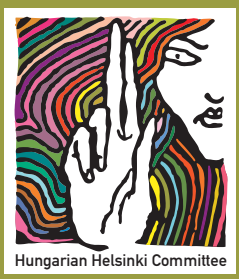
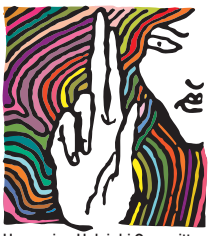


Implementing Article 7 of the Right to Information Directive Across the European Union

COUNTRY STUDIES

2017

Funded by the Justice Programme of the European Union



Hungarian Helsinki Committee

Implementing Article 7 of the Right to Information Directive Across the European Union

COUNTRY STUDIES

2017

Funded by the Justice Programme of the European Union

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Contents

Belgium

Country study prepared by:
Laurens van Puyenbroeck* and *Pieterjan Van Muysen

A) General information

1. Please provide a brief description of the main phases of the criminal procedure in your country.[1]

Belgium has a population of approximately 11 million. It is divided into three regions, each having a separate official language system: the Dutch speaking Flemish region, the French speaking Walloon region and the partly German speaking Walloon region.

The Belgian criminal justice system is primarily based on the French (Napoleonic) Penal and Criminal Procedure Codes.

In 1867 a new Penal Code was introduced in Belgium while the Criminal Procedure Code (CPC) stayed the same as the old Napoleonic Code of 1808. Although it no longer appears in its pure form, the Belgian criminal procedure still has many inquisitorial characteristics.

Many important laws have been made over time to change certain aspects of the criminal procedure. Since the beginning of 2016 some fundamental reforms are being made to the criminal procedure as to guarantee a more swift and efficient way to hear the cases.

At the time of writing this country study, the Belgian criminal justice system consists of two main phases. The pre-trial or investigation phase on the one hand and the trial phase on the other.

The pre-trial phase is non-adversarial. Its proceedings are in writing and secret. The investigation is not executed autonomously by the police, but is always led by a magistrate, the public

[1] The answer to this question is based upon the following publication: Cape, E., Namoradze, Z., Smith, R. and Spronken, T. (2010), *Effective Criminal Defense in Europe*, Antwerp, Intersentia, pp. 67–72.

prosecutor. In about 10% of the criminal cases, the investigation is led by a competent magistrate, the investigating judge (who is, at the same time, a judge and an examining magistrate). These investigations are referred to as 'judicial investigations'. When specific enforcement orders (for such measures as an arrest warrant or a wire tap) have to be issued, the intervention of an investigating judge is obligatory. The public prosecutor is (except under some legally defined circumstances) not competent to issue such orders. When the investigating judge issues an enforcement order for which he/she is exclusively competent (such as an arrest warrant), the investigation automatically becomes a judicial investigation. Therefore, all criminal cases where a suspect is being kept in pre-trial detention, constitute a judicial investigation.

The investigations that are being led by the prosecutor are since 10 February 2013 partially adversarial.[2] All inquiries are made without the presence of the suspect, although he/she is allowed to request access to the file, as does every directly interested person.

The judicial investigation, on the other hand, has for many years already, been partially adversarial, particularly since the reform in 1998. The formally accused suspects and the civil parties are allowed to request access to the file and to make additional inquiries.

Although there was, before 2013, purely on a legislative level, a difference between both types of investigation, at present this difference has diminished. In practice however, with regard to the investigations that are led by the prosecutor, in the view of the author, due to the lack of any obligation to motivate a denial of the request to access the file, a standard motivation is being given in most cases to deny any access, contrary to the judicial investigation where the investigating judge must give the reasoning for an approval or denial.

The trial phase on the other hand is characterised by adversarial proceedings. However, these proceedings still have some considerable non-adversarial characteristics (cfr. *infra*). The investigation that was led by the prosecutor is ended when the prosecutor decides whether the case should be brought before the trial judge. In that case the prosecutor directly summons the persons involved while stating the crimes in the summons that where allegedly committed by the defendant.

The judicial investigation, that was being led by the investigating judge, can only be ended by the decision of an investigating court which shall be deciding whether the facts of the investigation might constitute an offence and which persons might be responsible. The investigating courts do not rule on the evidence but only state if there are serious indications against any person, which might constitute a criminal offence. After the ruling of the investigating courts, depending on what was decided, the case is being brought before a criminal court.

2 Article 21*bis* CPC.

During the trial phase the criminal file is forming the basis for the trial as it was compiled during the investigation. The trial judge normally will have read the file and will consequently lead the investigation during the trial. The trial judge can order inquiries but the parties cannot call witnesses and interrogate them unless the judge agrees.

In theory all the evidence should be produced at trial. However, in practice the trial phase is usually – except for the Assize Court – restricted to the verification of the evidence procured during the pre-trial investigation.

2. Was the implementation deadline for the Right to Information Directive[3] respected in general, and specifically with regard to Article 7 of the Right to Information Directive?

The implementation of the Right to Information Directive was respected in general. In accordance with this Directive, the Law of 27 December 2012 came into force on 10 February 2013. It was not a law that was exclusively made for implementing the Directive but it had some provisions relating to the right of information during criminal proceedings.

For the rest the Belgian legal system already complied – based upon different laws and case law – with Article 7 of the Right to Information Directive (e.g. article 61*ter* CPC which already provided the right to access to the case materials).

B) The law and practice of access to the case materials in general – Compliance with Article 7 (2)–(5) of the Right to Information Directive

3. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) in the investigative phase of the procedure in general, i.e. the rules applied and the practice followed in your country in this respect in general, irrespective of whether the defendant is arrested/detained or not.

a) Scope of the case materials accessible to the defendant, both in terms of the type of evidence (e.g. are minutes of witness interrogations or expert opinions accessible to the defence or not, etc.) and in terms of the format of the case materials (e.g. are video recordings accessible in their original format or not, etc.)

[3] Directive 2012/13/EU on the right to information in criminal proceedings

During the investigative phase of the procedure, there are two ways of accessing the case materials depending on the kind of investigation that is being executed (cfr. *supra*).

During the investigation led by the prosecutor every involved person (and therefore also the defendant) can ask the prosecutor to be granted access to the case materials, according to article 21*bis* CPC.

Based upon this article the defence may ask to view all the case materials, but the prosecutor may make restrictions. For instance, when the suspect was interrogated, he/she should be given a copy of his/her statement immediately or within one month after the interrogation.[4] In serious and exceptional circumstances the prosecutor may decide with a written motivation that a copy of the interrogation may only be given after a period of 3 months.[5]

During the judicial investigation every involved person may ask the investigating judge for permission to access the criminal file according to article 61*ter* CPC.

In both types of investigation, when access is granted, the suspect may view the whole file unless the prosecutor or investigating judge specifically state that only certain documents may be accessed. Therefore, in general, all witness statements, expert opinions, police information, video files etc. are accessible by the defence.

b) Possible restrictions applicable by authorities (e.g. restricting access for reasons described in Article 7 (4) of the Right to Information Directive or for other reasons)

Access to case materials may be denied during the investigating phase. As mentioned before, the main characteristic of the investigation, irrespective of the person leading the investigation, is the fact that they are confidential. There is no enforceable right to access the criminal file during the investigation, except when the suspect is being detained pending the investigation (cfr. *infra*). As such, only a right to ask for access to the file is embedded within the Belgian law.

The prosecutor as well as the investigating judge is not obligated to motivate their decision.

The law states that the investigating judge can deny access based upon the fact that any access by the suspect could prejudice the ongoing investigation, could endanger some persons or would violate the right to private life of others. At last the suspect should have a legitimate reason to access the file.[6]

4 Article 28*quinquies* §2, al. 1-2 CPC.

5 Article 28*quinquies* §2, al. 3 CPC.

6 Article 61*ter* § 3 CPC.

c) Timing of and deadline for providing access to case materials

Due to the fact that the investigation in general is confidential, the deadline for access to the case materials is at the end of the investigation.

When there was no request made during the investigation to access the criminal file, access will only be granted automatically when the investigation is finished.

When a request was made to the investigating judge, he/she has the obligation to make a decision within one month after the request has been lodged.[7] When the investigating judge does not decide in time, the request must be considered denied.[8]

The prosecutor on the other hand is not bound by any period of time to decide.

d) Format in which access to case materials may/shall be granted (paper copies, electronic format, etc.)

The case materials are only accessible in the courthouse and on paper. Recently, in cases with very large criminal files, these case materials are being provided electronically. However, the defence still has to go to the courthouse during opening hours for accessing the criminal file on a computer.

e) Costs of accessing case materials

Accessing the case materials is free of charge. However, when the suspect orders a copy of the documents, a cost will be charged. The cost of a copy is € 1.75 per page and starting from the third page the cost is € 0.30 per page with a maximum of € 1,450.[9]

f) Possible avenues of remedy (e.g. complaint procedures for denying access) and their effectiveness

During the judicial investigation the suspect is able to appeal the decision of the investigating judge when the access to the case materials was denied. Such an appeal should be motivated and will be brought before the Court of Appeal.

In the prosecutor-led investigation, the law does not foresee any possibility for appeal. Therefore, in practice, the request of a suspect in almost all cases is being denied with a standard motivation, no remedy being possible.

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7 Article 61*ter* § 2 CPC.

8 Article 61*ter* § 6 CPC.

9 Article 272 §1, 1° W. Reg.

Recently however, the Constitutional Court decided that a possibility to appeal the decision of the prosecutor should be provided.[10] The legal practice has still to show how this ruling of the Constitutional Court affects the right to information.

Although the law has not yet changed accordingly, in practice the courts will apply the same appeal proceedings as during the judicial investigation.

g) Whether violating rules pertaining to access to case materials may result in the non-admission of certain evidence

When the rules of accessing the case materials were violated, the evidence is still being admitted. Only when obtaining the evidence happened in an illegal way, the evidence might be excluded from the case based upon Article 32 of the Previous Title of the CPC.

4. Please indicate whether the rules and the practice are different in the trial phase of the criminal procedure (or in any other phase of the criminal procedure following the investigation) from the rules and practice in the investigative phase. If the rules and/or the practice are different, please elaborate on the differences as compared to the investigative phase.

Due to the fact that the investigation phase is confidential and non-adversarial, the access to case materials is fundamentally different with regard to the trial phase where the defendant is provided with all the evidence that was gathered during the investigation.

5. Has Article 7 (2)–(5) of the Right to Information Directive been implemented on the legislative level and in practice?

On the legislative level, Article 7 (2)–(5) of the Right to Information Directive has been partially implemented. The Belgian law provides legal avenues for the suspect to access the case materials during the investigation phase. However, the restrictions that are provided in the fifth paragraph are not specifically mentioned in the Belgian legislation.

In addition, Article 7 of the aforementioned directive provides for a right to information. The Belgian legislator did not provide such a right in the Belgian legislation. A suspect merely has the right to ask for access to the case materials.

10 Constitutional Court 25 January 2017, nr. 6/2017.

Only in two cases is an exception made to the lack of the right to access the information. Firstly, when the suspect is placed in pre-trial detention (cfr. *infra*). Secondly, when the judicial investigation is finished and the investigation courts must decide on how the case is to proceed. All suspects have at that time the right to view the file during a period of at least 15 days before the hearing (or a period of three days when one of the suspects is being held in pre-trial custody).[11]

6. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (2)–(5) of the Right to Information Directive, both in terms of the law and the practice.

The first major problem with the decision whether to grant or deny access lies in the fact that there does not exist any obligation to motivate the decision. Consequently, in practice, the decisions are not motivated and do not allow the suspect to fully understand the reasons of the prosecutor or the investigating judge.

The second major problem is the lack of the right to information during the investigation. As mentioned before, a right to request is provided in law but a right to information is not.

7. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (2)–(5) of the Right to Information Directive?

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C) The law and practice of access to the case materials in case of arrested/detained persons – Compliance with Article 7 (1) and (5) of the Right to Information Directive

8. Please provide information on the scope of persons who fall under the category 'arrested and detained' in your country in terms of Article 7 (1) of the Right to Information Directive. Are the respective domestic rules implementing Article 7 (1) of the Right to Information Directive applicable

11 Article 127 CPC.

also to defendants being under house arrest as a pre-trial measure? Are there types of detention (as defined by the case-law of the European Court of Human Rights) that are not covered by the domestic rules aimed at implementing Article 7 of the Right to Information Directive?

Every person who is deprived of his/her liberty qualifies as a person who falls under the category 'arrested and detained' in terms of Article 7 (1) of the Right to Information Directive. Persons who are placed under house arrest as a pre-trial measure, which in Belgium is being executed by an electronic supervision measure, also fall under this category, as this is considered a way of executing the pre-trial detention.[12]

9. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) if the defendant is arrested/detained, i.e. the rules applied and the practice followed in your country.

a) Scope of the case materials accessible to the defendant, both in terms of the type of evidence (e.g. are minutes of witness interrogations or expert opinions or not) and in terms of the format of the case materials (e.g. are video recordings accessible in their original format or not)

When the suspect is being detained during the investigation phase, he/she has access to all the documents, evidence and information that is being gathered in his case (e.g. witness interrogations, expert opinions, police information etc.). He/she may not, however, access the case materials at any moment. The defendant or his/her counsel have access to the case materials only at specific times. (cfr. *infra*).

