

Access to the Case Materials in Pre-Trial Stages

Critical Questions of Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings



Article

Anna Pivaty, Anneli Soo *

ABSTRACT

The right of access to the case materials (Art. 7 of Directive 2012/13/EU) is crucial to enable an effective defence and ensure equality of arms in criminal proceedings. However, when it comes to the pre-trial stages of criminal proceedings, Art. 7 of Directive 2012/13/EU is not clear about the timing of access, the scope of access, and about the possible derogations from providing access to suspects and their counsel.

This article outlines the questions that, in our opinion, should most urgently be posed to the CJEU concerning the interpretation of Art. 7 in the context of pre-trial proceedings, e.g.: What are the documents that are "essential for challenging effectively" the lawfulness of arrest and detention under Art. 7(1)? Do the grounds for derogation under Art. 7(4) apply to Art. 7(1)? How should the derogation grounds under Art. 7(4) be understood? Do Art. 7(2) and (3) apply at the pre-trial stages of the proceedings, and particularly to pre-trial investigations? If yes, what is the scope and manner of access to the case materials that should be provided at these stages? We argue that further interpretation from the CJEU is necessary to ensure greater uniformity and stronger protection of the right of access to the case materials across the EU Member States.

AUTHORS

Anna Pivaty

Researcher

Maastricht University

Anneli Soo

Associate Professor of Penal Law -
Humboldt Experienced Researcher,
University of Cologne and Max Planck
Institute for Foreign and International
Criminal Law (2018-2019)
University of Tartu, Estonia

CITATION SUGGESTION

A. Pivaty, A. Soo, "Access to the Case Materials in Pre-Trial Stages", 2019, Vol. 14(1), eucrim, pp60–65. DOI: <https://doi.org/10.30709/eucrim-2019-001>

Published in

2019, Vol. 14(1) eucrim pp 60 – 65

ISSN: 1862-6947

<https://eucrim.eu>



I. Introduction: The Right of Early Access to the Case Materials in EU Law

In EU law the right of access to the case materials in criminal proceedings arises from Art. 7 of Directive 2012/13/EU on the right to information in criminal proceedings.¹ Two elements of the right are distinguished:

- The right of access upon arrest or detention (Art. 7(1));²
- General right to access the case materials (Art. 7(2) and (3)).³
- Art. 7(4) provides the grounds for derogation from the right.⁴

Directive 2012/13/EU was adopted on 22 May 2012 and had to be transposed by 2 June 2014. The CJEU has addressed interpretation of its Art. 7 only once so far.⁵

Art. 7 is the only article in Directive 2012/13/EU, which focuses on the right of access to the case materials. The central question is whether Art. 7 should be applied differently to the pre-trial proceedings as compared to the trial. As concerns Art. 7(1), obviously, it applies to both stages: someone can be arrested or detained both before and after the case reaches the trial. However, it is unclear from the wording of Art. 7(2) and (3) whether the general right of access to the case materials (unrelated to arrest or detention) also applies to the pre-trial procedural stages (such as pre-trial suspect interrogations), and to what extent. In *Kolev*, the CJEU did not clarify these issues either, as this case focuses on the latest, not on the earliest point of the proceedings when access should be granted.⁶ There are also other ambiguities of wording of Art. 7 in the context of pre-trial proceedings. For instance, the formulation of derogations in Art. 7(4) allows for some variance in interpretation depending on the national specifics, especially the part related to the prejudice to an ongoing investigation. These problems are discussed in detail below, as they form a basis for making an argument for requesting preliminary references to the CJEU.

II. The Right of Access to the Case Materials upon Challenge of Arrest or Detention: Emerging Questions

Although it is clear from Art. 7(1) that it applies at any stage of criminal proceedings upon arrest or detention, two questions remain open.

