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OUTCOMES OF THE TRAINAC STUDY BY THE CCBE/ELF

ERA SEMINAR "APPLYING PROCEDURAL RIGHTS
UNDER THE CASE LAW OF THE CJEU
(1TH FEBRUARY 2021)

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THE COUNCIL OF BARS AND LAW SOCIETIES IN EUROPE (CCBE)

- Representing more than 1 million lawyers in europe, through their Law Societies and Bar Associations.
 - 31 full members and 13 observers.
- Recognized as the voice of the legal profession.
- CCBE aims:
 - Regulation of the legal profession.
 - Defence of the rule of law.
 - Defence of human rights and democratic values.



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THE TRAINAC PROJECT ORIGINIS. OBJETIVES




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- The TRAINAC Project is an investigation project founded by the EU's Justice Programme and carried out by the CCBE and the ELF (European Lawyers Foundation).
- The aim was to provide an assessment by defence practitioners in the the EU of the implementation of the firsts three Directives on procedural safeguards:
 - Directive 2010/64, on the right of interpretation and translation.
 - Directive 2012/13, on the right of information.
 - Directive 2013/48, on the right of access to a lawyer.
- The study was published in 2016.
 - <http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf>



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THE TRAINAC PROJECT METHODOLOGY




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- Meetings with the appointed experts from 26 EU countries (Germany and Romania excluded).
- Widespreading a questionarie amongs defense practitioners of each countries.
- Compiling the information gathered in the questionaries and provided by each country experts in a final document.

OUTCOME


THE DIRECTIVE ON THE RIGHT TO INTERPRETATION AND TRANSLATION




- Inadequate quality requirements (p. 13).
- Lack of systematic approaches to ascertain the necessity of translation/interpretation (p. 13).
- Different approach to essential documents for translation (p. 15).
- Lack of safeguards for the confidentiality of communication between suspected or accused persons and their legal counsel (p. 12).
- Some Member States limit the scope of the right to interpretation for communication with legal counsel (p. 12).

OUTCOME


THE DIRECTIVE ON THE RIGHT OF INFORMATION




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- Extent, format, communication and temporal scope of the rights are not consistent across the Member States (p. 42/44)
- The information provided is often not clearly understandable (p. 40).
- The Letter of Rights for suspects or accused persons who are arrested or detained are not always provided in a timely way (p. 41).
- Letters of Rights do not always cover all the rights prescribed by the Directive (p. 35/36).
- Some Member States do not have a specific Letter of Rights for EAW, as prescribed by the Directive (p. 38).
- Some Member States have no specific provisions to challenge the lack of information (p. 53).



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OUTCOME

THE DIRECTIVE ON THE RIGHT TO BE ASSISTED BY A LAWYER

- Delay between the arrest and notification of the lawyer (p. 60/61).
- Limited role permitted to lawyers during questioning of suspects (p. 62/63).
- Difficulties in meetings in private with the lawyer (p. 63/64).
- The scope of the derogations is overly broad and open to abuse (p. 66).
- Weak remedies (p. 75).



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FURTHER DEVELOPMENTS

- Report from the **FRA**: Rights of suspected and accused persons across the EU: translation, interpretation and information (**2016**).
- Report from the **COMMISSION** to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (**2018**).
- Report from the **FRA**: Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings (**2019**).

ERA online seminar,
1 February 2021



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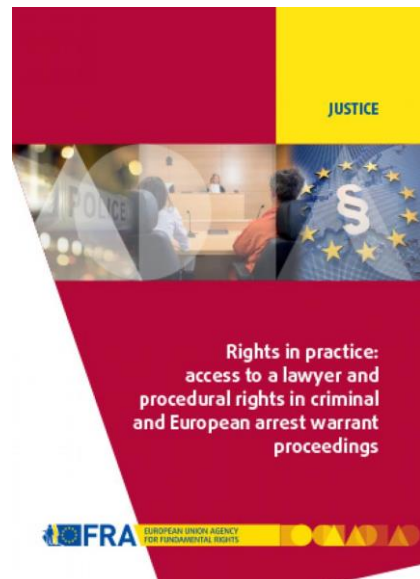
Outcomes of the FRA report

***'Rights in practice: access to a lawyer and
procedural rights in criminal and European
Arrest Warrant proceedings'***

Dr. Matylda Pogorzelska
Project manager



Report available on the [Agency's website](#)



At the European Commission's request, FRA assessed and presents in its report on how the procedural defence rights enshrined in

- **Directive 2013/48/EU** on the right of access to a lawyer in criminal proceedings and in EAW 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;
- **Directive 2010/64/EU** on the right to interpretation and translation in criminal proceedings
- **Directive 2012/13/EU** on the right to information in criminal proceedings

are being implemented in practice across eight Member States.

Member States researched:

Austria, Bulgaria, Denmark, France, Greece, the Netherlands, Poland, Romania

- All bound by the EAW FD.
- All – except for Denmark (specific opt-out agreement) – are bound by the Roadmap's measures.
- All EU Member States, however, regardless of any opt-out regime, are bound by the minimum standards of defence rights as developed in the case law of the European Court of Human Rights and embodied in the Roadmap's instruments.

Objective and focus of the research:

Objective:

- Examine how authorities fulfil, in practice, their obligations regarding the procedural rights of defendants in certain contexts.

