plea will be given and an initial bail decision taken. Under CPS guidance, prosecutors are supposed to provide copies of any documents on which they intend to rely. These initial details are usually supplied without difficulty, currently in paper, though it is not uncommon for barristers to arrive at court to find no papers available yet, producing delays. After the initial hearing, there is a continuing duty of disclosure under the Criminal Procedure and Investigations Act 1996: prosecutors must disclose material which is capable of undermining the case for the prosecution or assisting the case for the accused. A list is provided to the defence of unused material, which may be requested by the defence.

E. THEMATIC ANALYSIS

INITIAL STAGES

Access to evidence prior to questioning

41. There appears to be very little access to the case file at the point of initial questioning. The main reason seemed to be that the rules applicable for arrest required only the provision of essential information, and not the file, with the right of access to the case file arising afterwards (**LU, FR, BE, ES, FR, IE**). In two responses it was specified that where the initial interrogation is by an investigating magistrate, access to the case file happened after that first interrogation (**LU, BE**). In other responses, the indication was that general rules applicable at the pre-trial stage technically applied at this point (**BG, DE, EE, HR, LT, PL**) but that access was lacking in practice, possibly because these same provisions include derogations in the interests of the investigation, which would be applied at this point (**BG, EE, HR, LT, PL**). Only three responses (**CZ, EL, UK**) indicated that access was provided at this stage, but one of these (**CZ**) mentioned that derogations might be applied and one (**UK**) left unclear the position of unrepresented suspects.
42. The result of this general absence of access to the case file at the point of questioning appears to be that the usefulness of this stage is essentially nil when a person is represented. Several respondents commented that, without access to the evidence, they will simply advise clients to remain silent until they have seen the file. Thus, the initial interrogation loses much value as the suspect will simply chose to wait and challenge the lawfulness of his arrest before a court.

¹¹ We will nevertheless refer to ‘access to the case file’, it being understood that for these cases we are referring to the provision to the defence of evidence which is or could be in the possession of the prosecution.

The first hearing on pre-trial detention

43. The requirement for a person deprived of liberty to be brought promptly before a judge has a special place in human rights jurisprudence, though mostly as acts as a guarantor against ill-treatment. LEAP members have, however, also reported that the first detention hearing before a judge is an important moment because a person detained at that point is likely to remain detained for a significant period, as other courts will be slow to interfere with the initial decision.
44. Yet, as several respondents (**HR, BG, ES, FR**) pointed out, the practicalities mean that this stage presents real defence challenges, as the file will be made available to the judge / court only shortly before the deadline, and it will be in movement between authorities prior to that, meaning that in practice there may be very little opportunity for the defence to acquaint itself with the file before this important hearing.
45. Three responses (**BE, PT, UK**) referred to rules providing for specific modalities on access to the case file at the first court hearing – though there may be others which were not mentioned in the responses. However, by and large, the legislation that the respondents referred to include no specific provision regarding the first detention hearing, which is covered by the general rule covering the whole pre-trial stage (**BG, CZ, DE, EE, EL, ES, PL, HU, HR, LT, LU, PL, RO**).
46. Some responses noted that the substantive right of access to the case file might be limited at this point on the basis of derogations, legally available or applied in practice even when the person is detained (**EE, BG, PL, ES**). This was a matter of more general concern and is discussed further below, but clearly derogations linked to the interests of the investigation will be most relevant soon after arrest, so their effect is particularly important to acknowledge at this point.
47. It should also be noted that in two jurisdictions where a first interrogation is taken by an investigating judge without the defence having prior sight of the file (e.g. **BE, LU**) that judge will also take a first decision as to detention and this will accordingly not be done with equality of arms; of course, that decision is immediately reviewed by a court, before which equality of arms will be ensured, but the court might defer to some extent to the investigating judge's view, making the lack of access at the initial stage potentially prejudicial.

