

# The State of Transposition by France of the EU Directives on the Rights of Suspects in Criminal Proceedings

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## Article

### ABSTRACT

The article assesses France's transposition of EU directives on the rights of suspects in criminal proceedings. While reforms have strengthened participation in trials, the right to information, and access to interpretation and translation, implementation often falls short of the directives' spirit. Access to a lawyer during police investigations remains limited, with restrictions on private meetings and delayed access for detained suspects. Disclosure of case materials is only partially ensured, and the use of self-incriminating statements continues despite ECtHR case law. Gros concludes that France has transposed the directives literally but without ambition, prioritising procedural efficiency and security over robust protection of suspects' rights, raising questions about the future of the French investigative judge model.

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# Introduction

The suspect is the key figure in procedural criminal law. To some extent, he is the reason for being of all criminal procedure, since the latter aims at setting up rules in order to protect him from unfounded accusations and arbitrariness. In line with the Stockholm Programme of 2010, the last few years have seen the EU strengthening the rights of suspects and accused persons.<sup>1</sup> It adopted a number of directives with the purpose of providing suspects with the means to understand, participate in, and complain about criminal proceedings, so that they are able to defend themselves effectively, in accordance with the right to a fair trial.<sup>2</sup> Although the directives entail minimum rules to which each Member State is free to give a broader scope, they sometimes have a deep impact on legal traditions. This is especially so in France.

The protection of suspects in French criminal procedure was not found to meet European standards and hence needed to keep on reforming so as to comply with the requirements of the directives. Indeed, initially, criminal procedure in France used to be based on an inquisitorial model in which suspects were hardly given a chance to defend themselves before their case was brought to court for judgment. It has nevertheless gradually turned into a mixed model including strong adversarial features. In France, investigations of serious or complex offenses are supervised by so-called "investigative judges." (*juges d'instruction*)<sup>3</sup> As soon as these judicial investigations have been launched, the suspects and their lawyers are granted the right to participate broadly in the investigations. But in cases in which no judicial investigations are launched or no investigative judge is appointed to the case in the first place, investigations are carried out exclusively by the police, under the supervision of the prosecutor.<sup>4</sup> They remain within a legal framework in which suspects are granted few rights. As a result, the protection of suspects is unbalanced, as it depends on the procedural stage in question.

Therefore, the need for transposition of the directives was unequal and mainly concerned police investigations. France has adopted laws just before the deadline for the purpose of compliance.<sup>5</sup> The changes regarding how suspects are handled during criminal proceedings are now evident. However, it is arguable that the transposition by France did not go far enough. There are some misgivings as to whether France has transposed the directives in a way that respects both their wording and their spirit. Although French legislation now enables suspects to participate more actively (below II.), the recent reforms may have failed to provide them with the means to defend themselves effectively at every stage of the criminal proceedings (below III.) .

## II. Implementing the Right of Suspects to Participate in Criminal Proceedings

French criminal procedure has fully incorporated a cornerstone of the adversarial system: the participation of the suspect into the criminal proceedings. For suspects, when they are summoned to appear before a Court and become accused persons, participation means physical attendance at their trial (I.1), but also having the capacity to understand the proceedings and to express themselves (I.2).

### The right of accused persons to attend their trial

The EU legislator intended to strengthen the right of accused persons to be present at their trial in the Member States and laid down the framework for "trials in absentia". Directive 2016/343 imposes on Member States the obligation to ensure that the accused persons are informed about the upcoming trial and that they have the right to attend it. In absence of the accused, a valid trial can only take place when he has been

unsuccessfully summoned or when he is duly represented by a lawyer.<sup>6</sup> Otherwise, the imposed sentence is challengeable and the accused person has the right to a new trial.<sup>7</sup> This is the case, for example, when a fugitive is sentenced *in absentia* while he is on the run and later caught.

The current French legislation was already in compliance with these requirements even before the directive was adopted. However, that has not always been the case. The ECtHR very much influenced the development of French legislation. The Strasbourg court held that the former French legislation, which denied an absent accused person the right to be represented by a lawyer, contradicted the right to a fair trial, despite the fact that the absent convict had the possibility to apply for a retrial anyway.<sup>8</sup> The legislation was modified in 2004 by a law that repealed the old "*contumace*" procedure.<sup>9</sup> Today's legislation corresponds both to the requirements of the directive and to ECtHR case law. Indeed, a trial is only valid in the absence of a person accused of a general offense ("*délit*") if he is represented by a lawyer or if he has been correctly summoned.<sup>10</sup> Otherwise, he is sentenced in default and has the right to a new trial.<sup>11</sup> When the accused is tried for a serious offense ("*crime*") before an Assize Court, the provisions of French legislation even go beyond the requirements of the directive, as even the person represented by a lawyer is granted the right to a retrial in any case.<sup>12</sup>

## The right of suspects to understand the proceedings and to express themselves

In order for suspects to be involved in the proceedings, they must be given the opportunity to understand what charges they are facing and to be heard. This objective is targeted by two directives that have, on the whole, been implemented properly by France: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU on the right to information.