First, which documents are essential for challenging effectively the lawfulness of the arrest or detention? According to the ECtHR, reasonable suspicion is a condition *sine qua non* for the lawfulness of the arrest or detention, but with the lapse of time it is not enough to justify continued detention.⁷ With the lapse of time other valid grounds must exist to justify the deprivation of liberty, such as the risk of absconding or tampering with evidence.⁸ When it comes to challenging the lawfulness of the detention, the ECtHR requires that “the detainee must be given an opportunity effectively to challenge the basis of the allegations against him [...]. This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention [...]. It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him [...]”⁹

Here, access to the case materials provides the detainee with information about the evidence, which supports the law enforcement agents' claim about the existence of reasonable suspicion that he has committed an offence, and (if applicable) about the additional ground(s) for continued detention. Based on this information, the detainee can challenge these claims, and submit evidence if necessary. The explanatory memorandum of the Commission proposal on the Directive calls it a "limited access to the case-file" which "ensures the fairness of pre-trial proceedings concerning the lawfulness of arrest and detention."¹⁰ In this context, a number of questions arise: To what extent is the access limited? Does it cover all evidence the prosecution has against the suspect? If not, who decides, and based on what criteria, which evidence should be revealed to the defence, given that the lawyer – who would be best suited to assess which evidence is essential for challenging the arrest or detention effectively – is not given access to the complete case materials? And how, if at all, could the lawyer or the suspect control whether all such evidence has been disclosed? Does "limited access to the case-file" also cover exculpatory evidence in the possession of the prosecution?¹¹ These questions are very closely related to the next question concerning the possible derogations of Art. 7(1).

When it comes to determining which evidence is essential for challenging the arrest or detention, evidently, national peculiarities must be considered when making individual decisions about the scope of access to case materials, because the laws of Member States may provide for different grounds for continued detention (as long as they are in line with Art. 5(3) ECHR and the respective case law).¹² However, the question is to what extent should national differences be taken into account? What if, for instance, national law defines the moment from which 'reasonable suspicion' exists (and the criminal proceedings begin) differently than the respective ECtHR case law?¹³ In Bulgaria for instance, the first 24 hours of police detention, or police arrest, of someone suspected of having committed a crime are not considered part of the criminal proceedings,¹⁴ and therefore detention orders (which do not contain information about the factual grounds for arrest) might be handed out to suspects hours after the actual detention. Is this situation compatible with Art. 7(1)? Nevertheless, the questions we raised above about the interpretation of Art. 7(1) are more general, and therefore they need fundamental answers given by the CJEU. In addition, as we will demonstrate immediately below, the questions on the interpretation of Art. 7(1) and (4) are interrelated, and therefore must be analysed jointly.

This leads us to the second question, i.e. does Art. 7(4) apply in cases where access to the case materials must be granted in accordance with Art. 7(1), i.e. can Art. 7(1) be derogated by Art. 7(4)? One might consider several arguments against and for the derogation. On the one hand, literal interpretation of Art. 7(1) and (4), which is one of the dominant interpretation techniques of the CJEU,¹⁵ seems to suggest that Art. 7(1) cannot be derogated by Art. 7(4). As Art. 7(4) makes reference only to Art. 7(2) and (3), it implies that it does not apply to any other paragraphs of Art. 7. This is also backed by historic interpretation (even though the CJEU does not often rely on it), because the explanatory memorandum of the Commission proposal to the Directive makes reference to possible derogations from access to the case materials only in relation to access for the preparation of the trial.¹⁶ Also, this viewpoint is also shared by legal academic literature.¹⁷ On the other hand, contextual interpretation (also often used by the CJEU)¹⁸ suggests that Art. 7(1) may be derogated on the grounds provided in Art. 7(4). More precisely, recital 42 of Directive 2012/13/EU states that "[t]he provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights". Furthermore, according to recital 32 "[r]estrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the ECHR and as interpreted by the case-law of the European Court of Human Rights." According to the ECtHR, the right of access to the case materials upon arrest or detention can be restricted if it is strictly necessary, for example to protect the safety and security of third parties (witnesses or victims).¹⁹ In any case, the contextual interpretation relies on recitals

32 and 42 of the Directive, as these recitals – read in conjunction with Art. 7(1) – limit the right provided in this paragraph.