The suspect must view the materials in the courthouse where it is being provided to him/her on paper. The Belgian justice system is gradually being digitalised and as a consequence to this evolution, the files can be viewed on a computer in the courthouse. When videos are part of the criminal file, it is also possible to view these on a computer in the courthouse.

Taking photocopies of case materials is not allowed except when a special request is made. However, in practice, in some parts of the country it is being tolerated for the lawyer to take photocopies, but they cannot be made public.

12 Article 16 §1, al. 2 Law of 20 July 1990 (*B.S.* 14/08/1990).

b) Possible restrictions applicable by authorities

There are no specific restrictions mentioned in the law regarding the access to all case materials. During the pre-trial detention, the suspect has the right to access all case materials that will be assessed by the judge who shall decide upon the continuing of the pre-trial detention.

One general exception is being made for the special investigation methods (e.g. undercover work, stake-outs and the use of informants).[13] The defence can access the results, but the execution of these special investigation methods is confidential (because otherwise any suspect would know how these investigations are being executed, which would render them useless in the future).

c) Timing and deadline of providing access to case materials

The suspect who is being held in pre-trial detention shall be brought before a judge within five days after the investigating judge had detained him/her.[14] One day before the hearing by the pre-trial detention judge, the suspect is given access to the case materials.[15]

Despite this right to access, the suspect has no access to the case materials when he/she has to appear before the investigating judge who shall decide upon the detention and the issuing of the arrest warrant. The suspect will be interrogated by the investigating judge and will be heard upon the necessity of issuing an arrest warrant. Neither the suspect nor his/her counsel have information on the case materials that the investigating judge has at his/her disposal.

When an appeal is lodged against the first decision of the pre-trial detention judge, the court of appeal will hear the case within 15 days, during which the case materials cannot be accessed by the suspect, except from the new documents which are produced within that period of two weeks and may be accessed within two days before the hearing.[16] In practice, however, the suspect, due to a more practical view on the appeal procedure, may access all case materials during this period of two days before the hearing, although this does not constitute a right.

When the pre-trial detention is being prolonged, it will be reviewed every month and starting from the third decision regarding the pre-trial detention, every two months.[17] Two days before those hearings the suspect is given access to all the case materials as long as he/she is being

13 Article 235*ter* §3 CPC.

14 Article 21 §1 Law of 20 July 1990 (*B.S.* 14/08/1990).

15 Article 21 §2 Law of 20 July 1990 (*B.S.* 14/08/1990).

16 Article 30 §3 Law of 20 July 1990 (*B.S.* 14/08/1990).

17 Article 22, al. 1 - 2 Law of 20 July 1990 (*B.S.* 14/08/1990).

held in pre-trial detention.[18] From the moment the suspect is released, the rules apply as stated under Section B) of this country study (cfr. *supra*).

d) The format in which access to case materials may/shall be granted (paper copies, electronic format, etc.)

See Section B) 3. d) of the present country study.

e) Costs of accessing case materials

See Section B) 3. e) of the present country study.

f) Possible avenues of remedy (e.g. complaint procedures for denying access) and their effectiveness

Denying the access to the case materials when the suspect is being held in pre-trial detention is not subject to any form of remedy on a legislative level.

However, in practice, access to case materials is always provided. And when it is not provided in accordance with the law, the suspect may ask for more time to access the criminal file.

g) Whether violating rules pertaining to access to case materials may result in the non-admission of certain evidence or the release of the defendant

In the exceptional case where access to case materials is prohibited, a non-admission of the evidence is not provided (see Section B) 3. g) of the present country study).

However, in the authors' view, one may argue that his/her rights, according to Articles 5 and 6 of the European Convention on Human Rights, were manifestly violated, which should lead to the immediate release of the defendant. Nonetheless, in practice, this will not result in non-admission of evidence.

10. Please indicate whether the rules and the practice are different in this regard in the various phases of the criminal procedure. If the rules and/or the practice differ, please explain these differences.

While during the investigation led by the prosecutor and the judicial investigation where no person is being detained, a request must be made to access the case materials and restrictions

[18] Article 22, al. 4 Law of 20 July 1990 (*B.S.* 14/08/1990)

can be imposed to the access, a right to access the case materials is automatically provided when someone is being detained during the judicial investigation. In the latter case no request is needed.

However, during the trial phase, irrespective of whether the suspect is being held in detention or not, access is provided to all case materials. Except for the execution of the special investigative measures (cfr. *supra*), no restrictions are imposed.

11. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented on a legal level and in practice?

Article 7 (1) in conjunction with Article 7 (5) of the Right to Information Directive has been partially implemented due to the fact that the suspect cannot access the file when he/she is called to appear before the investigating judge. Afterwards, when the suspect is called to appear before the pre-trial detention judge, a right to access the case materials is provided.

However, no remedy is provided when – although it rarely happens – the access is not provided. The practice usually resolves this by allowing additional time to view the case materials.

Due to the lack of a remedy and the impossibility to access the file when appearing before the investigating judge, in the authors' view, the Right to Information Directive was only partially implemented.

12. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive, both in terms of the law and the practice.

The major problems have already been addressed in this country study. The lack of any remedy against a denial of access and the impossibility to access the case materials when appearing before the investigating judge are the major problems.

13. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive?

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D) Additional information relevant regarding the implementation of Article 7 of the Right to information Directive

In practice one main issue occurs. Many cases begin with police information which is not specified. Sometimes, however, that information is so specific and detailed that it must be concluded that it has been gathered by other investigative actions (for instance a witness, an observation, etc.).

When the defence argues before the trial judge that access to the case materials regarding the source of such information must be given, it is up to the trial judge to decide whether the origin of that information should be made available to the defence or not. Although the European Court of Human Rights explicitly states that it is up to the defence to decide whether documents are relevant in the case,[19] the trial judge may (and often does) deny access to those case materials.

While the implementation of Article 7 of the Right to Information Directive during the trial phase has been processed, in practice, the defendant may encounter the obstacle of (evidence based on) police information, which is kept confidential and is not subject to any examination by the defence.

19 ECtHR, *Bendenoun v. France,* Judgment of 24 February 1994, Application no. 12547/86; ECtHR, *Oral v. Turkey*, Judgment of 25 November 2008, Application no. 18384/04.

England and Wales

Country study prepared by:
Professor Ed Cape

A) General information

1. Please provide a brief description of the main phases of the criminal procedure in your country.

The English and Welsh system of criminal procedure is rooted in the adversarial tradition. There are three phases of criminal procedure: the investigative stage; the trial stage; and the appeal stage. The investigative stage is normally commenced by the arrest of a person on suspicion of a criminal offence, although a person who is suspected of a criminal offence may be interviewed as a 'volunteer', either at a police station or elsewhere, and in the case of certain offences (eg., minor traffic offences), criminal proceedings may be commenced without either interview or arrest. If arrested, the police have power to detain the person for up to 36 hours without charging them with a criminal offence, and in more serious cases can apply to a magistrates' court for a 'warrant of further detention' to detain the person without charge for up to a total of 96 hours from the time that they were initially detained at a police station following arrest. As a result of changes introduced by the Policing and Crime Act 2017, where a suspect is released on bail by the police during the investigative stage (i.e., without having been charged with a criminal offence), the police must apply to a court if they want to extend bail beyond 3 months (or 6 months in certain serious cases), but this procedure does not provide for any additional rights of the suspect to be given access to case materials.

The investigative phase ends, and the trial phase commences, if a person is charged with a criminal offence (which is a decision for either the police or the Crown Prosecution Service, depending on seriousness and/or likely plea), following which they will initially appear at a magistrates' court; although the case may then be transferred to a Crown Court if it concerns an 'indictable' offence. 'Indictable' offences are of two types: indictable-only (eg., murder) or either-way (eg., theft). In the case of the former, following the hearing in a magistrates' court, the case is transferred to the Crown Court. Where a person is charged with an either-way offence, a magistrates' court may direct that it be dealt with in the Court Court or the accused may elect trial in the Crown Court. However, most either-way offences are dealt with in a magistrates' court.

When an accused appears in a magistrates' court, that court will decide whether they should be remanded in custody (pre-trial detention) or released on bail pending trial and/or sentence. However, most cases are dealt with by way of a guilty plea, which means that the primary function of the court is to decide on sentence, and there is pressure on the courts to deal with cases as quickly as possible, and without adjourning them. If an adjournment is necessary, either for trial or sentence, the court will decide whether to remand the accused in custody or to release them on bail. Most defendants are granted bail.

Whether there is an appeal phase depends upon whether the accused appeals against conviction and/or sentence (the prosecution only has very limited rights of appeal), and there are relatively few appeals.

2. Was the implementation deadline for the Right to Information Directive respected in general, and specifically with regard to Article 7 of the Right to Information Directive?

The Directive on the right to information was given effect at the investigative stage by amendments to the relevant statutory codes of practice (Police and Criminal Evidence Act 1984 (PACE) Codes of Practice C and H). These amendments took effect on the transposition date of 2 June 2014, and the provisions of the Directive were largely faithfully transposed.[20] This included the requirements of the EU Directive, Article 7 (1) (and Article 7 (5) in so far as it relates to Article 7 (1)), but not Article 7 (2)–(4). No action was taken to transpose the requirements of Article 7 in respect of the trial and appeal phases – it appears to have been assumed by the Ministry of Justice, and other relevant bodies, that existing law already satisfied the requirements. However, amendments were subsequently made to the Criminal Procedure Rules in respect of disclosure prior to hearings at which pre-trial detention is to be considered (see further below).

B) The law and practice of access to the case materials in general – Compliance with Article 7 (2)–(5) of the Right to Information Directive

3. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) in the investigative phase of the procedure in general, i.e. the rules applied

20 For an analysis of the transposition at the investigative stage in England and Wales, see Cape, E. (2015), 'Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?' *Criminal Law Review*, Issue 1, pp. 48–67.

and the practice followed in your country in this respect in general, irrespective of whether the defendant is arrested/detained or not.

It is important to remember that in English and Welsh criminal procedure, the investigative stage does not involve appearance before a court; except for the limited purpose of an application for a warrant of further detention or in respect of an application to extend the period of bail without charge (see Section B) 1. above). Article 7 (3) of the Directive states that access to 'all material evidence' must be granted 'at the latest upon submission of the merits of the accusation to the judgement of the court', and a case is not submitted to a court for judgement as to the merits during the investigative stage. It appears, therefore, that the government has taken the view that the Directive does not impose an obligation to grant access to the material evidence during the investigative stage.

There is no obligation in legislation or the PACE Codes of Practice for the police to grant access to material evidence during the investigative stage (but see Section C) below regarding the obligation to grant access to documents that are essential for challenging the lawfulness of arrest or detention during the investigative stage). The disclosure obligation at the investigative stage is limited to: (a) the obligation to inform a person who has been arrested that they are under arrest, and the grounds for the arrest (PACE s. 28); (b) the reasons for detention at a police station following arrest (PACE s37(5)); and (c) information to enable the suspect to understand the nature of the suspected offence and why they are suspected of it (Code C, para 11.1A). However, these obligations are obligations to provide information rather than access to relevant case materials.

With regard to (a), case-law has taken a limited approach to how much information needs to be given. The European Court of Human Rights (ECtHR) has held, in respect of a UK applicant, that an arrested person must be told 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest'.[21] Whilst, in principle, this approach has been adopted by the English and Welsh courts, in one case, the Court of Appeal held that where a person was arrested on suspicion of violent disorder that it would ordinarily be sufficient for the police simply to say that the person concerned was being arrested on suspicion of violent disorder at a particular time and place.[22] This approach is reflected in PACE Code of Practice C, which states that the arrested person must be informed of the nature of the suspected offence and when and where it was allegedly committed (Note for Guidance 10B).

With regard to (b), the statutory requirement is that a person detained at a police station must be informed of grounds for detention. Research evidence indicates that the normal procedure is for the custody officer to recite one or both of the statutory grounds (to secure or

21 *Fox v UK* (1991) EHRR 157 at [40].

22 *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858.

preserve evidence, or to obtain evidence by questioning), without providing information about how these relate to the facts of the particular case.[23]

With regard to (c), Code C, para. 11.1A (which was inserted in Code C in order to comply with Article 6 (1) of the EU Directive),[24] provides that before a person is interviewed

> '… they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of [the suspected] offence and why they are suspected of committing it, in order to allow for the effective exercise of the rights of the defence'.