Directive 2012/13/EU foresees that suspects should be promptly provided with two types of information: information about their procedural rights and information about what accusations are being made against them. First, suspects are to be informed about their rights in the criminal proceedings.<sup>13</sup> Although the obligation for the investigators to notify the suspects about their rights was already provided for in French criminal procedure, this obligation has been reshaped and extended in order to match the requirements of the directive.<sup>14</sup> The scope of the notification now notably includes the right to be assisted by a lawyer, the right to interpretation, and the right to communicate with third parties.<sup>15</sup> As required by the directive, the arrested person is to be given a letter of rights, which he is allowed to keep throughout the time he is deprived of liberty.<sup>16</sup> Furthermore, all suspects, are now to be notified of their procedural rights.<sup>17</sup> Under the former legislation, only suspects in custody were. Secondly, suspects are to be informed about the accusations.<sup>18</sup> Here again, the transposition of the directive only led to minor changes. Such an obligation on the part of investigators already existed under the French Code of Criminal Proceedings. The transposition of the directive only made this obligation more precise, as the suspect is now to be told the place, the time, and the legal classification of the offense he is suspected of.<sup>19</sup>

Directive 2010/64/EU aims at giving foreign suspects or suspects with hearing or speech impediments the opportunity to participate effectively in criminal proceedings. Member States shall ensure that, when suspects appear before investigative and judicial authorities, they are provided with interpretation "*of a quality sufficient to safeguard the fairness of the criminal proceedings*" without delay.<sup>20</sup> Suspects are also to be provided with a written translation of "*essential documents*" within a reasonable period of time.<sup>21</sup> As a result, appropriate measures have been taken in French law. Indeed, the right to interpretation and to translation of essential documents for the duration of the proceedings is solemnly granted at the very beginning of the French Code of Criminal Proceedings.<sup>22</sup> The description of the obligations with respect to the scope and timing of the interpretation and translation meets European requirements.<sup>23</sup> However, one negative point

must be highlighted. According to the directive, Member States are required to set up a mechanism or a procedure in order to assess whether the person needs an interpreter or not.<sup>24</sup> Such a mechanism is not provided for in French law. When the authorities have doubts about whether the person understands and speaks French, they merely have to "verify" this "by all means."<sup>25</sup>

By way of guaranteeing their presence or representation at trial, making sure they know what they are accused of and enabling them to overcome the barrier of language, French criminal procedure undoubtedly gives suspects the means of participating in the proceedings. However, we will now see that formal participation of the suspects is useless if they are not able to defend themselves effectively.

### III. Implementing the right of suspects to defend themselves effectively in criminal proceedings

The implementation of the right of suspects to defend themselves effectively must be examined at two crucial phases of the criminal proceedings: during police investigations (below 1.) and in the trial phase (I.2).

#### The right of suspects to defend themselves during police investigations

At the first stage of the criminal proceedings, when the investigations are still in the hands of the police and the prosecution, decisive evidence might be collected because the facts are fresh and persons may have been caught in the act. In the eye of the European legislator, suspects must already be given the ability to defend themselves on this occasion by way of access to a lawyer and to the materials of the case.

Directive 2013/48 states that suspects shall have the right of access to a lawyer "in such time and in such manner so as to allow (them) to exercise their rights of defence practically and effectively."<sup>26</sup> Even though this access is facilitated by the fact that suspects can apply for, and benefit from, legal aid in a way which fits the requirements of Directive 2016/1919 on legal aid,<sup>27</sup> it appears that France has shied away from ambitiously transposing the right of access to a lawyer during police investigations. According to Directive 2013/48, the moment at which a lawyer is allowed to intervene is, in principle, immediately after a person has been notified that he is suspected of having committed an offense, without undue delay.<sup>28</sup> France, however, was compelled to grant access to a lawyer at an even earlier time in order to comply with ECtHR case law. Indeed, according to the ECtHR, the assistance of a lawyer has to be provided "as from the first interrogation of the suspect by the police."<sup>29</sup> The French legislation was thus recently changed so as to allow a suspect to be assisted by a lawyer from this moment on.<sup>30</sup> However, if the suspect is not detained, the assistance of a lawyer is granted under the condition that the alleged offense is punishable by imprisonment. Furthermore, the suspect who is not detained has no right to a private meeting with the lawyer before the hearing.<sup>31</sup> When the suspect is detained in police custody, this private meeting cannot last more than 30 minutes, and the intervention of the lawyer can be postponed up to 24 hours in "exceptional circumstances," with approval of the judiciary.<sup>32</sup>