THE PRE-TRIAL STAGE AS A WHOLE

In general (i.e. irrespective of the person being deprived of liberty)

General rules foresee access at the pre-trial stage

48. All the responses confirmed that the legislation foresees – in principle – access to the case file during the pre-trial stage (**BE, BG, CZ, DE, EE, EL, ES, FR, HR, HU, LT, LU, PL, PT, RO, UK**). One response (**EE**) noted that this general rule – the result of implementation of the Directive – was in principle an advance on the prior situation in which no access would be provided until closure of the investigation, though the availability of derogations diminished its significance.

Some question marks about extent of access

49. One respondent (**HU**) said that the law differentiates between the different types of material which the defence are entitled to access at this point, entitling the defence to access all expert

opinions and minutes of the investigative acts where they can be present, but other documents can only be seen 'upon the discretion of the investigative authority'. Some responses (**DE, UK**) noted concern about documents which were not considered by the investigative authorities to be material, but which might be relevant, though these could be requested.

Who gets access and how

50. A number of responses (**BG, CZ, EE, EL, HR, HU, LT, RO**) stated or implied that the general rules applied to both suspect and lawyer. Only one response indicated that the right belonged primarily to the lawyer, unless the person was unrepresented, with the possibility of giving copies to the suspect subject to approval which was often not given (**FR**). Where there was a right of consultation, subject to the application of derogations, the person could be put in possession of the file by the provision of a photocopy (**PT, RO, EL**).
51. Responses also showed that access to the case file was something often available only upon request or application (**EE, EL, GR, PT, LT**), as opposed to a right to obtain or an obligation incumbent upon the investigative authority to provide the documents. Respondents did not note that this, as such, caused problems in exercising defence rights. However, respondents were mostly lawyers, and it could be that such a requirement can pose problems for unrepresented suspects.

Derogations, how they operate and their use / effects

52. Two responses (**FR, LU**) no mention was made of derogations, suggesting there was a right of access to the full file. These positive examples show that investigations can be led without the use of secrecy, meaning that the use of secrecy powers should be limited to justified exceptions.
53. In general, however, the right of access to the case file was subject to derogations provided expressly in law (**BE, BG, CZ, DE, EE, EL, ES, HR, HU, IE, LT, PL, PT, RO, UK**). Derogations also took the form of a facility to certify specific items of evidence or information about evidence as being protected from disclosure by public interest considerations (**IE, UK**).
54. Responses mostly referred to derogations protecting the state's ability to carry out an effective investigation (**BE, BG, DE, EE, EL, ES, HR, HU, LT, PT, RO**). The formulations of such derogations were variable, including, for example: 'to secure the course of preparatory proceedings' (**PL**); 'to protect an important public interest e.g. the inquiry of the investigation,' (**GR**); 'if it will not obstruct the investigation' (**BG**); 'if this may damage the criminal proceedings' (**EE**). In one case (**ES**), the basis for the derogation as a safeguard of investigative efficacy is not in the text of the provision but arises in the case-law interpreting it. Other derogations related to the life and safety of third persons, including the victim (**BE, EE, EL, HR, PT, RO**). One response referred to a derogation so broad – 'serious reasons' – that it could lead to abuse (**CZ**). The public interest certificates available in the common law jurisdictions were also broad phrased but their use closely circumscribed by case-law (**IE, UK**).
55. Most of the legislative texts contained no further guidelines, though further guidance may arise from the jurisprudence of the courts (e.g. **ES**). This requires further thought, as the articulation of such derogations may raise an issue vis à vis the need for legal certainty and clarity in implementation of a Directive, particularly for unrepresented persons.

56. In three Member States (**ES, HR, RO**) these provisions regarding derogations on access to the case file were subject to limitations in time (respectively 30 days renewable, 30 days maximum and 10 days maximum). Other responses did not suggest that derogations were limited in time.
57. Various respondents noted that the use of such derogations was prevalent (**BG, EE, ES, HR, HU, LT, PL**), or occasional (**CZ, PT**), in practice. In some cases (**EE, HU, PL**) these comments referred mostly to the practice pursuant to the situation prior to recent amendments, with the impact of the changes (made in order to implement the Directive) not yet known.