The obligation is, however, qualified by the requirement that whilst the information must always be sufficient for the suspect to understand the nature of the offence for which they have been arrested and detained, 'this does not require the disclosure of details at a time which might prejudice the criminal investigation' (para. 11.1A). A Note for Guidance attached to the Code states that the information to be provided should normally include, 'as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question' (Note for Guidance 11ZA) – although it is a matter of discretion for the police officer concerned to interpret the requirement that the information be sufficient to enable the suspect to understand the nature of the offence etc. Despite the clear terms of Code C, para. 11.1A, the Association of Chief Police Officers issued a Position Statement stating that pre-interview disclosure should not be given to suspects who are not represented by a lawyer – which is clearly contrary to both Code C and the EU Directive, Article 6 (1).[25]

In terms of practice, it seems that the amount of information provided by the police at the investigative stage depends very much on the nature and seriousness of the suspected offence, and the particular police officer concerned. In the only published research based on fieldwork conducted since the amendments of Code C came into force, it was found that pre-interview disclosure (i.e., the provision of information, as opposed to access to materials) was routinely provided in cases where the suspect was legally represented, but that it varied considerably in terms of the amount of detail provided, and that this depended upon the strategy adopted by the officer dealing with the case. Sometimes, the officer would show

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23 See, for example, Blackstock, J., et al. (2014), *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*, Antwerp, Intersentia.

24 Prior to this, it had been held that the police were under no obligation to provide disclosure regarding the suspected offence other than that required by the PACE s. 28 (*R v Imran* [1997] Crim L.R. 754).

25 ACPO, *National Policing Position Statement: Pre-Interview Briefings With Legal Advisers and Information to be Supplied to Unrepresented Detainees*, National Investigative Interviewing Strategic Steering Group, June 2014. Note that ACPO has since been disbanded and replaced by the National Police Chiefs Council.

materials to the lawyer (and sometimes the suspect), for example, CCTV footage or screen-shots of mobile telephone records, but the police would often withhold information.[26] Ministry of Justice guidance, *Simple Cautions for Adult Offenders*, provides that before administering a caution,[27] the police must inform the suspect of the evidence against them. However, it has been held that this does not extend to requiring the police to provide access to materials.[28]

4. Please indicate whether the rules and the practice are different in the trial phase of the criminal procedure (or in any other phase of the criminal procedure following the investigation) from the rules and practice in the investigative phase. If the rules and/or the practice are different, please elaborate on the differences as compared to the investigative phase.

The position at the trial phase of proceedings differs significantly from the position at the investigative stage. Being a common law jurisdiction, there is no concept of a *dossier*, but there is a long established requirement for the prosecution to provide the defence with the evidence on which it intends to rely at trial, in advance of the trial (known as 'used material'), and this is now largely governed by the Criminal Procedure Rules (CrimPR), which are issued under legislative authority. The only evidential material that the court will see is that produced in evidence either by the prosecution or by the defence. The two major issues are: (a) the stage at which access to 'used materials' must be provided, and what must be provided (particularly having regard to the fact that England and Wales has a guilty plea system); and (b) the obligation to disclose information or materials which have been gathered by the police, but which the prosecution does not intend to use at trial (known as 'unused material'). Subject to the exception noted below, no changes were made in response to the EU Directive on the right to information because, presumably, it was believed that England and Wales was already in compliance.

The stage at which access must be provided and what must be provided

The prosecutor must serve 'initial details' of the prosecution case

- on a defendant who requests them, as soon as practicable, and no later than the beginning of the day of the first hearing;
- on a defendant who does not request them, at or before the beginning of the day of the first hearing (CrimPR, r. 8(2)).

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26 Sukumar, D., Hodgson, J. and Wade, K. (2016), 'Behind Closed Doors: Live Observations of Current Police Station Disclosure Practices and Lawyer-Client Consultations' *Criminal Law Review*, Issue 12, pp. 900–914.

27 A simple caution is an out-of-court disposal which is determined and administered by the police, usually in respect of a minor offence, and which require and admission of guilt by the suspect.

28 *R (Manser) v Commissioner of the Police for the Metropolis* [2015] EWHC 3642 (Admin).

The 'initial details' depend upon whether, immediately before the first court hearing, the defendant was in police custody. If the defendant was in police custody (i.e., they were kept in police custody after being charged with the offence, pending the first court appearance), the initial details are a summary of the circumstances of the offence, and the defendant's criminal record, if any (CrimPR, r. 8.3(a)). If the defendant was not in police custody immediately before the first court hearing (eg., they had been released on bail after having been charged with the criminal offence), the initial details are:

(i) a summary of the circumstances of the offence,

(ii) any account given by the defendant in interview, whether contained in that summary or in another document,

(iii) any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence,

(iv) the defendant's criminal record, if any, and

(v) any available statement of the effect of the offence on a victim, a victim's family or others (CrimPR, r. 8.3(b)).

In addition to the obligation to provide 'initial details' under the CrimPR, the prosecution are required under a statutory code of practice (and common law) to provide the defence with any material which might assist the defence with the early preparation of its case or at a bail (PTD) hearing: for example, relevant previous convictions of key prosecution witnesses, and statements that have been withdrawn by witnesses.[29] As a result of a recent amendment of the CrimPR, if the prosecutor wants to introduce information contained in a document listed in r. 8.3, and the prosecutor has not served that document on the defendant or made the information available to them, the court must not allow the prosecutor to introduce the information unless the court first allows the defendant sufficient time to consider it (CrimPR, r. 8.4). Failure to comply with these rules may result in the court ordering disclosure and/or adjourning the case to allow for disclosure to take place.

Defendants are normally required to plead, or indicate their plea (i.e., guilty or not guilty) at the first court hearing. A Criminal Practice Direction states that the information supplied by the prosecution must be sufficient to allow the defendant and the court to take an informed view on plea and (where applicable) venue (i.e., in an either-way case, whether the case is suitable for trial in a magistrates' court or in the Crown Court). However, it can be seen that the disclosure obligation potentially falls short of the requirements of Article 7 (2) and (3) in cases where the defendant was in police custody immediately before the court hearing. The view to be taken of this depends upon whether the first court hearing is regarded as a hearing at which the merits of the accusation are considered by the court. In the sense

29 Criminal Procedure and Investigations Act 1996 Code of Practice, paras. 6.6 and 78.1.

that no trial takes place, it can be argued that the court does not consider the merits of the accusation. However, in the context of the guilty plea system (by which a court may never consider the merits of the accusation if the defendant pleads guilty), and given that Article 7 (2) provides that material evidence should be disclosed 'in order to safeguard the fairness of the proceedings and to prepare the defence', it can be strongly argued that the provisions do not comply with Article 7. This is ameliorated, to a certain extent, by the new r. 8.4. However, defence lawyers complain that courts are pressurising their clients to plead before they have had access to, and have had sufficient time to consider, the material evidence.

Where a defendant pleads not guilty, the disclosure process differs depending up whether the case is tried in the Crown Court or in a magistrates' court. Where a defendant is sent for trial in the Crown Court, copies of the documents containing the evidence on which the charge(s) are based must be served on the defendant within 50 days from the date on which the defendant is sent for trial if they are in pre-trial detention, or otherwise within 70 days (which reflects the fact that, generally, trials of defendants who are in pre-trial detention are listed more quickly than those of defendants who are on bail).[30] This disclosure may be provided electronically, but there is no charge whether it is provided electronically or in hard copy. If the prosecution fail to serve the documents, the court has power to order disclosure.

In the case of trials in a magistrates' court (summary trials), there is no statute or rule requiring disclosure of the material evidence. However, the normal practice of the Crown Prosecution Service is to serve on the defendant, or their lawyer, all the evidence (eg., witness statements, CCTV footage, etc.) upon which they intend to rely at trial. It appears that the CPS normally comply with this practice, although defence lawyers sometimes complain of late service. If relevant material is not served on the defence in advance of trial, the court has power to adjourn the case to allow for the material to be served, and also has power to dismiss the prosecution. It might be argued that the lack of regulation of disclosure in summary trials breaches Article 7 (2) of the Directive, although it should be noted that the Directive requires Member States to ensure that access is granted, but does not require that this be regulated by state or statutory rules.

Unused material

The disclosure of 'unused' material is governed by the Criminal Procedure and Investigations Act (CPIA) 1996, and the CrimPR. The prosecution must disclose to the defence any previously undisclosed material (i.e., material that has not been disclosed as 'used' material) which 'might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused' (CPIA 1996, s. 3). In a case that is being tried in the Crown Court, such material must be disclosed irrespective of plea. In a case being tried

30 Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 SI No. 902.

in a magistrates' court, the obligation only applies if the defendant pleads not guilty and the case proceeds to trial. The prosecutor is under a continuing duty to review the issue of disclosure, so that if the prosecutor becomes aware of material that should be disclosed at a time during the trial phase, he or she must disclose it (CPIA 1996, s. 7A). There are no time limits for disclosure, but relevant material must be disclosed as soon as practicable (CPIA 1996, s. 13(1)).

Material must not be disclosed if a court has concluded that it is not in the public interest for it to be disclosed (CPIA 1996, s. 3(6)). Recognised grounds for withholding material on the grounds of public interest include: national security, diplomatic relations and international comity; the proper functioning of public service; police communications; information concerning police informants and information relating to the detection of crime. Note that this only applies to 'unused' material, and material that the prosecution intend to use for the purpose of prosecution (i.e., 'used' material) must always be disclosed in advance of trial.

In terms of enforcement, the defence can make an application to the court for disclosure of 'unused' material although this, of course, assumes that the defence is aware of it (CPIA 1996, s. 8). A failure or refusal of the prosecution to disclose relevant 'unused' material may result in the defence making an application to stay proceedings as an abuse of process, and may also provide the basis for an appeal. For example, in one case, a conviction was quashed where the prosecution failed to disclose videos relating to surveillance of the defendant's business premises.[31]

5.1. Has Article 7 (2)–(5) of the Right to Information Directive been implemented on the legislative level?

As noted in Sections B) 3. and 4., Article 7 (2)–(5) has been partially implemented by amendment to the statutory PACE Code of Practice, and by amendment of the CrimPR, and in certain other respects was already reflected by the CrimPR.

5.2. Has Article 7 (2)–(4) of the Right to Information Directive been implemented in practice?

There is limited evidence of how the provisions are operating in practice, but broadly it is possible to conclude that the provisions have been partially implemented and, in some respects, the provisions were already reflected in practice before the Directive came into force.

31 *R v Hadley* [2006] EWCA Crim 2544.

6. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (2)–(5) of the Right to Information Directive, both in terms of the law and the practice.

- There is only a limited right of access to material evidence at the investigative stage (see Section 3. above), disclosure is very dependent on discretionary decisions made by police officers, with no right of review (although the suspect can make a formal complaint), and the police have challenged the requirement that disclosure be given to unrepresented suspects.
- The law provides for only limited access to material evidence at the early stages of the trial phase, and this is especially so where a defendant appears in a magistrates' court in police custody. This is exacerbated by the fact that there is systemic pressure on defendants to plead, or to indicate a plea, at the first hearing.
- The right of access to material evidence in summary trials (i.e., 'used' material) is not governed by statutory rules, and the obligation to disclose 'unused' material only applies once an accused has pleaded not guilty (so relevant information may not be available when the accused is considering their plea).

7. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (2)–(5) of the Right to Information Directive?

- It is good that Code of Practice C contains an explicit requirement regarding disclosure (para. 11.1A), although the requirement arguably does not go far enough in terms of explaining what must be disclosed.
- The explicit obligation in the CrimPR to provide any written witness statement or exhibit that is available to the prosecutor, to the accused at the first court hearing, although this should be extended to cases where the accused is produced in custody.
- The combined effect of the rules regarding the disclosure of 'used' and 'unused' materials in Crown Court trials mean that in practice, the disclosure obligations of Article 7 (2)–(5) are routinely complied with.

C) The law and practice of access to the case materials in case of arrested/detained persons – Compliance with Article 7 (1) and (5) of the Right to Information Directive

8. Please provide information on the scope of persons who fall under the category 'arrested and detained' in your country in terms of Article 7 (1) of the Right to Information Directive. Are the respective domestic rules implementing Article 7 (1) of the Right to Information Directive applicable also to defendants being under house arrest as a pre-trial measure? Are there types of detention (as defined by the case-law of the European Court of Human Rights) that are not covered by the domestic rules aimed at implementing Article 7 of the Right to Information Directive?

A person who is detained by a police officer on suspicion of committing a criminal offence is regarded as being under arrest, whether or not the officer explicitly arrests the person. A person who is arrested must be taken to a police station as soon as practicable, although this can be temporarily delayed if the police wish to search their premises. The person can, alternatively, be released on bail or without bail, to attend a police station on a future date. When an arrested person is taken to a police station, a custody officer must decide whether they should be detained, and if the decision is to detain them they can be detained without charge, initially for up to 24 hours (although this can be extended). This process is subject to regulation by the PACE 1984. A person may be arrested under the Terrorism Act 2000 on suspicion of being a terrorist, but the procedure is more or less the same, except that the maximum period of detention without charge is longer. The only other provision for detention at a police station is under the Mental Health Act 1983, under which a person may be detained at a police station as a 'place of safety' for up to 72 hours (soon to be reduced to 12 hours by provisions in the Policing and Crime Act 2017). There is no concept of house arrest under English and Welsh law, although it is possible for a suspect or accused to be made subject to a curfew as a condition of police bail (pre-charge) or court bail (post-charge).