Further to this, Directive 2012/13 on the right to information in criminal proceedings notably imposes on Member States the obligation to ensure that all suspects are given access "at least to all material evidence in the possession of the competent authority (...) in order to safeguard the fairness of the proceedings and to prepare the defence."<sup>33</sup> This has to happen at the latest "upon the submission of the merits of the accusation to the judgment of a court." A special regime applies to the detained suspect, who is allowed access to all documents that are essential to effectively challenging the lawfulness of the detention.<sup>34</sup> In this respect, the requirements of EU law may be inferior to those set out by the ECtHR. The latter holds that any person charged with an offense has to be given access to the material enabling him to prepare his defence.

According to the ECtHR, a person is considered charged as soon as he is arrested, as he is officially notified that he will be prosecuted, or at the moment when preliminary investigations are opened.<sup>35</sup> In contrast, French legislation gives the accused persons access to all materials, at the latest when the case is brought before the criminal court for judgement. Therefore, even if it may not comply with ECtHR case-law, it still complies with the minimum standards imposed by the EU directive as regards suspects who are not detained. It remains, however, that the requirements of the directive are surely not met as to detained suspects. Indeed, as soon as they are detained by the police, the suspects and their lawyers are only allowed access to the records of the notification of rights, the medical examination, and the hearings.<sup>36</sup>

## Respect for the presumption of innocence on trial

The EU legislator adopted Directive 2016/343, which aims at strengthening certain aspects of the presumption of innocence. Of course, this core principle of all liberal criminal procedures has been, on the whole, properly applied by France for a long time. It holds a constitutional rank<sup>37</sup> and plays a guiding role in the Code of Criminal Proceedings.<sup>38</sup> Any person violating the presumption of innocence may be held liable under civil<sup>39</sup> and criminal law<sup>40</sup>. Nevertheless, the directive contains certain aspects of this principle, with which French criminal law does not entirely comply.

One such aspect is the right not to incriminate oneself.<sup>41</sup> This right is closely linked to the right to have the assistance of a lawyer, and part of the lawyer's mission is to prevent suspects from making self-incriminating statements. This is why the ECtHR holds that any use of such statements to justify a conviction, even together with other admissible evidence, amounts to a violation of the right to a fair trial.<sup>42</sup> The Preliminary Article of the French Code of Criminal Proceedings is not as demanding, when it states that "*no one can be sentenced on the mere ground of declarations they made without having been able to communicate with a lawyer and to be assisted by him.*" *A contrario*, the Code seems to allow the use of self-incriminating evidence in part, together with other integral evidence. This is also the interpretation chosen by the highest French jurisdiction and is reflected in current case law. Indeed, the High Court refuses to review judgments in which the convict "*was not sentenced exclusively and essentially on the mere ground of self-incriminating statements.*"<sup>43</sup> Although this solution is not expressly prohibited by the Directive, it seems however to be in discordance with ECtHR case law.

## IV. Conclusion

France transposed the EU directives on the rights of suspects and accused persons in criminal proceedings literally. However, there are a lot of aspects which do not correspond to the spirit of the Directives. On the one hand, all provisions that were missing in French law have now been provided for in the French Code of Criminal Proceedings. On the other hand, however, the exercise to comply with European standards transposition was not carried out in an ambitious manner. Provisions on the right of access to a lawyer and to the materials of the case were transposed while using the full extent of the derogations allowed by the relevant provisions of the directives. This lack of a strong will to extend the rights of suspects in criminal proceedings could be interpreted as disinterest in the issue at a time when the political emphasis is quite set on the security and efficiency of criminal proceedings instead of protecting the individuals' rights. Furthermore, one must consider that the EU's influence could lead the current French procedural model to collapse along with its key figure: the investigative judge. The protection of suspect's rights can be seen as a reason for the existence of judicial investigations in the French procedural model. If broad rights are granted to suspects from the moment the police investigations are initiated, supporters of the abolition of investigative judges

may hence argue that maintaining a separate procedural framework of judicial investigations is now superfluous.