The pre-trial stage when a person is deprived of liberty

58. Most responses (**BE, EE, DE, HR, HU, PL, PT, RO**) made specific provision for the situation of a person deprived of liberty, in line with Article 7(1), with different approaches taken to the delimitation of which documents need to be disclosed.
59. In one case, which Fair Trials regarded as positive (**RO**), when the person is detained, that person and their lawyer have the right of access to the full case file, without possibility of derogation. In another (**BE**), the law governing pre-trial detention likewise provided for access to the whole file.
60. Two responses (**HU, PL**) referred to legislation providing for access to documents referred to in the prosecutorial motion for detention, a solution also envisaged by a draft law mentioned in one response (**LT**). Both provisions were new and it remained to be seen how they would operate in practice, a key question since this approach delegates the function of selecting relevant documents to prosecutors, in a context of prior concern about abuse of secrecy powers.
61. Other responses (**DE, EE, HR**) referred to provisions containing a general legal criterion linked to the lawfulness of detention using formulations such as ‘evidence which is relevant to the assessment of ... the existence of circumstances on which the [detention decision] is being made’ (**HR**) or ‘evidence which is relevant to the assessment of the merits of an arrest warrant’ (**EE**).
62. In the common law jurisdictions surveyed (**IE, UK**) the assumption was that evidence would be made available according to the general disclosure rule. One response (**IE**) noted that the timing of disclosure, not always prompt, could make challenging detention difficult.
63. Of concern in relation to detained persons was the fact that, according to some responses, derogations allowed the restriction of access even to evidence essential to the assessment of the lawfulness of detention (**BG, EE, PT, ES**). In one case, the general rule applicable in all cases provided both the right of access and derogation where access would ‘obstruct the investigation’ (**BG**). In another, an amendment specifically implemented the Directive provided for derogation on which applied to the general right of access and the specific right of access to evidence relevant to challenging an arrest warrant (**EE**). In another case, the general rule and its accompanying derogation currently draw no distinction for detained persons (**ES**), though a draft law was being discussed. And in another, the provision requiring access to the evidence sustaining a coercive measure was subject to derogation (**PT**). Such provisions raise manifest issues of compliance with Article 7(1) of the Directive, raising a need for national courts to apply the Directive directly, and for further scrutiny by the European Commission.

Judicial control / review of restrictions on access

64. In some cases, powers to restrict access to the case file were described as belonging to a judge or court on application of the prosecutor (**ES, HR**). In other cases, the power was described as belonging to the prosecutor, subject to the possibility of bringing challenges before a higher prosecutor (**PL**) or court (**EE, EL, HU, PT**). We would observe that the possibility of bringing a challenge only before a higher prosecutor appears unsatisfactory if there is no further challenge available before a judge, given the requirement in Article 7(4) of the Directive and the Charter.
65. The effectiveness of the systems of challenge varied, with some responses more upbeat (**CZ**), but other respondents – going on past practice, new laws having been adopted recently – were less optimistic that such challenges would ultimately result in access being granted (**PL, EE**). In one jurisdiction (**HU**), it was noted that there had previously been a practice of not issuing formal decisions denying access, which made such ‘decisions’ difficult to challenge, with the impact of a new requirement for a formal decision not yet known.