Because CJEU case law emphasises that recitals should not limit or contradict the rights stipulated in the actual provisions of a directive,²⁰ it may be argued that contextual interpretation is not appropriate to solve the given interpretation question. If the outcome of literal interpretation is however that both lawyers and suspects (as the holders of the rights) should be granted access to all materials of the case that are essential to challenge the arrest or detention, this inevitably raises the question on how to protect important values, such as privacy or personal safety? For instance, what if there is a real risk that disclosing the name(s) or whereabouts of (a) certain witness(es), or the (full) content of their statements to the suspect, might cause an attempt on the part of the suspect to influence their testimony and/or threaten their privacy or safety? This question is definitely worth raising with the CJEU. Here, an additional question to be addressed is whether procedures in some Member States enabling lawyers to see the materials but not to share them with their clients are compatible with Art. 7(1).²¹

Additionally, the timing of disclosure might also raise some issues. According to recital 30, the necessary documents must be made available to the defence “at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention [...], and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention”. But what does this really mean? How much time should the defence be granted before the judicial authority makes such decision, considering that the aim of adequate preparation is the effective exercise of the defence rights?

III. The General Right of Access to the Case Materials in Pre-Trial Proceedings: Does it Exist and to What Extent?

As already stated above, Art. 7(2) and (3) leave open the question whether access to the case materials (at least to some extent) has to be granted in pre-trial proceedings for other purposes than challenging an arrest or detention. The initial proposal for Directive 2012/13/EU envisaged that access to the case materials should be granted once the investigation of the criminal offence is concluded (then Art. 7(2)). Under this formulation, Member States would need to provide full access to the case materials (unless the public safety and security grounds for derogating from such access existed) upon the conclusion of the pre-trial investigation, but did not encourage them to provide access earlier – other than for the purpose of challenging an arrest or detention, which is a separate obligation provided in Art. 7(1).

The current wording of Art. 7(3) defines the latest possible stage of the proceedings when access should be granted – i.e. “upon submission of the merits of the accusation to the judgment of a court” –²² but adds that access should be granted “in due time to allow the effective exercise of the rights of the defence.” According to Art. 7(2), such access is necessary “in order to safeguard the fairness of the proceedings and to prepare the defence”. In this way, Art. 7(3) calls for variation of practices in the Member States. It might be that some states choose to provide access to the case material exactly at the latest possible stage of the proceedings foreseen by the Directive, but it might also be that some decide that for the effective preparation and exercise of the defence it is essential to provide access already in the earlier stages (during or in the end of pre-trial investigation). This decision is most likely to be made based on national laws and practices. For instance, those Member States that encourage the practice of negotiations in criminal proceedings towards out-of-court settlements are more likely to encourage early disclosure of the evidence in the possession of the prosecution to enhance such practice.²³ In addition, in those Member States where lawyers are expected

to actively participate in pre-trial proceedings (e.g. via active participation in suspect interrogations or the gathering of evidence), counsel might encounter less difficulties convincing authorities that in order to fulfil their duties effectively, they need to be informed of the evidence in the prosecution's possession.

But are these differences acceptable in the light of Art. 7(2) and (3) of the Directive? If, for instance, in Member State A this provision is interpreted in a way that the right of access to the case materials is provided for suspects who have not been arrested or detained only shortly before the court proceedings, and in Member State B already when counsel prepares for the initial interrogation, would suspects be equally able to exercise their defence rights effectively in both Member States? Is Member State A following the minimum standards, which Member State B has decided to depart from towards a higher standard of protection? Or is Member State A falling below minimum standards? Should the right of access to the case materials at an earlier stage than the referral of the case to court in Member State B be really left open for a case-by-case decision with an option for the national courts to make a preliminary reference to the CJEU? Or should there be a common EU-wide approach concerning the question at which stages of pre-trial criminal proceedings the right of access to the case materials is essential for the effective exercise of the defence rights?²⁴ We believe that this is a subject worth forwarding to the CJEU to clarify.

Art. 7(2) provides for the right of full access to the case materials – “to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons”²⁵ – at the latest when the case reaches the court (Art. 7(3): “upon submission of the merits of the accusation to the judgment of a court”). If these paragraphs are to be interpreted in a manner that they grant access to the case materials also at the pre-trial stages of the proceedings if necessary for exercising effective defence rights, the question arises whether full or partial access should be given (and would differences between Member States be acceptable)? There are two viable alternatives. First, it may be argued that because the aim of granting access is to “allow the effective exercise of the rights of the defence”, the extent of access to the case materials depends on the stage and type of the proceedings in which it is granted. For instance, participation in the proceedings for an out-of-court settlement seems to require full prior knowledge of the existing evidence. In this first scenario, the decision on how much to reveal to the defence would belong to the competent authorities and would depend on their understanding of what is an “effective exercise of the rights of the defence” and how granting access to the case materials contributes to it. In addition, even when the competent authority concludes that granting access to evidence would contribute to the effective defence, it could still refuse such access based on Art. 7(4). Second and alternatively, it may be argued that in principle, full access to the case materials should be granted because full knowledge of the file is necessary for effective exercise of the defence *per se*, unless grounds for derogation under Art. 7(4) exist, which makes the right of access potentially more extensive, than in the first scenario.