1. European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, O.J. C 115, 4 May 2010, 1.↵
2. Directive (EU) 2010/64 on the right to interpretation and translation, O.J. L 280, 20. October 2010, 1; Directive (EU) 2012/13 on the right to information, O.J. L 142, 22 May 2012, 1; Directive (EU) 2013/48 on the right of access to a lawyer and the right to communicate with third parties, O.J. L 294, 22 October 2013, 1; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, O.J. L 65, 9 March 2016, 1; Directive (EU) 2016/1919 on legal aid, O.J. L 297, 4 November 2016. For an explanation of these Directives see also Cras/De Matteis, (2010) *eucrim*, 153; Cras/De Matteis, (2013) *eucrim*, 22; Cras, (2014) *eucrim*, 32; Cras/Erbežnik, (2016) *eucrim*, 25; and Cras in this issue.↵
3. Articles 79 to 230 of the French Code of Criminal Proceedings (CPP).↵
4. A criminal case usually starts with police investigations. The appointment of an investigative judge comes at a later step. However, all criminal cases are not managed by an investigative judge. Cases considered as minor only lead to police investigations.↵
5. Law No 2013-711 of 5/08/2013 along with decree No 2013-958 of 25/10/2013 and law No 2014-535 of 27/05/2014.↵
6. Art. 8 Directive (EU) 2016/343, op. cit. (n.2).↵
7. Art. 9 Directive (EU) 2016/343, op. cit. (n.2).↵
8. ECtHR, 13 February 2001, *Krombach v. France*, Appl. no. 29731/96; the Court concluded that there was a violation of Art. 6 (1) taken in conjunction with Art. 6 (3 lit.c) ECHR.↵
9. Law No 2004-204 of 09/03/2004.↵
10. Art. 411 CCP.↵
11. Articles 412 together with 487 and following CCP.↵
12. Articles 379-2 and following CCP.↵
13. Which, according to Art. 3 Directive (EU) 2012/13, op. cit. (n.2), include the right of access to a lawyer, the possibility of applying for legal aid, the right to know about the accusation, the right to interpretation and translation, and the right to remain silent.↵
14. Law No 2014-535 of 27/05/2014, op. cit. (n. 4).↵
15. Articles 61-1, 63-1, 113-4, and 116 CCP.↵
16. Articles 63-1 and 803-6 CCP.↵
17. Art. 61-1 CCP.↵
18. Art. 6 Directive (EU) 2012/13, op. cit. (n.2).↵
19. Articles 61-1, 63-1, 113-4, and 116 CCP.↵
20. Art. 2 Directive (EU) 2010/64, op. cit. (n.2).↵
21. Art. 3 Directive (EU) 2010/64 op. cit. (n.2).↵
22. Preliminary article, III CCP.↵
23. Articles D594 and following CCP.↵
24. Art. 2 (4) Directive (EU) 2010/64, op. cit. (n. 2).↵
25. Articles 803-5 and D 594-1 CPP.↵
26. Art. 3 (1) Directive 2013/48/EU, op. cit. (n. 2).↵
27. Directive (EU) 2016/1919, op. cit. (n. 2), whose requirements are to my mind sufficiently fulfilled by law No 91-647 of 10/07/1991 and decree No 91-1266 of 19/12/1991.↵
28. Art. 2 (1) together with Art. 3 (2) Directive (EU) 2013/48.↵
29. ECtHR, 27 November 2008, *Salduz v. Turkey*, Appl. no. 36391/02.↵
30. Art. 63-3-1 CCP, created by law No 2011-392 of 14/04/2011 and Art. 61-2, created by law No 2014-535 of 27/05/2014.↵
31. Art. 61-2 CCP.↵
32. Articles 63-4 and 63-4-2 CCP.↵
33. Art. 7 (2-3) Directive (EU) 2012/13, op. cit. (n. 2).↵
34. Art. 7 (1) Directive (EU) 2012/13, op. cit. (n. 2).↵
35. ECtHR, 27.06.1968, *Neumeister v. Austria*, Appl. no. 1936/63; ECtHR, 27.06.1968, *Wemhoff v. Germany*, Appl. no. 2122/64; ECtHR, 16.07.1971; *Ringeisen v. Austria*, Appl. no. 2614/65; together with ECtHR, 09.05.1977, *X v. Belgium*, Appl. no. 2614/65.↵
36. Art. 63-4-1 CCP.↵
37. Art. 9 of the 1798 Declaration on the Rights of Man and of the Citizen.↵
38. Preliminary article III of the CCP.↵
39. Art. 9-1 of the French civil code.↵
40. Art. 29 of the Law on the freedom of the press of 29 July 1881 and Art. 226-10 of the Criminal Code.↵
41. Art. 7 (2) Directive (EU) 2016/343, op. cit. (n.2).↵
42. ECtHR, 27.11.2008, *Salduz v. Turkey*, Appl. no. 36391/02.↵
43. Cour de cassation, criminal chamber, 06.12.2011, No 11-80326; 20.03.2012, No 11-83638.↵

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