Modalities of access to the case file at the pre-trial stage

66. The modalities of access to the case file varied at the pre-trial stage, though not all responses discussed this in detail. One response noted that the legislation allowed (if access was granted) the making of ‘extracts’, i.e. taking notes, but did not permit the making of copies (**BG**). Another noted that at the pre-trial stage the file could be consulted but not removed from the judge’s office, leaving lawyers to take notes or pictures (**LU**). As mentioned above, in one case, a copy could only be given to the client upon request (**FR**).
67. Other responses commented that there was the opportunity to request a copy of the file, which could be refused in the same way as the substantive right of access (**BE, EL, LT, PL, PT, RO**), though there was no indication that this was problematic. In the common law jurisdictions, disclosure would be provided in the form of copies (**IE, UK**), and a list of material not relied upon of which disclosure could be granted if requested (**UK**).
68. One respondent (**DE**) said only electronic versions would be made available in bigger cases and two examples (**DE, UK**) mentioned that electronic files could be given to the defence which were encrypted, had no passwords or required an expensive software package to be read.
69. There were also complaints of limited time, coupled with the volume of the case file (**FR**) affecting the defence’s ability to prepare for hearings properly. One response (**EL**) explained that while copies could be made, the defence have to pay a fee to make copies (an issue which may arise in other jurisdictions too), though the questionnaire did not specifically ask about this.

UPON COMPLETION OF THE INVESTIGATION

Right of access to the case file to prepare for trial

70. Positively, almost all the respondents reported having adequate access to the case file in time for trial. Several responses (**BE, BG, CZ, DE, EE, FR, HU**) referred to laws making explicit provision for the right of access to the entire file upon completion of the investigation, enabling the defence to propose further investigative measures or supplement the file with other evidence.

In other cases (**HR, CZ, DE, IE, UK**), provisions applicable throughout the pre-trial phase provided access to the case file at some point prior to trial in any case.

Modalities of access to the case file at this stage

71. Mostly, respondents reported a greater ability to obtain copies of the file at this point. In cases where general rules applied for all stages of the proceedings (**LT, CZ, HR**), the accompanying modalities would govern the modalities of access upon completion of the investigation too.
72. One response (**BG**) stated that even though the applicable law at this point foresaw only consultation of the file, in practice there was full unrestricted access with the ability to make copies, from the moment the case is transferred to the court.
73. One response (**EE**) explained that the law governing this point foresees access to a digital copy, with the possibility for the prosecutor to restrict the ability to print copies, the ability to discuss the case file with a detained person on the basis of an electronic copy (using shared prison computers) could be very limited and undermine the effectiveness of defence.
74. It was reported in one jurisdiction (**ES**) where parts of the proceedings can be declared secret, the full file had to be disclosed at least 10 days before the end of the pre-trial stage and in practise it was usually handed over much earlier. However, in some Member States which had one provision governing the whole criminal procedure (**HU, LT**) access and the ability to make copies, even after the investigative stage, was still theoretically at the will of the prosecution.

F. KEY CONCLUSIONS

75. Based on the above information, we have drawn the following headline conclusions:

- a. **Access to the case file prior to questioning is generally lacking** – Virtually all responses indicate that, at the point of initial questioning (either by police or other investigative authority) suspects do not have prior access to their files. Information is usually limited to an (often very basic) description of the charge. As a result, there is a general practice of lawyers advising clients to remain silent until the file has been seen. It was noted in the survey that lawyers in certain Member States were pushing the authorities to apply an expansive interpretation of Article 7(1), and we conclude that this would be a useful point for the CJEU to clarify.
- b. **At the pre-trial investigation stage –**
 - i. **Access is the rule, but derogations exist in most jurisdictions and are applied extensively** – There is an in principle access to the case file in all Member States though there are variable rules on whether this is provided by the prosecuting authorities or upon request. There is, however, a problem of derogations linked to the needs of the investigation being used throughout the pre-trial phase, with the result that the ability of the defence to participate effectively and scrutinise prosecutorial / investigative action may be limited and may only become possible upon completion of the investigation. This was the general position; in relation to detained persons, see ii. below.

ii. When the suspect is detained –

1. The first determination on detention is neglected as a key moment –

The general picture was that no specific provision is made for access to the case file at the first determination by a court, which is covered by the general rules applicable to the whole pre-trial phase. The Directive mentions in recital 30 that documents should be provided ‘in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention’, and practical challenges linked to the transfer of the (potentially large) police file to the court following arrest may currently be diminishing the effectiveness of the initial challenge.