The interpretation of derogations provided in Art. 7(4) raises further questions. There are two distinct grounds for derogation in Art. 7(4): the protection of third parties (“access may lead to a serious threat to the life or the fundamental rights of another person”) and an important public interest (“access could prejudice an ongoing investigation or seriously harm the national security of the Member States”). In the initial draft of the Directive, the first ground was formulated almost identically compared to the adopted version, but the second ground was conceived much narrower, as it stated that access to certain materials could be refused if such access may seriously harm the internal security of the Member State.²⁶ In the finally adopted version, national security is mentioned together with the interests of the ongoing investigations (as implied in “prejudice an ongoing investigation”) as possible examples of what may be considered an “important public interest” (implying that these two examples are non-exhaustive).

The ‘life and limb’ clause is also provided as a ground for derogation from the right of access to a lawyer in Art. 3(6)(a) of Directive 2013/48/EU.²⁷ However, there is no ‘important public interest’ clause, as the second

ground for derogating the right of access to a lawyer is formulated as the need for investigating authorities to “prevent substantial jeopardy to criminal proceedings” (Art. 3(6)(a) of Directive 2013/48/EU). As a result, Art. 3(6)(b) of Directive 2013/48/EU is much more precise than Art. 7(4). In the latter, the public interest clause with reference to the interests of the ongoing investigation leaves a wide margin of interpretation for the Member States, which may use this ground excessively to the prejudice of defence rights.²⁸ The need to secure an effective conduct of criminal proceedings is more frequently invoked with regard to the pre-trial stage of the criminal proceedings than to the trial itself. Therefore, if Art. 7(2) and (3) are interpreted in a manner that they apply to pre-trial investigations (at least to some extent), national authorities can block this access due to the very vague wording of Art. 7(4), which would turn the right to early access to case materials into more of an exception than a rule. Consequently, we believe that here further guidance from the CJEU is needed in order to ensure effective protection of the rights of defence.

IV. Conclusions

The issue of pre-trial access to the case materials is delicate. Packer observed that any norm-setting in the area of criminal process aims at achieving a certain balance between two types of competing values: due process and crime control.²⁹ Likewise, the conflict between due process and crime control values underlies the debate about the right of early access to the case materials. On the one hand, an unlimited right of access from the initial stages of criminal proceedings would ensure maximum protection of due process values. Early access to the case materials is crucial for the effective conduct of defence. It provides counsel with an opportunity to choose tactics for interrogation (in general terms, whether to advise the suspect to remain silent or give statements), to request the gathering of evidence from the authorities (or to gather evidence himself or herself if national law permits), and to decide on the overall strategy of defence (e.g. whether to seek an out-of-court settlement, to proceed to trial etc.). These opportunities contribute to the principle of equality of arms, which has been embraced by the ECtHR not only as a principle that applies in trial, but also in pre-trial proceedings.³⁰ On the other hand, imposing restrictions or derogations from the right of access to the case materials, and/or delaying the moment when such access should be granted, would ensure optimal protection of crime control values. Thus, the earlier the suspect and his/her lawyer are granted access to the case materials, the greater the potential risk of prejudice to the ongoing investigation. Pre-trial investigations, especially at the early stages, are vulnerable to the risk of suspects tampering with evidence, as well as threatening witnesses. Therefore, next to compromising the integrity of criminal investigations, unlimited early access to the case materials may also jeopardise the safety of third parties.