Focus:

National proceedings involving persons who are suspected of a crime, are summoned for questioning, but are not deprived of their liberty.

National proceedings involving persons who are suspected of a crime, are summoned for questioning, and deprived of their liberty.

Cross-border proceedings involving persons arrested pursuant to an EAW.

FRA's report is based on:

(Small) Desk research and Social fieldwork research

252 interviews - conducted in 2018.

These included:

- **169 criminal justice professionals** (judges, prosecutors, police officers, lawyers, staff of monitoring statutory bodies)
- **83 defendants** (48 arrested in the state in which they were charged and 35 arrested in another EU country based on an EAW)

Member State	Defendants in national proceedings	Defendants in EAW proceedings	Lawyers	Police officers	Judges and prosecutors	Members of bodies that monitor detention facilities	Total number of interviewees
AT	5	5	6	4	6	3	29
BG	5	6	6	5	4	3	29
DK	5	4	4	6	6	4	29
FR	10	3	8	8	7	5	41
EL	6	4	6	5	5	3	29
NL	4	2	7	7	4	2	26
PL	7	7	6	7	9	3	39
RO	6	4	4	6	7	3	30
Total	48	35	47	48	48	26	252

Key findings:

- Defendants are not always effectively informed about their rights
- At the initial stage defendants are sometimes questioned as witnesses
- Access to legal assistance is often delayed
- Defendants do not receive accurate information about the charges and reasons for their arrest

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Defendants are not always effectively informed about their rights

- Most practitioners and defendants agree that defendants **receive this information before the first official questioning**.
- The **information given differs in its scope and content, and in how it is conveyed**.
- Several **factors** determine whether or not defendants receive information about their rights in an effective manner. These include, among others:
 - Assigning defendants a procedural status other than that of a suspect
(*e.g. person of interest, witness, person invited for an 'intelligence talk'*)
 - Barriers to defendants accessing information due to particular vulnerabilities
(*e.g. language barriers, lack of education, disabilities or intoxication*)
 - Accessibility of the format in which the information about rights is provided.
 - Authorities not having practices to verify a defendant's understanding of the information provided, especially when no lawyer is present.

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At the initial stage defendants are sometimes questioned as witnesses

- FRA's research identifies cases in which law enforcement authorities question a person as a **witness** or **'informally'** ask them questions, even when there are plausible reasons for suspecting that person's involvement in a crime.

(Means: Defendants do not receive information about their rights as a suspect – in particular, the right to remain silent and not to incriminate themselves.)

- FRA's research also highlights instances in which law enforcement authorities establish **informal practices** so that defendants' self-incriminatory statements, made as a witness, can later be used against them legally in the course of the proceedings

(e.g.: by questioning former witnesses again, this time as defendants, and asking them if they stand by their previous statements)

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Access to legal assistance is often delayed

- Respondents highlight the **crucial** importance of defendants having **access to legal assistance** – especially **from the very beginning** of criminal proceedings.
- Respondents argue that **defendants deprived of liberty, in particular, face difficulties in accessing lawyers directly and/or in private.**

(e.g.: police officers or defendants' relatives call lawyers on their behalf. Sometimes, these calls are significantly delayed after the moment of arrest or detention.)

- When such **'indirect' or delayed contact** occurs, **defendants cannot obtain advice** at an early stage, such as to remain silent.

(→ Lawyers cannot ask questions that may help them to prepare an effective defence.)

- **Defendants deprived of liberty do not always have the possibility of talking to their lawyers in private before the first questioning.**

(→ Instead, where conversations happen at all, they are often short and/or take place in public corridors in the presence of police officers.)

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Defendants do not receive accurate information about the charges and reasons for their arrest

- Respondents indicate that very often, when **informing defendants about the accusations (charges)** against them and the reasons for arrest, authorities tend to limit themselves to indicating the relevant provisions of criminal law, using technical language, and not specifying the actual allegations.
- In some cases, both persons deprived and persons not deprived of liberty receive information about the accusation after some delay, and suspects deprived of liberty learn about the grounds for arrest only after being detained for some time.

Results:

- ❖ creates practical challenges for building an effective defence
- ❖ impedes a defendant's ability to challenge deprivation of liberty, especially for defendants who do not benefit from legal assistance.

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EAW specific results:

- Consent to surrender – defendants are often insufficiently informed about the meaning and the consequences
- Representation in the issuing MS:
 - Authorities in the executing MS very often do not inform about the right to appoint a lawyer in the issuing MS
 - If so, the right remains theoretical due to lack of support
 - Ideally, the issuing MS should provide a list of defence lawyers
- Many shortcomings in the field of translation

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Issues found in EAW procedures:

- Language barriers
 - Right to information
 - Consenting to transfer to another MS
 - Misunderstanding: Persons making decisions contrary to their interests
- Ensuring effective legal representation
 - Access to interpreter
 - Access to a lawyer in issuing MS

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Upcoming
FRA Publication
 on
Procedural (Defence) Rights

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2021

Publication of FRA report
“Presumption of innocence and the right to remain silent and to be present at trial – perspective of professionals from selected Member States”

Directive 2016/343/EU



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**Thank you very much for
your attention!**

[Q&A]

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Thank you



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