2. Sufficient legal provision is made in most countries for access to documents essential to challenging detention – The survey generally suggested that legal rules provided a right of access to documents which are relevant to a detention decision, though the legislative drafting varied to some extent. A good number of responses found that there was no problem in this regard. The effectiveness of the approach of linking the right of access to the documents mentioned in a detention order is not yet demonstrated.

3. However, in a number of Member States, either in law or in practice, access even to these documents is restricted – Worryingly, there seemed to be laws in place allowing the application of derogations to the right of access to documents needed to challenge detention. Two replies to the questionnaire in particular expressed serious concern that in practice, detained suspects are not able to challenge their detention effectively for this purpose. Member states are failing to respect the gravity of pre-trial detention and overlooking the necessity to allow it to be effectively challenged.

iii. There is generally the ability to obtain a copy (sometimes electronic) of the file during the investigative stage – By and large, the survey suggested lawyers were able to consult and make copies of the file during the investigative stage (unless derogations are applied). Practices relating to the availability of the case file at prosecutors’ offices do, however, pose problems. In general, lawyers were also able to make paper copies of the file for the client to keep, and in some cases electronic copies could be obtained pre-trial. However, there were possibilities to restrict this, and in one example, the right of consultation allows only the taking of notes. Restrictions of this nature limit the ability of the defence to participate effectively in pre-trial proceedings.

iv. Challenges to refusal of access – Only two responses seemed to suggest that there was no recourse to a court to challenge a refusal of access at the pre-trial stage. Otherwise, the survey suggested that it was possible to challenge refusals

of access at the pre-trial stage. The practice of not issuing a formal decision when denying access historically was a problem in terms of judicial protection.

- c. **Upon completion of the investigation** – In most Member States, there were separate provisions governing access to the full file in order to prepare for trial, and it appears that there is generally access to either a full paper copy or an electronic copy. There were some doubts as to unused materials not considered to fall within the scope of the case by prosecutors, which could assist the defence. Consultation of documents in prisons could pose practical problems for the preparation of the trial defence.

CONCLUSIONS / FURTHER RESEARCH

76. As noted above, this survey was not exhaustive but it nevertheless hope that it provides a reasonable picture as to the situation in over half the Member States. We would hope for different actors involved in this process to take the matter forward as follows:

- a. **The European Commission** should ensure that Member States provide it with all the necessary information to conduct a thorough review, covering both the substantive rules regarding access to the case file and the practical arrangements for giving effect to them. It must be prepared to carry out infringement procedures if necessary.
- b. **EU Member State Governments** are welcome to contact Fair Trials via the contacts above if they wish to discuss the content of this report. In particular, we are happy to organise meetings with Fair Trials staff, the LEAP Advisory Board member for the country in question and the Permanent Representation in Brussels, subject to capacity.
- c. **Defence lawyers** should continue to push courts to refer to the Directive when interpreting and applying national laws on access to the case file. Lawyers are welcome to use the comparative information in this report to inform their courts of approaches in other Member States, and to approach LEAP or Fair Trials staff for litigation support.
- d. **Bar associations** should continue the work they are already doing to promote use of the Directive or, if they are not doing so, explore training programmes to help lawyers challenge problems arising in practice. Fair Trials and LEAP are keen to cooperate.
- e. **National courts** should where necessary, interpret provisions enabling the restriction of access to the case file in line with the Directive and, in any event, ensure that these are not applied at the expense of access to documents necessary to challenging detention. A question as to the proper interpretation of Article 7(1) vis a vis access to the case file prior to questioning should be referred to the CJEU.
- f. **Academics** can help complete the picture sketched in this report with analyses of statistical data, jurisprudence of the courts relating to the relevant provisions of national procedures and constitutional provisions, and how these relate to the Directive.
- g. **NGOs** are encouraged to use the information in this report in their domestic advocacy targeted at parliaments and governments and/or strategic litigation. Fair Trials and LEAP are happy to consider cooperating with such initiatives.

Fair Trials Europe

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