Where a person has been charged with a criminal offence, the police can withhold bail and produce the person in court in custody (normally, no later than the next working day). A court has power to remand a person in custody (pre-trial detention) pending their trial and/or sentence. The court, of course, has the power to sentence a person to a custodial sentence.

9. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) if the defendant is arrested/detained, i.e. the rules applied and the practice followed in your country.

As indicated earlier, Code of Practice C (and Code of Practice H in respect of persons arrested on suspicion of being a terrorist) was revised to take account of the EU Directive on the right to information.[32] When an arrested person is taken to a police station the custody officer, at the time that they determine whether to detain the person at the police station, must make available to the detainee *or* their solicitor '[d]ocuments and materials which are essential to effectively challenging the lawfulness of the detainee's arrest and detention'. Documents and materials are 'essential' for this purpose if they are capable of undermining the reasons and grounds which make the detainee's arrest and detention necessary (Code C, para. 3.4(b)). The obligation to make available essential documents and materials also applies if and when a decision is made to extend the period of detention without charge, at the time that a person is charged, and when a decision is made about detention after charge (pending the first court appearance). The decision about which documents or materials should be disclosed is made by the custody officer, acting in consultation with the investigating officer, or by an officer who makes an application to the court for a warrant of further detention (Code C, para. 3.4(b) and 15.0). A Note for Guidance in the Code provides that the investigating officer must bring to the attention of the officer making the relevant decision 'any documents and materials in their possession or control which appear to undermine the need to keep the suspect in custody' (Code C, Note for Guidance 3ZA). The Code is silent on the issue of when access must be granted, but the clear implication is that it should be as soon as practicable.

It should be noted that the definition of 'essential' document is arguably too narrow, since it refers to documents relevant to the *necessity* of arrest or detention, as opposed to the *lawfulness* of arrest or detention, although the general obligation is to make available documents and materials that are essential to effectively challenging the lawfulness of arrest or detention.[33] On the other hand, the way in which the EU Directive has been transposed means that documents and materials must be disclosed if they are *capable* of undermining the lawfulness of arrest or detention (which is broader than, for example, *do undermine* lawfulness), and the obligation arises without the suspect having to assert that their arrest or detention is unlawful.

If access to documents or materials is provided, this would be free of charge. If the suspect or their lawyer are dissatisfied with the access to documents or materials that have been provided, the Code provides that the matter must be reported to a police inspector to deal with as a complaint (Code C, para. 3.26). It is unlikely that a mere failure to provide access to documents or materials would lead to the exclusion of evidence; the issue on any argument regarding exclusion would be whether the arrest or detention was unlawful (and the impact of that on any evidence obtained) rather than whether there was disclosure.

32 Reference here is only made to Code C, but the provisions of Code D are in almost identical terms.

33 See further, Cape, E. (2015), 'Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?' *Criminal Law Review*, Issue 1, pp. 48–67.

There is no evidence about how the provisions regarding access to documents or materials are working in practice.

10. Please indicate whether the rules and the practice are different in this regard in the various phases of the criminal procedure. If the rules and/or the practice differ, please explain these differences.

The rules referred to in Section C) 9. above only apply where a person is arrested and detained at the investigative phase of proceedings. Therefore, they do not apply once an accused appears in court. No legislative or other changes were introduced to give effect to Article 7 (1) in trial or appeal phases of the criminal process. Arguably, the provisions on disclosure of 'unused' material should include documents or materials relating to the lawfulness of arrest or detention, but only if any unlawfulness is relevant to the substantive case against the accused. For example, if the prosecution were aware of documents or materials relevant to the lawfulness of detention at a police station at which a confession was obtained, this should be disclosable. However, if the prosecution were aware of documents or materials relevant to the lawfulness of pre-trial detention, they would not be disclosable as 'unused' material. Arguably, a prosecutor would be under a general duty to disclose documents or materials that they are aware of that indicate that arrest or detention was unlawful, but there is no specific legal rule requiring them to do so.

11.1. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented on a legal level?

As noted, at the investigative stage, the provisions of Article 7 (1) have been reasonably well transposed. However, no action was taken to transpose Article 7 (1) at the other stages of the criminal process, and current laws do not fully comply with the provision.

11.2. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented in practice?

There is no available information about how the relevant provisions are working in practice at the investigative stage. As noted, the law does not reflect the obligations set out in Article 7 (1), but there are few challenges to the lawfulness of arrest or detention.

12. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (1) – and, in conjunction with that,

Article 7 (5) – of the Right to Information Directive, both in terms of the law and the practice.

- The government has not commissioned any research on the implementation of the provisions, and relevant statistics are not routinely collected.
- No action was taken to give effect to Article 7 (1) at the trial or appeal phases of the criminal process.
- There is no statutory obligation on the authorities to disclose documents or materials that are essential to effectively challenging the lawfulness of arrest or detention at the trial or appeal phases of the criminal process.

13. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive?

- The explicit requirements in Code C regarding the duty to make available essential documents and materials at the investigative stage is clear, although it offers no specific guidance on what might be regarded as essential documents or materials.
- The explicit requirement that the investigating officer must bring to the attention of the custody officer any essential documents or materials is clear, although it also offers no specific guidance.
- The obligation in Code C to provide access to documents or materials that are *capable* of undermining the necessity for arrest or detention, although too narrowly framed, is good in that it means that such documents or materials must be disclosed irrespective of whether the suspect actually challenges the lawfulness of their arrest or detention.

D) Additional information relevant regarding the implementation of Article 7 of the Right to information Directive

Given the decision of the UK to leave the EU, there is no prospect of any further action being taken to implement the provisions of the Directive.

Germany

Country study prepared by:
Dr. Anna Oehmichen

A) General information

1. Please provide a brief description of the main phases of the criminal procedure in your country.

In Germany, the criminal procedure can be divided into the following phases:

Pre-investigatory phase (*Vorermittlungen*): During this preliminary phase of the investigation, the suspect is often not yet identified. At this stage, information is gathered by the police. Some scholars do not take into account this phase at all, since the 'real investigations', including coercive measures, only start in the investigatory phase. This phase ends with either closing the 'pre-investigations' or formally opening the investigatory phase. Access to the file is rarely[34] given at this stage of the proceedings.

Investigatory/preparatory phase (*Ermittlungsverfahren*): This is the main phase of investigation during which searches and seizures, remand detentions, wire tapping etc. can take place. This phase is generally carried out by the police, but supervised and guided by the prosecutor. This phase ends with the prosecution either closing the investigations, if no sufficient suspicion could be established, or with filing an indictment with the competent court. Access to the file is usually granted at this stage, unless there are reasons to deny it. However, it is, at the latest, granted at the end of the investigatory phase.

Intermediary phase (*Zwischenverfahren*): This is the phase between indictment and the competent court's decision to open trial. During this phase, the court checks the indictment and decides whether, on basis of the indictment and the files, the indictment will be allowed, and, in consequence, the public trial will be opened, or the indictment will be rejected. Access to the file is usually granted.

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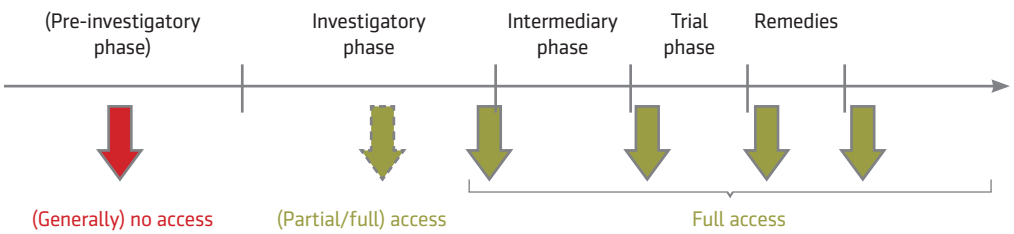
34 Before investigations have formally been opened, there may exist a right to information based on data protection law, cf. s. 491, CCP (Federal Court of Justice, *Bundesgerichtshof, Neue Zeitschrift für Strafrecht – Rechtsprechungsreport (NStZ-RR)* 2009, 145).

Trial phase (*Hauptverfahren*): During this phase, the court is the leading organ providing access to the file. The trial phase ends with a verdict, which acquits the accused or establishes his or her guilt, as well as the sentence. Access to the file is usually granted.

Remedies phase (*Rechtsmittelverfahren*): The verdict can be appealed. For petty offences, appeal is possible both on basis of facts and law, whereas more serious crimes can only appealed on legal grounds. After all remedies have been exhausted, the decision becomes final. Access to the file is usually granted.

Enforcement phase (*Vollstreckungsverfahren*): After the final judgment, in this phase, the sentence is being enforced. Based on new facts, a **review** of the decision is possible under certain circumstances. Access to the file is usually granted.



2. Was the implementation deadline for the Right to Information Directive respected in general, and specifically with regard to Article 7 of the Right to Information Directive?

The Right to Information Directive was implemented into German law by Act of 2 July 2013 (in force since 6 July 2013), which also transposed Directive 2010/64/EU on the right to interpretation and translation into German law.[35] With regards to access to the file, this led to an extension of the catalogue of rights of which a person has to be informed upon arrest, covering now also

- his/her defence lawyer's right to access to the file,
- the right of the accused who does not have a defence lawyer to request, on his/her own, access to the files and information,
- legal remedies (complaints) against the arrest warrant.

35 *Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren vom 02.07.2013*, *Bundesgesetzblatt = BGBl.* (Official Gazette) 2013, I, p. 1938.

Other than this, the legislator did not see any need to transpose Article 7 of the Right to Information Directive.[36]

B) The law and practice of access to the case materials in general – Compliance with Article 7 (2)–(5) of the Right to Information Directive

3. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) in the investigative phase of the procedure in general, i.e. the rules applied and the practice followed in your country in this respect in general, irrespective of whether the defendant is arrested/detained or not.

The access to the file is one of the core rights of the defence. Enshrined in the rule of law and as a basis for the principle of equality of arms, it enjoys constitutional protection.[37] The right to inspect the file is regulated in Section 147 of the German Code of Criminal Procedure (CCP).[38]

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36 Cf. *BR-Drs.* (Federal Council prints) 816/12 of 21.12.2012; *BT-Drucks.* (parliamentary prints) 17/12578 of 28 February 2013.

37 Federal Court of Constitution, BVerfGE 63, 45 (61).

38 An English version of the Code of Criminal Procedure (as of 2014) is provided by the German ministry of justice, online available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html. Section 147 CCP reads as follows:

(1) The defence counsel shall have authority to inspect those 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.

(2) If investigations have not yet been designated as concluded on the file, defence counsel may be refused inspection of the files or of individual parts of the files, as well as inspection of officially impounded pieces of evidence, insofar as this may endanger the purpose of the investigation. If the prerequisites of the first sentence have been fulfilled, and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, 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.

(3) At no stage of the proceedings may defence counsel be refused inspection of records concerning the examination of the accused or concerning such judicial acts of investigation to which defence counsel was or should have been admitted, nor may he be refused inspection of expert opinions.

During the investigatory phase and at the end of it, the prosecution decides whether to grant access and to which extent. During the trial phase, the court decides.[39]

The **scope** of the access is not limited by law. It can therefore include minutes of witness interrogations, expert opinions, transcripts of telephone tapping, memos of a house search, as well as lists of seized objects, pictures, etc. It can also include CDs or other data carriers, e.g. CCTV records or relevant audio or video data. Generally, the defence counsel shall be permitted to take the original files, with the exception of pieces of evidence, to his/her office or to his/her private premises for inspection, unless significant grounds present an obstacle thereto, (Section 147(4), CCP). Accordingly, pieces of evidence (e.g. telecommunication data) are not included in the file and therefore not subject to the right to information.

As a **rule**, the defence shall be granted **full access to the file, at any stage of the proceedings**. Moreover, there are some essential parts of the files to which **access may never be denied** (cf. Section 147(3), CCP):

- inspection of records concerning the examination of the accused (e.g. statements of the accused) or concerning such judicial acts of investigation to which defence counsel was or should have been admitted, and
- inspection of expert opinions.

(4) Upon application, defence counsel shall be permitted to take the files, with the exception of pieces of evidence, to his office or to his private premises for inspection, unless significant grounds present an obstacle thereto. The decision shall not be contestable.

(5) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall be competent to decide. If the public prosecution office refuses inspection of the files after noting the termination of the investigations in the file, or if it refuses inspection pursuant to subsection (3), or if the accused is not at liberty, a decision by the court competent pursuant to Section 162 may be applied for. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply mutatis mutandis. These decisions shall be given without reasons if their disclosure might endanger the purpose of the investigation.

(6) If the reason for refusing the inspection of the files has not already ceased to exist, the public prosecution office shall revoke the order no later than upon conclusion of the investigation. Defence counsel shall be notified as soon as he once again has the unrestricted right to inspect the files.