All these considerations could be found in Art. 7(4) of Directive 2012/13/EU that provides derogations from the right of (unlimited) access to the case materials in criminal proceedings. However, there is evidence that derogations from pre-trial access to case materials are used too extensively in the EU Member States.³¹ One of the reasons for this might be that law enforcement authorities still seem to believe that the best way to solve crimes is to conduct investigations first by keeping the details of the investigation confidential, after which the suspect or the accused can be confronted with the entire body of evidence against him. We believe that the contemporary understanding of equality of arms in pre-trial proceedings precludes this approach. With this article we encourage practitioners to contest these practices by raising questions of interpretation of Art. 7 of Directive 2012/13/EU in the context of the principle of adversarial proceedings and the principle of equality of arms in pre-trial proceedings, which could be a source of inspiration for making preliminary references to the CJEU.

1. O.J. L 142, 1.6.2012, 1.²⁸

2. Art. 7(1) of Directive 2012/13/EU: "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." ↵
3. Art. 7(2) of Directive 2012/13/EU: "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." Art. 7(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. Art. 7(4) of Directive 2012/13/EU: "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. CJEU, 5 June 2018, case C-612/15, *Criminal proceedings against Nikolay Kolev and Others*. ↵
6. Ibid, paras. 90-100. ↵
7. ECtHR, 12 May 2015, *Magee and others v. the UK*, Appl. nos. 26289/12 et al., para. 88. ↵
8. ECtHR, 28 July 2005, *Czarnecki v. Poland*, Appl. no. 75112/01, para. 37. ↵
9. ECtHR, 19 February 2009, *A. and others v. the UK*, Appl. no. 3455/05, para. 204. ↵
10. European Commission, "Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings", COM(2010) 392 final, p. 9. ↵
11. In *A. and others v. the UK* (op. cit. (n. 9)) the ECtHR noted that, "while the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the Court has held that it might sometimes be necessary to withhold certain evidence from the defence on public-interest grounds." (para. 206) It did not use the phrase "evidence for and against the accused" in the context of challenging arrest or detention. However, it stated that, "the proceedings must be adversarial and must always ensure 'equality of arms' between the parties" (para. 204), and required that, "the detainee must be given an opportunity effectively to challenge the basis of the allegations against him." (ibid) The principle of equality of arms is not honored and the opportunity to effectively challenge the basis of the allegation is not given to the detainee if exculpatory evidence is concealed. ↵
12. Despite the extensive existing Strasbourg case law on the lawful basis for detention, Fair Trials has reported quite remarkable differences concerning the grounds for pre-trial detention among the Member States. Fair Trials, "A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU, 2016", <<https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>>, pp. 18-20, accessed 1 February 2019. ↵
13. Reasonable suspicion is defined by the ECtHR as "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed offence". See e.g. ECtHR, 30 August 1990, *Fox, Campbell and Hartley v. the UK*, Appl. nos. 12244/86; 12245/86; 12383/86, para. 32. ↵
14. See Y. Grozov, "National Approaches to Effective Defence: Bulgaria", in: E. Cape and Z. Namoradze (eds.), *Effective Criminal Defence in Eastern Europe*, 2012, p. 104. ↵
15. CJEU, 28 June 2007, case C-467/05, *Criminal proceedings against Giovanni Dell'Orto*, para. 54. ↵
16. COM(2010) 392 final, op. cit. (n. 10), p. 9. ↵
17. S. Allegrezza and V. Covolo, "The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?", in: Z. Durdevic and E. Ivicevic Karas (eds.), *European Criminal Procedure Law in Service of Protection of the Union Financial Interests: State of Play and Challenges*, 2016, p. 47; A. Tsagkalidis, "Directive 2012/13/EU on the Right to Information in Criminal Proceedings", ERA, Krakow, 2 March 2017, <http://www.era-comm.eu/procedural_safeguards/kiosk/pdf/2017/Article_Right_to_Information.pdf>, p. 13, accessed 1 February 2019. ↵
18. Cf., for instance, CJEU, *Criminal proceedings against Giovanni Dell'Orto*, op. cit. (n. 15), paras. 55-57. ↵
19. ECtHR, *A. and others v. the UK*, op. cit. (n. 9), para. 205. ↵
20. CJEU, 24 November 2005, case C-136/04, *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*, para. 32. ↵
21. The ECtHR has accepted these procedures on specific conditions: ECtHR, *A. and others v. the UK*, op. cit. (n. 9), paras. 209-211. ↵
22. In *Kolev*, the CJEU stated that the requirements of Article 7(3) are met if access to the case materials has been granted "after the lodging before the court of the indictment that initiates the trial stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file in the course of proceedings, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings." CJEU, *Criminal proceedings against Nikolay Kolev and Others*, op. cit. (n. 5), para. 100. ↵
23. However, Fair Trials has reported that such enhanced or early access to the case materials is often not provided, and therefore this situation needs improvement. Fair Trials, "The Disappearing Trial. Towards a rights-based approach to trial waiver systems", <https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf>, pp. 80-81, accessed 10 March 2019. ↵
24. The CJEU hinted in *Kolev* that the latest point in time for granting access to case materials may vary depending on the type of procedure by stating that "as a general rule and without prejudice, in some cases, to special or simplified procedures, that that disclosure should take place, and that the opportunity to have access to the case materials should be afforded, no later than the point in time when the hearing of argument on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits." (CJEU, *Criminal proceedings against Nikolay Kolev and Others*, op. cit. (n. 5), para. 92). ↵
25. Here it is important to notice that the Directive limits disclosure to "material evidence", but this may lead to a situation in which material relevant for the defence remains unrevealed as it is not used for the purposes of the court proceedings. See the recent rape cases in the UK in which undisclosed unused materials contained exculpatory evidence, leading to the enquiry and report by the Attorney General. Attorney General's