(7) Where an accused has no defence counsel, information and copies from the files shall be given to the accused upon his application, provided that this is necessary for an adequate defence, cannot endanger the purpose of the investigation, also in another criminal proceeding, and that overriding interests of third persons meriting protection do not present an obstacle thereto. Subsection (2), first part of the second sentence, subsection (5) and Section 477 subsection (5) shall apply mutatis mutandis.

39 Cf. Section 147(5), CCP.

The named material is deemed so essential for a fair trial that access to it shall under no circumstances be denied.[40] 'Records concerning the examination of the accused' include written statements of the accused[41] as well as all minutes of police, prosecution and the court about interrogations of the accused, no matter when these were taken and what procedural status the accused had at that time (e.g. witness).[42] It also includes oral hearings in connection with a review of (remand) detention (s. 118c, CCP) as well as judicial examinations of the co-accused, of experts (s. 168c, CCP), as well as judicial examinations of other evidence (s. 369, CCP).[43]

According to the law, only by way of exception, the prosecution may (i.e. at its discretion) **deny** full or partial access if two conditions are met:

- the investigations have not been designated as concluded on the file, and
- the disclosure of the file may jeopardise the purpose of the investigations.[44]

Another restriction is possible in the case of **covert investigations**.[45] In these cases, the files must be separated from the general files during the preparatory phase as long as the concerned person is not be notified as this would jeopardise the purpose of the investigations,[46] so that they often will not be disclosed to the defence counsel at all. However, if a person is detained based on the results of covert investigations, e.g. the reports of the undercover agent, the judge ordering the detention needs to disclose this material to the defence (Section 147(2), 2nd sentence, CCP).

Furthermore, it is important to note that the access by the defence is in any event limited to the file concerning his/her client, the accused. In consequence, a practical way to exclude material from the defence's view is by **separating the proceedings** against the co-accused, so that certain information is only deemed relevant in the file of the co-accused. This can be problematic if the same material is incriminatory for the co-accused (which justifies placing it in that file) but, at the same time, would discharge the accused. An exception to this rule has

40 Wessing, *Beck-OK* (Online Commentary), § 147 margin no. 9.

41 Wohlers, *Systematischer Kommentar* (Systematic Commentary) StPO § 147 margin no. 100.

42 *Oberlandesgericht* (Higher Regional Court of) Hamm, *Strafverteidiger* 1995, 571.

43 *Karlsruher Kommentar* (Commentary from Karlsruhe), § 147 margin no. 18.

44 Cf. Section 147(2) of the CCP.

45 I.e., for example, the so-called 'grid search' (s. 98a, CCP), mail confiscation (s. 99, CCP), telephone tapping (s. 100a, CCP), acoustic interception within and outside private premises (ss. 100c–100f, CCP), taking of photographs or video surveillance (s. 100h, CCP), the use of IMSI catchers (s. 100i, CCP), of undercover investigators (informers)(s. 110a, CCP), and police observation (s. 163d–f, CCP).

46 S. 101(2), 2nd sentence, CCP.

been made in cartel proceedings, where the separation of files did not prevent access to the files against the co-accused because they all belonged to one overall complex.[47]

Furthermore, the access to 'official documents held by authorities who declare that disclosure would be detrimental to the welfare of Germany' (s. 96, CCP) can also be denied. This may apply to police papers,[48] secret service information,[49] or also investigations concerning another case.[50]

Moreover, in practice it often happens that access to the file is **postponed** on the basis that the file is currently sent somewhere else (e.g. to a co-offender, or to the court). There is no remedy against this argument; even in case of detention you cannot challenge such a postponement, as it is no longer in the hands of the prosecution to provide access, given that the prosecution has sent the files somewhere else. This is a problem often encountered in practice, the solution of which seems obvious: a copy of the file should be kept at the prosecution's office and always available to the defence. Somehow, prosecution services are very reluctant to this solution. However, as Germany plans to introduce the electronic file, there is hope that this problem will disappear in the near future.

Another restriction to the full right to access may happen in the case of tax investigations: The **tax secrecy** (s. 30 of the German Tax Act) limits the access to the extent that disclosure might violate the confidentiality of concerned persons.[51] This can even have criminal consequences.[52]

The **right to access of the accused** himself/herself encounters further restrictions at present. In Germany, traditionally, access to the file was only granted to the defence counsel, not to the accused. It was only after the European Court of Human Rights' ruling, in which the Court ruled that the suspect who has no lawyer must be granted access to the file already at the investigatory phase,[53] that the German legislator saw the need to complement Section 147 by a 7th paragraph, in which certain rights to information are now granted to the accused, however, only subject to certain conditions. Pursuant to S. 147(7), CCP, access shall only be granted

- to the accused who has no defence counsel,
- in form of information or copies (i.e. no access to the original),

47 Federal Court of Justice (*Bundesgerichtshof, BGH), Neue Juristische Wochenschrift (NJW)* 2007, 3652.

48 Administrative Court (*Verwaltungsgerichtshof, VGH)* Kassel *Strafverteidiger (StV)* 1986, 52.

49 Federal Court of Administration (*Bundesverwaltungsgericht, BVerwG)*, NJW 2004, 963.

50 Higher Regional Court *(Oberlandesgericht)* Frankfurt a. M., NJW 1982, 1408; Higher Regional Court (*Oberlandesgericht)* München *Neue Zeitschrift für Strafrecht (NStZ)* 2005, 706.

51 Cf. Nr. 34(4) of the Instructions for the criminal and regulatory proceedings in tax matters (*Anweisungen für das Straf- und Bußgeldverfahren (Steuer) [AStBV (St)]).*

52 Cf. S. 353b, Criminal Code (Breach of official secrets and special duties of confidentiality).

53 ECtHR, *Kunkel v. Germany*, Decision of 2 June 2009, Application no. 29705/05.

- insofar as this is necessary for an adequate defence,
- if it cannot endanger the purpose of the investigation, either of the present criminal case or in another one, and
- if overriding interests of third persons meriting protection do not present an obstacle thereto.[54]

However, there is a bill which will change this and grant full access to the accused, but again only under the condition that he/she is not defended by counsel, and that the access will not jeopardise the purpose of the investigation (in another criminal proceeding as well) or overriding interests of third persons meriting protection do not present an obstacle thereto.[55]

Besides the defence counsel and the accused, other interested parties may also be granted (limited) access, depending on their particular role.[56]

The other reason described in Article 7 (4) of the Right to Information Directive, '**important public interest**', is not written in the German law. However, if such a public interest should be in danger, in all likeliness the prosecutor will also consider this as 'jeopardising the purpose of the investigation' and therefore deny access based on this reason.

Regarding the **timing**, access should be granted as soon as possible, but, at the latest, at the conclusion of the investigations.[57] As outlined above, there are certain parts of the file which must be made available in all events (Section 147(3), CCP) and therefore as soon as access is being requested. Moreover, in light of the constitutional principle of proportionality, the prosecution is obliged to deny only partially the access if the purpose of the investigations can thus be served.[58]

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54 This provision can be considered as a (limited) implementation of Article 7 (4) of the Right to Information Directive, which foresees another reason to restrict the right to access in case of 'serious threat to the life or the fundamental rights of another person'.

55 *BT-Drs.* (Parliamentary Prints) 18/12203 of 28 April 2017.

56 Other interested parties, such as the victim (s. 406e, CCP) or the civil party (s. 475(3), CCP), or any other interested party (e.g. witnesses, scientists, journalists) may request access through their legal representative if they can present a legitimate interest. Legal entities affected by regulatory fine can request access through their legal representative based on s. 444(2), 434(1), 147, CCP. Further, in regulatory proceedings, concerned parties may be granted inspection of the files unless third parties have opposing and overriding interests that are worthy of protection (s. 49(1), Act on Regulatory Offences).

57 German Constitutional Court, BVerfG 12.1.1983 – 2 BvR 864/81, NJW 1983, 1043; German Federal Court of Justice, *Bundesgerichtshof (BGH)* 11.11.2004 – 5 StR 299/03, NJW 2005, 300.

58 Cf. Kühne, H.-H., *Strafprozessrecht* (Law on Criminal Procedure), § 9 margin no. 216, with further references.

Regarding the **costs** of accessing case materials, in principle, access to the file is free of charge. However, according to no. 9003 of the cost index annexed to the Act on Court Fees,[59] the lawyer who requests the file to be sent to his/her office, which is the usual procedure, will be charged a lump sum of €12. If the file exists in electronic form and is transferred electronically, the lump sum only amounts to €5.[60]

The **remedies** against the refusal to access depend on the decision that needs to be challenged. During the **pre-investigations**, there is no right to access to the file, but only a right to information based on data protection law. Accordingly, denial of this right to information can only be challenged before the competent data protection officer.[61]

During the **investigatory phase**, it is the prosecutor who may decide to deny or give only limited access. In this case, the defence may apply for a judicial decision.[62] However, this remedy requires that one of the following situations applies:

- refusal in spite of the conclusion of the investigations,
- refusal although the requested material belongs to the privileged one to which access can never be denied (S. 147(3), CCP),
- refusal although the accused is in remand detention (s. 147(2), CCP).

Moreover, the judicial review of the prosecutor's decision is limited to check whether the prosecution used their power of discretion correctly.[63]

Any other refusal by the prosecutor is not covered by this remedy, so that other grounds for refusal may only be challenged by **disciplinary complaints** or **remonstrance** (although, in practice, with little effectiveness).[64]

During the **intermediary phase**, in case the judicial decision does not grant the requested access, this decision can be challenged by complaint.[65]

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59 *Kostenverzeichnis Gerichtskostengesetz, KV GKG*. For regulatory proceedings, the same lump sum of 12 EUR will be charged based on s. 107(5) of the Regulatory Offences Act (*Ordnungswidrigkeitengesetz, OWiG*).

60 No. 9003(2), KV GKG; s. 107(5), 2nd sentence, OWiG.

61 Based on s. 491 (1), CCP, read in conjunction with s. 19(5) of the German Data Protection Act (*Bundesdatenschutzgesetz),* cf. Federal Court of Justice, *Bundesgerichtshof,* NStZ-RR 2009, 145.

62 S. 147 (5), second sentence, CCP.

63 Regional Court (*Landgericht*) Landau, *Strafverteidiger (StV)* 2001, 613.

64 Wessing, Beck Online Commentary, § 147 margin no. 26.

65 S. 304, CCP.

During **trial phase**, decisions by the judge can only be challenged later, in the context of the appeal against the judgment, e.g. on the ground that the defendant's right to fair trial was violated.[66]

Once the indictment has been issued, it is the competent judge who is responsible for granting access to the file. Judicial decisions limiting access can be challenged by complaint (s. 304, CCP), but not against the modality of the given access.[67]

The unlawful refusal of (partial or full) access to the file generally[68] does not impede the **admissibility of evidence** contained in the files; however, it may constitute an undue restriction of the defence, and thus present an absolute ground for appeal on legal grounds.[69]

4. Please indicate whether the rules and the practice are different in the trial phase of the criminal procedure (or in any other phase of the criminal procedure following the investigation) from the rules and practice in the investigative phase. If the rules and/or the practice are different, please elaborate on the differences as compared to the investigative phase.

As outlined above, once the investigations have been concluded, full access must be given. In the **trial phase**, the presiding judge will generally grant **full access** (obviously only insofar as he or she is aware of existing material). In practice, the prosecution has ways of excluding material from the case file although it is known to them, for instance, by separating files of several co-offenders and judging them separately (see above), or by considering parts of the file as 'irrelevant' since it cannot be used to prove the guilt of the defendant. The latter is of course problematic as such evidence may, quite the contrary, be exculpatory evidence. Moreover, if the prosecution has used undercover agents who have not provided any inculpatory evidence, the prosecution may decide that this file, which was kept separately from the general files during the investigative phase, will not be submitted to the court so that neither the judges nor the defendant are aware that an undercover agent has been used at all.[70]

66 S. 305, CCP.

67 *Bundesgerichtshof* (Federal Court of Justice), decision of 30 June 2016, case no. StB 18/16 (BeckRS 2016, 12732).

68 However, according to one scholar, essential violations of the principle of completeness and truthfulness of the file can constitute a violation of fair trial, which may result in an absolute bar to proceeding (cf. Thomas/Kämpfer, Munich Commentary, § 147 margin no. 53). Furthermore, in relation to tax offences, it has been argued that the unlawful refusal of access shall result in the inadmissibility of the file as a whole (Simon/Vogelberg, Steuerstrafrecht, 3rd edition 2011, p. 352.)

69 Cf. S. 338 no. 8, CCP.

70 This may be problematic in case of police incitement in light of the case law of the European Court of Human Rights (cf. ECtHR, *Furcht v. Germany*, Judgment of 23 October 2014, Application no. 54648/09).

5.1. Has Article 7 (2)–(5) of the Right to Information Directive been implemented on the legislative level?

Article 7 (2)–(5) of the Right to Information Directive has been partially implemented in the present law. With regard to **Article 7 (2),** partial or full access to the written file is generally granted as long as this will not jeopardise the purpose of the investigations. In Germany, the prosecutor is bound by the '**principle of completeness of the file**' (*Prinzip der Aktenvollständigkeit*). However, there is no legal definition as to what material is subject to be filed. It will at least include all written documents, technical records (recording images and sounds as well as videos) that may be of relevance for the question of guilt and sentencing.[71] This also includes criminal records. In other words: except for internal papers, whatever has been produced for the proceedings may not be taken out of the file.[72] The access shall include all documents to which the court also has access.[73] Once the prosecution has analysed telephone tapping, the access also includes access either to the written transcripts or by allowing the defence counsel to go the court secretary and listen to the recordings there. If this is not sufficient, he or she is entitled to a copy. If the recordings are in a foreign language, the presence of an interpreter may be required. The lack of personal or budgetary resources is not a valid argument to restrict access.[74] The scope of access is problematic with regards to information that has been gathered by the police during the investigations against the accused or against others and which is not deemed relevant for the case against the accused (so-called *Spurenakten*). The Federal Constitutional Court ruled in 1983 that this information must only be submitted to the court (and thereby becomes subject to the right to access) insofar as its contents may be of relevance for the establishment of the accused's guilt or the determination of the sentence.[75]

With regards to the **relevant point in time** when access shall be granted (**Article 7 (3)** of the Right to Information Directive), access shall be granted **at all stages of the proceedings**.[76] This means that as a rule, access shall be granted also at the investigatory phase, it may only be restricted at this stage in case access would jeopardise the purpose of the investigations (see *supra*). The German provision therefore provides a wider right than the one provided for

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71 *Landgericht* (Regional Court) Itzehoe *StV* 1991, 555; Wessing, Beck-OK StPO § 147 margin no. 13, with further references.

72 Cf. *Bundesgerichtshof* (Federal Court of Justice), decision of 10 October 1990, case no. 1 StE/8/89 – StB 14/ 90, NStZ 1991, 94.

73 Cf. *Bundesgerichtshof* (Federal Court of Justice), decision of 10 October 1990, case no. 1 StE/8/89 – StB 14/ 90, NStZ 1991, 94.

74 *Oberlandesgericht* (Higher Regional Court of) Frankfurt, *StV,* 2001, 611; Pfeiffer, StPO (2005) § 147 margin no. 3.

75 *Bundesverfassungsgericht* (Federal Constitutional Court), judgment of 12.01.1983, case no. 2 BvR 864/81, *NJW* 1983, 1043.

76 Wessing, Beck-OK StPO, § 147 margin no.3.

in the Directive. Moreover, in cases of remand detention, the defence counsel is generally provided access at least to those parts of the files that are relevant to assess the legality of the detention (see also *infra*, Section C)).[77]

With regards to the grounds to refuse or limit access (**Article 7 (4)** of the Right to Information Directive) and to the costs (**Article 7 (5)**), see *supra* Section B) 3. b), e).

5.2. Has Article 7 (2)–(4) of the Right to Information Directive been implemented in practice?

In general, most of the requirements of Article 7 (2)–(4) of the Right to Information Directive were already met in **German practice** prior to its formal Implementation Act. The Implementation Act as such only extended the scope of the applicable legal notice. The most relevant practical problem is to define the exact scope of what belongs to the file, and this is not a problem for which Article 7 of the Right to Information Directive provides guidance.

6. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (2)–(5) of the Right to Information Directive, both in terms of the law and the practice.

A general problem of the German law is that the **precise content** of what should belong to the file is not clearly defined. In consequence, there are some case files which are classified diversely by the courts, such as, for instance, files that were made in relation to other criminal proceedings but may be of relevance (*Spurenakten*), or, for example, company audits in case of tax offences.[78] Access to these papers is often denied on the grounds that they are only 'internal documents' that do not form part of the official file. On the other hand, the results of the audit may be of great relevance for the assessment of the criminal risk. The Higher Regional Court of Rostock decided in a recent case that company audit reports that the financial authorities had not considered as relevant for the criminal proceedings indeed were to be filed, and that access to this material had to be given to the defence.[79] In practice, however, access to such files is regularly denied.[80]

Another practical problem is related to **telecommunication data**. The prosecution services will generally only file those parts of the tapped communication that they deem relevant.

77 S. 147(2), 2nd sentence, CCP.

78 Regarding this problem, cf. Gehm, StV 2016, 185.

79 *Oberlandesgericht* Rostock, decision of 7 July 2015, case no. 20 VAs 2/15, StV 2015, 677.

80 Gehm, StV 2016, 185, 188, with further references.

However, the defence may have an interest in also looking at other parts of the recorded communication. In recent years they have increasingly filed applications to access to such material which has often been denied based on the grounds that privacy rights of third parties were affected.[81]

In light of the European Court of Human Rights' case-law, it may be deemed problematic that the suspect or accused has no own right to access, and only a limited right to information, only under the condition that he/she has no defence lawyer. This situation, coupled with the fact that in German criminal procedure, under certain circumstances a person will be assigned a (duty) counsel ex officio, whether he/she wants this or not, can be criticised for restricting the rights of the accused. In particular, if the accused is poorly defended, he/she might be better served looking at his/her file himself/herself than depending on the good will of the sometimes little motivated defence counsel appointed by the court.

7. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (2)–(5) of the Right to Information Directive?

The German law states as a principle that **full access** to the file should be granted **at any stage of the proceedings**; only by way of exception may this principle be abandoned. As always with exceptions, they must be interpreted restrictively. Moreover, the prosecution needs to have reasons why it refuses the access. Consequently, it is good practice to allow access to relevant case material at a relatively early stage of the proceedings.

C) The law and practice of access to the case materials in case of arrested/detained persons – Compliance with Article 7 (1) and (5) of the Right to Information Directive

8. Please provide information on the scope of persons who fall under the category 'arrested and detained' in your country in terms of Article 7 (1) of the Right to Information Directive. Are the respective domestic rules implementing Article 7 (1) of the Right to Information Directive applicable also to defendants being under house arrest as a pre-trial measure? Are there types of detention (as defined by the case-law of the European Court

81 'Significant grounds' within the meaning of S. 147(4), CCP. For an overview on recent case law and existing legal remedies, cf. Wettley/Nöding, NStZ 2016, p. 633 ff.

of Human Rights) that are not covered by the domestic rules aimed at implementing Article 7 of the Right to Information Directive?

In Germany, a person may be **arrested** provisionally when caught in the act or being pursued.[82] A person may be **detained** on remand, based on strong suspicion of having committed a criminal offence of a certain minimum gravity (otherwise arrest would not be proportionate and therefore illegal), if there exists a ground for arrest e.g. risk of flight.[83]

The access to the information relevant to assess the legality of the detention, as a rule, shall be granted, cf. s. 147(2), CCP. Within the meaning of this norm, it refers both to provisional arrest and remand detention. No house arrest exists in Germany.

9. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) if the defendant is arrested/detained, i.e. the rules applied and the practice followed in your country.

The scope of case materials, format, costs and admissibility of evidence, is the same as without detention (see *supra* at Section B) 3.). There is no differentiation in German law and practice in this regard.

The **grounds for restrictions** are more limited. S. 147(2), 2nd sentence, CCP, provides an exception to the exception that full access may be denied insofar as it jeopardises the investigations. If the concerned person is arrested or detained, the defence must be provided without delay with at least the information relevant to assess the legality of the detention. The provision was introduced in 2009 following the European Court of Human Rights' decision.[84]

82 S. 127, CCP.

83 S. 112 (2), CCP, provides the following reasons for detention:

1. it is established that the accused has **fled or is hiding**;
2. considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (**risk of flight**); or
3. the accused's conduct gives rise to the strong suspicion that he will
   a) destroy, alter, remove, suppress, or falsify evidence,
   b) improperly influence the co-accused, witnesses, or experts, or
   c) cause others to do so,

   and if, therefore, the danger exists that establishment of the truth will be made more difficult (**risk of tampering with evidence**).

84 ECtHR, *Kunkel v. Germany,* Decision of 2 June 2009, Application no. 29705/05; see also Thomas/Kämpfer, *Münchener Kommentar* (Munich Commentary) StPO § 147 margin no. 27.

Regarding **timeline**, access shall be granted **as soon as possible**, and access to the material relevant to assess the legality of the detention should be provided in a particularly speedy manner, in conformity with the general principle of urgency (*Beschleunigungsgrundsatz)* which applies especially to detention matters. In practice, in detention matters access is often granted relatively fast, although the access is not always complete. However, there are also cases in which this principle is not complied with by the prosecution authorities. In some cases, access to the file was only granted after 10 days of (remand) detention. In another, the files made available to the defence did not even contain the name of the (detained) accused, and only by lodging a complaint against his/her detention on the grounds that there was no strong suspicion against the client was the defence eventually granted access to the inculpatory material.

Regarding **remedies**, in addition to those mentioned above (Section B) 3.), limited access may justify a complaint against the detention, in case the disclosed material is not sufficient to understand the grounds for the strong suspicion and the reasons for the detention (flight risk or risk of obstruction of the investigations). This may lead the prosecutor to disclose more material to the defence so that, in light of the new material at hand, the complaint against the detention may lack substance.

10. Please indicate whether the rules and the practice are different in this regard in the various phases of the criminal procedure. If the rules and/or the practice differ, please explain these differences.

The findings outlined above at Section B) 4. apply *mutatis mutandis* in the situation of detention/arrest.

11.1. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented on a legal level?

Article 7 (1) has been partially implemented through S. 147(2), second sentence, CCP, which reads as follows:

> If the prerequisites of the first sentence have been fulfilled (i.e. the investigatory phase is not yet concluded and full access could jeopardise the object of the investigation), and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to the defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.

The wording of the last phrase 'as a rule' suggests that the relevant information could in theory also be made available in another form, e.g. by oral information. Such an interpretation is still – theoretically – possible in exceptional circumstances under the current law, but would be contrary to the Directive. Moreover, according to the standard commentary of the CCP, oral or written summaries of the contents of the file are not sufficient, following the case law of the European Court of Human Rights, which German authorities have to observe. Moreover, the judicial decision to order detention may not be based on information that was not made available to the defence.[85]

Regarding the requirement of **Article 7 (5)**, the Directive has been partially implemented, since there is regularly a lump sum of €12/€5 charged if the defence counsel requests the file to be sent to his/her office. The argument that the file can be accessed free of charge at the prosecutor's or the court's office is a bit sarcastic as this solution will cost the lawyer generally more time and therefore money than having it sent to his/her office.

11.2. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented in practice?

Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive has by and large been implemented. In practice, German prosecutors generally do provide access to the parts of the file that they deem 'disclosable', especially when the concerned person is under arrest. However, there are cases in practice in which access to the file is postponed, or in which access is not fully granted. Not always are the parts made available to the defence as well as those that are relevant to assess the legality of the detention (see *supra* Section C) 9. c)). The prosecution sometimes argues that access shall only be granted at some point during the investigatory phase, without referring to a specific point in time. This is of course *contra legem*, but does happen in practice.

12. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive, both in terms of the law and the practice.

It is a major problem that **only parts of the file** are disclosed when the client is under arrest, especially since at this moment, it is very unlikely that the – arrested – suspect would be able

85 BT-Drs. (parliamentary prints) 16/11644 p. 34 with reference to ECtHR, *Foucher v. France,* 17 February 1997, Application no. 10/1996/629/812; cf. also ECtHR, *Falk v. Germany*, Decision of 11 March 2008, Application no. 41077/04; Meyer-Goßner/Schmitt StPO § 147 margin no. 25a.

to jeopardise the investigations by looking at the file. Moreover, **postponement** of the access may cause a problem. Sometimes, access to the file must be 'forced' by lodging a complaint against the legality of the detention.

13. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive?

In spite of the practical problems that occur sometimes in relation to detention/arrest, in general prosecutors do provide **speedy access** to the case file and share the interest of speeding up the proceedings in these cases. The principle of urgency applicable in cases of detention/arrest is well-known by both prosecution and courts; and both will rarely miss the deadlines provided by law in these cases. This also reflects on the right to access to the file, which will usually be granted rather quickly.

Romania

Country study prepared by: ***Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR-CH)***

A) General information

1. Please provide a brief description of the main phases of the criminal procedure in your country.

According to the 2014 Romanian Criminal Procedure Code (CPC), the criminal procedure has 4 phases: the criminal investigation, the preliminary chamber phase, the trial phase and the enforcement of the final decisions.[86]

The new CPC has introduced a new institution between the criminal investigation phase and the trial one: the preliminary chamber judge (Articles 342–348) verifies the legality of the indictment ordered by the prosecutor, verifies the legality of the evidence gathered and the procedural acts undertaken by the criminal prosecution bodies, settles complaints against the orders of non-prosecution or non-indictment as well as other situations expressly provided by the law. The duration of the preliminary chamber procedure (in writing) is of a maximum of 60 days. The preliminary chamber judge shall return the case to the prosecutor's office if he/she has found that evidence was unlawfully obtained.