Office, "Review of the efficiency and effectiveness of disclosure in the criminal justice system. November 2018", <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf>, accessed 10 March 2019. ↵

26. European Commission, "Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings", *op. cit.* (n. 10), p. 9. ↵

27. Directive 2013/48/EU 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, *O.J. L* 294, 6.11.2013, 1. ↵

28. The excessive use of the 'interest of investigation' clause has been reported by Fair Trials (Fair Trials, "Legal Experts Advisory Panel Survey Report: Access to the Case File, March 2015", <<https://www.fairtrials.org/wp-content/uploads/Access-to-file-report-FINAL.pdf>>, pp. 16-17, 19, accessed 1 February 2019) and the European Union Agency for Fundamental Rights (FRA), "Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information", 2016, p. 78 and figure 7 on p. 79). ↵

29. H.L. Packer, *The Limits of the Criminal Sanction*, 1968, pp. 149-173. ↵

30. ECtHR, 24 November 1993, *Imbrioscia v. Switzerland*, Appl. no. 13972/88, para. 36; ECtHR, 30 March 1989, *Lamy v. Belgium*, Appl. no. 10444/83, para. 29. ↵

31. Fair Trials, "Legal Experts Advisory Panel Survey Report", *op. cit.* (n. 28); FRA, "Rights of Suspected and Accused Persons Across the EU", *op. cit.* (n. 28). ↵

* Authors statement

This article is based on the following research: A. Pivaty and A. Soo, "Article 7 of the Directive 2012/13/EU on the Right to Information in Criminal Proceedings: A Missed Opportunity to Ensure Equality of Arms in Pre-Trial Proceedings?", forthcoming in the journal "European Journal of Crime, Criminal Law and Criminal Justice" (issue 2/2019). It develops the ideas expressed in the original article on a more practical level, which we hope to be of added value for practitioners interested in EU law on criminal procedure and procedural rights. We would like to thank Laure Baudrihaye-Gérard for her most valuable ideas and comments, which helped us improve this article a lot.

COPYRIGHT/DISCLAIMER

© 2019 The Author(s). Published by the Max Planck Institute for the Study of Crime, Security and Law. This is an open access article published under the terms of the Creative Commons Attribution-NoDerivatives 4.0 International (CC BY-ND 4.0) licence. This permits users to share (copy and redistribute) the material in any medium or format for any purpose, even commercially, provided that appropriate credit is given, a link to the license is provided, and changes are indicated. If users remix, transform, or build upon the material, they may not distribute the modified material. For details, see <https://creativecommons.org/licenses/by-nd/4.0/>.

Views and opinions expressed in the material contained in eucrim are those of the author(s) only and do not necessarily reflect those of the editors, the editorial board, the publisher, the European Union, the European Commission, or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the European Commission are not responsible for any use that may be made of the information contained therein.

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.

Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.

All content is freely accessible at <https://eucrim.eu>, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.

The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



Co-funded by
the European Union