For the purposes of this study we will only refer to the suspect and the defendant as subjects of criminal proceedings. The suspect is the person in relation to which there *is a reasonable suspicion,* based on evidence, that he/she committed an offence stipulated by the CPC.[87] The defendant is the person who has been formally charged and against whom a criminal investigation has been initiated, becoming part of the criminal proceedings.[88]

86 Romania, Law no. 135/2010 on the Code of Criminal Procedure (Legea nr. 135/2010 privind Null Cod de Procedură Penală).

87 Article 77 CPC.

88 Article 82 CPC.

2. Was the implementation deadline for the Right to Information Directive respected in general, and specifically with regard to Article 7 of the Right to Information Directive?

The Right to Information Directive should have been transposed into national law by 2 June 2014. Up to this date, May 2017, it has not been fully transposed and implemented.

In response to a 2015 FRANET expert FOI request concerning the measures taken to implement the Directive, the Ministry of Justice (MJ) claimed at the time that most of its provisions have been transposed into national legislation, with the exception of the adoption of a standard letter of rights for suspects and convicted persons during the criminal proceedings (Article 4 of the Directive).[89] In December 2016, APADOR-CH made recommendations concerning the MJ's draft law on the matter.[90] However, the transposition of this particular article lags behind and the initiative is still at the level of draft law.[91]

Concerning specifically Article 7, in July 2015 a new executive order issued by the Ministry of Internal Affairs (Ministerul Afacerilor Interne, MAI), Order no. 64/2015 on organisational measures for exercising the right of access to case files in criminal proceedings entered into force.[92] The main change that this order brings is that its Article 11 sets a standard price for obtaining copies from case files during the criminal investigation phase: app. €0.11 (RON 0.5) for an A4 page and app. €0.23 (RON 1) for an A3 page. Some lawyers have argued that these fees are very high and hinder the right to access to the case file.[93]

89 According to a response from the Ministry of Justice an FOI request by FRANET experts, no. 19874/2005, 10 April 2015.

90 Ministerul Justiției, Proiectul de ordin comun privind modelul informării scrise înmânate suspecților, inculpaților sau persoanelor condamnate în cadrul procedurilor penale ori persoane căutate în baza unui mandat european de arestare cu privire la drepturile acestora, http://www.just.ro/proiectul-de-ordin-comun-privind-modelul-informarii-scrise-inmanate-suspectilor-inculpatilor-sau-persoanelor-condamnate-in-cadrul-procedurilor-penale-ori-persoanelor-cautate-in-baza-unui-mandat-euro/, 14 December 2016.

91 At the time of writing this report, May 2017.

92 Ministerul Afacerilor Interne, Ordinul nr. 64/2015 privind stabilirea unor măsuri organizatorice în scopul asigurării exercitării dreptului de a consulta dosarul penal, 7 iulie 2015.

93 Catalin Oncescu, lawyer, Câteva aspecte de interes practic privind 'dreptul de a solicita consultarea dosarului', https://www.juridice.ro/374637/cateva-aspecte-de-interes-practic-privind-dreptul-de-a-solicita-consultarea-dosarului.html, 7 May 2015.

B) The law and practice of access to the case materials in general – Compliance with Article 7 (2)–(5) of the Right to Information Directive

3. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) in the investigative phase of the procedure in general, i.e. the rules applied and the practice followed in your country in this respect in general, irrespective of whether the defendant is arrested/detained or not.

Scope of case materials accessible to the lawyer and the suspect/defendant; method of access

Article 94 of the Criminal Procedure Code regulates access to all case files materials. The right applies throughout the entire duration of the criminal proceedings (Article 94 (1)) for both the suspect (Article 78) and the defendant (Article 83) and their lawyers (Article 94 (8)). Case file consultation implies the right to read its documents, the right to write down data or information from the case file and the right to obtain photocopies at the client's expense.[94]

In reality, Article 94 (4) is restrictive for the suspect, whose right to consult the file is restricted until he/she becomes a defendant. There is no limit in time for being a suspect. However, one year after the criminal investigation has started, the suspect can lodge a complaint concerning the length of the criminal investigation,[95] contesting thus his quality as a suspect. If the complaint is admitted, the judge will set a deadline for the prosecutor to solve the case file.

Article 94 (7) refers only to the preventive measures ordered by the rights and liberties judge (pre-trial detention, house arrest, judicial oversight) but does not apply also to police arrest which is ordered by the criminal investigation bodies or the prosecutor. The preventive measure of police arrest (maximum 24 hours) can be ordered both against the suspect and the defendant. In practice, the suspect is merely being informed about the charges against him/her and he/she can give a statement (Article 209 (2)).

Even for the lawyer, the time to study the case file at the point of the initial questioning by the police/prosecutor is limited if the prosecutor makes a request for pre-trial detention. This is because in Romania the maximum period of the police arrest is 24 hours[96] and the judge needs

94 Article 94 (2) CPC.

95 Article 488 (1) CPC.

96 Article 23 of the Constitution.

to hold a hearing before this period expires, so he/she has limited time to operate within. *'There are situations when there are 20 lawyers for 20 suspects and they quarrel over the case file, the time is very limited.'* [97]

During the criminal investigation and within a reasonable time, the prosecutor shall decide upon the date and duration of the case file consultation. This right may also be delegated to criminal investigation bodies.[98] On a reasoned basis, only the prosecutor may restrict the case file consultation for a maximum period of 10 days if it could harm the proper conduct of the criminal investigation.[99]

In 2015 the Ministry of Internal Affairs issued an order establishing some organisational measures to ensure the exercise of the right to consult the case file.[100] According to this order, the request will be forwarded to the competent prosecutor for approval within two working days from receipt (Article 4 (1)). If approved, the criminal investigation bodies will issue, within a reasonable time, an order mentioning the date, hour and duration of the case file consultation (Article 5).

Since the law does not provide for a time limit for approving the request, the practice differs greatly and this can lead to abuses. Depending on the prosecutor, the request may be granted on the spot, generally within 10 days, but it may also be denied two weeks after the request was made.[101] In some cases, copying of the case materials is not done in a timely manner in order to be useful for the defence, as the time that passes between the request to study the case file and its approval by the prosecutor is sometimes very long.[102]

There are lawyers who have argued that the prosecutors' disposal to restrict access to the case materials is shortly motivated and it might be useful to that the CPC would stipulate the concrete cases in which access to the case file may be restricted.[103]

In the view of APADOR-CH, the possibility of case file restriction is formulated in rather general, large, ambiguous terms.

97 Anca Ioana Iuga, lawyer, Cluj Bar, interview for APADOR-CH, 15 May 2017.

98 Article 94 (3) CPC.

99 Article 94 (4) CPC.

100 Ordin nr. 64 din 01/07/2015 privind stabiliraea unor măsuri organizatorice în scopul asigurării exercitării dreptului de a consulta dosarul penal.

101 Anca Ioana Iuga, lawyer, Cluj Bar; Mihaela Musan, lawyer, Brasov Bar; interviews, 15 May 2017.

102 Mihaela Musan, lawyer, Brasov Bar, interview, 15 May 2017.

103 Mihaela Musan, lawyer, Brasov Bar, interview, 15 May 2017.

For example, when it comes to the maximum of 10 days' interdiction to study the case file, the text is ambiguous as it stipulates that the limitation may not exceed the maximum of 10 days but it may be interpreted in the sense that other unlimited number of limitations, not exceeding 10 days, may follow. In the case of limiting the access to the case file, the CPC does not provide for a total maximum duration (in practice, the prosecutor may say that he/she has restricted the access for 10 days for one reason, and later they may restrict it to an additional 10 days, on grounds that another reason emerged. Article 94 (4) should be changed to be more clear, stipulating that the total number of days for which the case file consultation will be restricted shall not exceed 10 days. As it is now, the law only provides that the restriction shall not exceed 10 days, leaving unclear the situation of the maximum number of days for which restriction in a case file may be ordered.

The maximum limitation of 10 days applies only for the defendant, not for the suspect. For the suspect, the law does not provide a time limitation for the interdiction to consult the file (Article 94 (70)). The same restriction applies to the lawyer of the suspect.[104]

The CPC does not provide the same right for the suspect, the defendant and the lawyer to challenge restrictions. According to Article 95 (2) when the lawyer lodges a complaint against the restriction of access the case file, the hierarchal superior prosecutor has to solve the problem and communicate the solution, as well as its motivation within a maximum of 48 hours. By comparison, when the suspect or the defendant makes a similar complaint, it will, according to the law, be processed within 20 days (Article 338 CPC). This type of 'discrimination' in relation to the lawyer is not justified.

APADOR-CH considers that it would be good if the decision of the hierarchically superior prosecutor could be challenged before a judge, which is not the case right now.

Scope and format of the case materials accessible to the lawyer and the suspect/ defendant, cost of accessing materials

In the criminal investigation phase, the persons interested in making photocopies may submit a request based on the standard model.[105] Photocopying shall take place at the police station/ prosecutor's office headquarters with the available technical means.[106] Criminal investigation

104 In the old version of the CPC (1968), the interdiction to study the case file was equal for the suspect and the defendant/accused person (a maximum of 15 days). In the new version, the suspect is basically eliminated from the category of subjects who have access to the case file for reasons of preventing tampering with the investigation.

105 Article 7 (1) of the Ministry of Internal Affairs Order no. 64 din 01/07/2015 establishing some organisational measures to ensure the exercise of the right to consult the case file.

106 Article 9 (1) of the Ministry of Internal Affairs Order no. 64 din 01/07/2015 establishing some organisational measures to ensure the exercise of the right to consult the case file.

bodies shall ensure that personal data information present in the case file documents will not be visible on the photocopies. When setting the release date for the photocopies, the needed time for anonymizing personal data and photocopying will be taken into consideration.[107]

The standard price for obtaining photocopies from case files during the criminal investigation phase: app. €0.11 (RON 0.5) for an A4 page and app. €0.23 (RON 1) for an A3 page.[108]

The lawyer has access to all written evidence and video recordings (original or copies). Studying the case materials is free of charge, but photocopying the documents is not and it can be quite costly for a defendant who is in pre-trial detention and has no financial means. Moreover, legal aid does not cover the copies of the criminal files (volumes of case materials of hundreds, thousands of pages).

An example of good practice is that in some prosecutors' offices it is possible to also study the case file in an electronic format.[109] When this is the case, a problem arises because there are many lawyers and many case files and not enough computers. In Cluj, in order to read/study the case file in electronic format, you need to have a new, unused USB memory stick or CD. However, copying or transferring documents on a CD or a key will cost app. €0.11 (RON 0.5)/20 pages and app. €0.65 (RON 3) respectively.[110]

Regardless of the way one studies the case file, the time is limited (the general rule for the Cluj Tribunal is a maximum of three hours for case files with several volumes and several lawyers).

In practice, if the prosecutor is on annual leave, the lawyer has to wait for his/her return to be able to study the case materials. Often, when police officers are delegated to deal with the study of case files, each has a different procedure. Lawyers have complained that the majority do not know where judicial fees are to be paid and one must return several times to the police station (to get informed, to pay the tax, to collect the copies (even late in the afternoon).[111]

The study conditions at the prosecutor's office and the police station are inappropriate: crowded rooms, lawyers are used to studying the case materials on their knees or on the corner of a table.

107 Article 9 (4) of the Ministry of Internal Affairs Order no. 64 din 01/07/2015 establishing some organisational measures to ensure the exercise of the right to consult the case file.

108 Article 11 of the Ministry of Internal Affairs Order no. 64 din 01/07/2015 establishing some organisational measures to ensure the exercise of the right to consult the case file.

109 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

110 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

111 Anca Ioana Iuga, lawyer, Cluj Bar; Mihaela Musan, lawyer, Brasov Bar; interviews, 15 May 2017.

APADOR-CH considers that a problem might arise when it comes to anonymizing personal information on the photocopies, because the extent of such anonymizing is not defined. At the same time, anonymizing does not apply when taking notes from the case file, when one may write down all the information wanted. However, this concern has not yet been confirmed by any information related to the practice.

4. Please indicate whether the rules and the practice are different in the trial phase of the criminal procedure (or in any other phase of the criminal procedure following the investigation) from the rules and practice in the investigative phase. If the rules and/or the practice are different, please elaborate on the differences as compared to the investigative phase.

When the criminal investigation phase is over, the prosecutor sends the case file to the court (Article 329 (2) CPC) and the trial phase begins. There are no limitations as to the right of the accused to have access to the case file during the trial proceedings (Article 356 (1)).

In practice, the CPC provisions related to the right to consult the file are applied differently in the criminal investigation phase and the trial phase. As already mentioned, often the prosecutor does not reply to the request to consult the file, replies very late or delays the file consultation invoking various reasons. During the trial phase, access to the case file is theoretically easier, at the courts' archives.

The lawyer or the defendant may read/study the case file at the courts' archive, if it hasn't already been picked up by the judge for study. In this case, the lawyer has to make a request in order for the case file to be taken back to the archives, this in itself being a time consuming endeavour. One lawyer admitted that in practice, one judge denied her the right to study the case file on grounds that it had already been picked up by him for study.[112]

The cost of photocopying using the courts' premises is €0.043 (RON 0.2).[113] The problem is that most courts do not have a copy machine, so private copying machines in the vicinity of courts have to be used. They charge whatever price they want (higher than the one mentioned) and this can be costly for a defendant who has no money (practice encountered in the Alba Iulia, Cluj, Brasov and Bucharest courts).[114]

112 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

113 Article 9 (1) of the Government Emergency Order no. 80/2013 concerning legal stamp duties.

114 Nicoleta Popescu, lawyer, Bucharest Bar; Anca Ioana IUGA, lawyer, Cluj Bar; Mihaela Musan, lawyer, Brasov Bar; interviews, 15 May 2017.

Studying the case file in an electronic format is not a practice encountered in courts. However, as examples of good practice, the Cluj-Napoca court, the Cluj Tribunal and the Craiova Court of Appeal approve requests to photocopy the documents in the file with the mobile phone. The Hunedoara Tribunal allows copying with a professional scanner.[115]

5.1. Has Article 7 (2)–(5) of the Right to Information Directive been implemented on the legislative level?

It has been fully implemented, although some parts of the legislation are ambiguous enough to lead to abuses in practice (the CPC article referring to the case file consultation is restrictive for the suspect whose right applies only when he/she becomes a defendant; for the suspect the law does not provide a limitation in time of the interdiction to consult the file; the formulation of the provision related to the case file restriction (10 days maximum); no time limit for approving the case file consultation request; the prosecutor's refusal may not be challenged before a judge during the criminal investigation phase; challenging case file restrictions are not the same for a lawyer and a defendant). See problems raised in Section B) 3. of the country study.

5.2. Has Article 7 (2)–(4) of the Right to Information Directive been implemented in practice?

It has been partially implemented. As already mentioned, at the point of the initial question by the police, the suspect does not have access to the case file, the time for the case file consultation at this stage is very limited even for the lawyer (under the 24 hours expiration pressure), the prosecutor does not reply to the request to consult the file, replies very late or delays the file consultation invoking various reasons (there is no judicial control over the lawyer's orders, only that of the hierarchically superior prosecutor). During the criminal investigation phase, copying of the case materials is not done in a timely manner in order to be useful for the defence.

There are also no special provisions in the CPC related to case file consultation by the defendants who are in pre-trial detention. If they do not have a lawyer, they may not study the case file even if they make a request. In the best case scenario they are granted a little time in the courtroom, under escort in the box. Often, legal aid lawyers also study the case file in the courtroom, at the beginning of a hearing, making a very shallow defence.

115 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

When it comes to the pre-trial detention phase, the time for studying the case file is also limited, in most cases the lawyer may study the case materials in the courtroom, just before the hearing. On average, the defence lawyer has around 30 minutes to prepare for the initial judicial hearing to detain. There are also cases in which the lawyer consults the case file a few minutes before the hearing takes place.

6. Please indicate a maximum of three major problems in your country in terms of compliance with Article 7 (2)–(5) of the Right to Information Directive, both in terms of the law and the practice.

In terms of **practice,** lawyers mention: improper case file study conditions, especially in court archives (rooms without light, crowded, without sufficient chairs, sometimes one has to study standing), long time and multiple efforts in order to obtain copies of the case materials and the high costs for photocopying documents during the criminal investigation (app. €0.11), which affects in particular poor suspects and defendants.

With regard to **the law**, there should be more control by the courts when it comes to the prosecutor's orders to restrict case file consultation during the criminal investigation phase; according to the new CPP the suspect is basically eliminated from the category of subjects who have access to the case file for reasons of preventing tampering with the investigation; the possibility of case file restriction is formulated in rather general, large, ambiguous terms.

7. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (2)–(5) of the Right to Information Directive?

One of the goals of the 2015–2020 strategy for the judicial system, developed by the Ministry of Justice, is setting up a system that allows online access to case files.[116]

In 2014, the Ministry of Justice expressed the intention to fund the project through a public-private partnership, initially as a pilot project starting in 2015 for one court and then to be extended to the whole country.[117] The Cluj Court of Appeal already has such a system in place.

116 See: http://www.just.ro/wp-content/uploads/2015/09/h1155_231220141.pdf.

117 Minister of Justice in Romania, Robert Cazanciuc, 5 September 2014, interview in the national press, http://www.mediafax.ro/social/cazanciuc-se-contureaza-ideea-unui-parteneriat-public-privat-pentru-dosare-electronice-in-instanta-13212187.

An example of good practice is also that of the Craiova Court of Appeal. In a letter of 13 March 2015, sent as a reply to one request of the Dolj Bar Association, the court stated that parties and their lawyers may make copies and scans of documents from the relevant case files with their mobile phone or with a professional mobile scanner. All they need to do is make a request for this and wait for approval.[118] According to the interviews with lawyers, the Cluj-Napoca court, the Cluj Tribunal, Bucharest courts approve requests to photocopy the documents in the file with the mobile phone. The Hunedoara Tribunal allows copying with a professional scanner.[119]

C) The law and practice of access to the case materials in case of arrested/detained persons – Compliance with Article 7 (1) and (5) of the Right to Information Directive

8. Please provide information on the scope of persons who fall under the category 'arrested and detained' in your country in terms of Article 7 (1) of the Right to Information Directive. Are the respective domestic rules implementing Article 7 (1) of the Right to Information Directive applicable also to defendants being under house arrest as a pre-trial measure? Are there types of detention (as defined by the case-law of the European Court of Human Rights) that are not covered by the domestic rules aimed at implementing Article 7 of the Right to Information Directive?

Persons are deprived of liberty as a consequence of the following preventive measures: police arrest and pre-trial detention.

A person may be placed under police arrest as a preventive measure (Articles 202, 209–210 CPC). Police arrests have a maximum duration of 24 hours (Article 23 of the Constitution) and may only be ordered by the criminal investigation bodies or the prosecutor during the criminal investigation phase. Both a suspect[120] and a defendant[121] may be placed under police arrest.

118 See: https://www.juridice.ro/wp-content/uploads/2015/04/Scanare-sau-fotocopiere-cu-telefonul-mobil-sau-cu-un-scanner-profesional-mobil.pdf.

119 Nicoleta Popescu, lawyer, Bucharest Bar; Anca Ioana Iuga, lawyer, Cluj Bar; interviews, 15 May 2017.

120 The person in relation to which there is a *reasonable suspicion,* based on the evidence, that he/she committed an offence stipulated by the CPC (Article 77 CPC).

121 The person who has been formally charged and against whom a criminal investigation has been initiated, becoming part of the criminal proceedings.

If the prosecutor wants that person to stay in pre-trial detention after this period then the prosecutor has to notify the judge 6 hours before the expiry of the 24 hours, and ask the judge to place that person under pre-trial detention.[122] In this case the judge has to rule on the prosecutor's request within the 24-hour period.[123]

The new Criminal Code (CC) and CPC stipulate maximum lengths of pre-trial detention depending on whether it is imposed during the investigation phase or the trial phase of the criminal procedure. During the investigation phase of the criminal procedure the maximum length may not exceed 180 days.[124] During the trial phase, pre-trial detention may not be longer than half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years.[125]

The decision to remand a suspect in pre-trial detention is taken by a judge only against a defendant. It may be ordered for a maximum of 30 days[126] and may be renewed repeatedly for another 30 days. During the preliminary chamber procedure pre-trial detention should be reviewed periodically and no later than every 30 days if the reasons for which the pre-trial detention ordered still persist.[127] In the trial phase the judge will verify if the reasons for ordering pre-trial detention still persist, no later than every 60 days.[128]

The rules implementing Article 7 (1) of the Right to Information Directive are also applicable to defendants being under house arrest as a pre-trial measure. This is a new non-custodial alternative introduced by the reform of the CPC in 2014.[129]

As already mentioned, Article 94 of the CPP regulates access to all case file materials. The right applies throughout the entire duration of the criminal proceedings (Article 94 (1)) for both the suspect (Article 78) and the defendant (Article 83) and their lawyers (Article 94 (8)).

122 Article 209 CPC.

123 Article 225 CPC.

124 Article 236 CPC.

125 Article 239 CPC.

126 Article 233 CPC.

127 Article 207 CPC.

128 Article 208 CPC.

129 During the investigation phase of the criminal procedure the maximum length cannot exceed 180 days. In the preliminary procedure chamber and during trial the house arrest period cannot exceed half of the maximum sentence stipulated by law for the offence the defendant is accused of and cannot exceed 5 years.

9. Please provide information on the law and practice of access to the case materials of the defence (both the defendant and the defence counsel) if the defendant is arrested/detained, i.e. the rules applied and the practice followed in your country.

See information provided at Section B) 3. of this country study.

10. Please indicate whether the rules and the practice are different in this regard in the various phases of the criminal procedure. If the rules and/or the practice differ, please explain these differences.

The difference in practice is where defendants who are in pre-trial detention are concerned. For them, there are no special provisions in the CPC related to case file consultation. If they do not have a lawyer, they may not study the case file even if they make a request. In the best case scenario they are granted a little time in the courtroom, under escort in the box (at the initial hearing to detain or when pre-trial detention or alternative measures are being reviewed, each 30 days). Often, legal aid lawyers also study the case file in the courtroom, at the beginning of a hearing. Although the lawyer may study the case materials, the time allocated for that is not sufficient to effectively challenge the legality of any measure.[130]

The time for studying the case file is also limited, in most cases the lawyer may study the case materials in the courtroom, just before the hearing. On average, the defence lawyer has around 30 minutes to prepare for the initial judicial hearing to detain. There are also cases in which the lawyer consults the case file a few minutes before the hearing takes place.[131]

Taking into consideration that photocopying is very costly and that there are many poor defendants, it is clear that the right to access to case file materials is in fact not guaranteed.

Article 94 (7) of the CPC refers only to the preventive measures ordered by the rights and liberties judge (pre-trial detention, house arrest, judicial oversight) but does not apply to police arrest as well, which is ordered by the criminal investigation bodies or the prosecutor. In practice, the suspect in police arrest may not have access to the case file, he/she being merely informed about the charges against him/her and he/she may give a statement (Article 209 (2) CPC). In practice, a person may consult the case file when he becomes a defendant.

130 Ionut Maican, lawyer, Bucharest Bar, interview, 15 May 2017.

131 APADOR-CH (2015), *Is pre-trial detention used as a last resort measure in Romania? Research Report*, p. 27., available at: http://www.apador.org/wp-content/uploads/2016/02/Pre-trial-detention-in-Romania-by-APADOR-CH.pdf.

The time for studying the case file for the lawyer, during the police arrest, is limited by the judge, because he/she needs to have a hearing before the 24 hours expire. There is no electronic format of the case file in such situations, photocopying case materials is out of the question, the time is too short.

11.1. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented on a legal level?

It has been partially implemented. Studying the case materials is free of charge, but photocopying the documents is not and it can be quite costly for a defendant who is in pre-trial detention and has no financial means. Moreover, legal aid does not cover the copies of the criminal files (volumes of case materials, containing hundreds, thousands of pages).

11.2. Has Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive been implemented in practice?

It has been partially implemented. According to the law, the prices themselves differ in the criminal investigation phase and the trial phase. In practice, in the trial phase, although the law stipulates that the copy machine of the courts should be used, most of them do not have one so they use private photocopying machines whose owners charge whatever price they want (very high).

The process to get the photocopies is very long and complicated.

12. Please indicate a maximum of three major problems in your country's terms of compliance with Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive, both in terms of the law and the practice.

In terms of the law, there are no special provisions in the CPC related to case file consultation for the defendants who are in pre-trial detention. If they do not have a lawyer, they may not study the case file even if they make a request.

The case file consultation provisions (Article 94 CPC) only refer to the preventive measures ordered by the rights and liberties judge (pre-trial detention, house arrest, judicial oversight) but do not apply to police arrests as well, which are ordered by the criminal investigation bodies or the prosecutor.

In terms of practice, there would be a very limited time of access to the case materials for both the lawyer and the defendant granted by the judge in a situation when a request for pre-trial detention or house arrest is made. The defendant himself/herself has very limited access to the case file if he/she is in pre-trial detention or house arrest. In practice, the suspect under police arrest may not have access to the case file, he/she being merely informed about the charges against him/her, but he/she may give a statement (Article 209 (2) CPC).

13. Is there any legal or practical solution in your country which you would qualify as good practice in terms of implementing Article 7 (1) – and, in conjunction with that, Article 7 (5) – of the Right to Information Directive?

In some prosecutors' offices it is possible to study the case file in an electronic format during the criminal investigation phase (but not during the police arrest phase).[132] However, this is not a practice often encountered in Romania, and it does come with a cost: in Cluj, in order to read/study the case file in electronic format, one needs to have a new, unused USB memory stick or CD. Copying or transferring documents on a CD or a stick will cost app. €0.11 (RON 0.5)/20 pages and app. €0.65 (RON 3) respectively.[133]

132 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

133 Anca Ioana Iuga, lawyer, Cluj Bar, interview, 15 May 2017.

Annex – Selected list of relevant publications

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A compilation of French sources translated into English is available here.