

Questionnaire judicial remedies working group

This questionnaire relates primarily to exclusionary rules of evidence, and other judicial remedies (for example the reduction of sentence), for the violation of rules concerning procedural rights of suspects and accused persons in criminal proceedings within the scope of the EU Directives 2010/64/EU, 2012/13/EU, 2013/48/EU and 2016/343/EU.

“Exclusionary rule” is hereby defined as a rule prohibiting to use evidence obtained in violation of a given rule or procedural right.

For the purposes of this questionnaire “exclusionary rule” includes situations of “procedural nullities” defined as the vice and sanction that applies to an irregular procedural act (for example the questioning of the suspect in the absence of a lawyer or not notifying the suspect of their right to silence), which results in the prohibition of using evidence obtained thereby.

Please complete the questionnaire comprehensively and indicate the relevant national legal provision and/or case law.

You will see that the questionnaire consists of 10 questions and for each of the questions we are keen to get the information with regards to the exclusion of evidence in your jurisdiction for violations of specific rights provided under the Directives or similar national provisions.

- 1) If any of the following suspect’s and accused person’s rights are violated during the criminal proceedings, in what circumstances will evidence be excluded, if at all?

Right to Interpretation and Translation Directive ([Directive 2010/64/EU](#))

- a. Right to interpretation at any stage of proceedings (Article 2(1) of the Directive¹)?
- b. Right to interpretation for conversations with the defence counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (Article 2(2) of the Directive²)?
- c. Right to interpretation of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise the right of defence (Article 2(8)³)?

Right to Information Directive ([2012/13/EU](#))

¹ Article (2)(1) of the Directive states that “suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings”.

² Article 2(2) of the Directive states that “where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications”.

³Article 2(8) of the Directive states that “Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise the right of defence”.

- d. Right to be informed promptly of their right to access to a lawyer (Article 3(1)(a) of the Directive⁴)?
- e. Right to be informed promptly of their right to remain silent (Article 3(1)(e) of the Directive⁵)?
- f. Right of a suspect or arrested person to receive a written Letter of Rights (Article 4(1), (2), (3) of the Directive⁶)?

Access to a Lawyer Directive (2013/48/EU)

- g. Right to access to a lawyer before questioning by the police or by another law enforcement or judicial authority (Article 3(2)(a) of the Directive⁷)?
- h. Right to access to a lawyer upon carrying out identity parades, confrontations and reconstructions of the crime-scene or other evidence-gathering acts (Article 3(2)(b) of the Directive)?
- i. Right to access to a lawyer without delay after deprivation of liberty (Article 3(2)(c) of the Directive)?
- j. Right to access to a lawyer where a person has been summoned to appear before a

⁴ Article 3(1) of the Directive states that “suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: (a) the right of access to a lawyer; [...]”.

⁵ Article 3(1) of the Directive states that “suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: [...] (e) the right to remain silent.”

⁶ Article 4 (1), (2) and (3) of the Directive state that “suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty”. The Letter of Rights will include information on the above-mentioned rights (right to access to a lawyer; right to legal aid; right to be informed on the accusation; right to interpretation and translation; right to remain silent), as well as on

“(a) the right of access to the materials of the case;

(b) the right to have consular authorities and one person informed;

(c) the right of access to urgent medical assistance; and

(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority” and also “basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.”

⁷ Article 3 (1), (2) and (3)(c) of the Directive states that “suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively [...] 2. [...] without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court

3. The right of access to a lawyer shall entail the following: [...]

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

court with jurisdiction in criminal matters, in due time before they appear before that court (Article 3(2)(d) of the Directive)?

- k. Right to communicate confidentially with their defence counsel, including meetings, correspondence, telephone conversations and other forms of communication permitted under national law (Article 4 of the Directive⁸)?
- l. Right to have a lawyer present when questioned by the police?

Presumption of Innocence Directive ([2016/343/EU](#))

- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive⁹)?

- 2) If you responded that evidence will be excluded in any of the situations above, please let us know if the evidence will be excluded, for all possible purposes or only for certain purposes? If the latter, for which ones?

For example, evidence may be excluded as direct evidence, but not as corroborating evidence; it may be excluded to establish guilt, but not for a decision on the length of the sentence or in other related proceedings in the same criminal cases (for example decisions on pre-trial detention or the European Arrest Warrant); it may be excluded only for the proceedings against the suspect or accused person whose rights were violated, but not in the proceedings against other suspects or accused persons.

Right to Interpretation and Translation Directive ([Directive 2010/64/EU](#))

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- b. Right to interpretation for conversations with the defence counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (Article 2(2) of the Directive)?
- c. Right to interpretation of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise the right of defence (Article 2(8))?

Right to Information Directive ([2012/13/EU](#))

⁸ Article 4 of the Directive states that “Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law”.

⁹ Article 7(1) of the Directive states that “suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed”. Article 7(2) and (3) of the Directive state that “suspects and accused persons have the right not to incriminate themselves” and that “the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons”.

- d. Right to be informed promptly of their right to access to a lawyer (Article (3)(1)(a) of the Directive)?
- e. Right to be informed promptly of their right to remain silent (Article 3 (1) (e) of the Directive)?
- f. Right of a suspect or arrested person to receive a written Letter of Rights (Article 4(1), (2), (3) of the Directive)?

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- l. Right to have a lawyer present when questioned by the police?

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- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?

- 3) If evidence obtained in violation of the suspect's or accused person's right is excluded, will secondary evidence obtained thereby be excluded? ("fruit of the poisonous tree doctrine", for example, if the suspect or accused person has made a statement following a violation of their rights, which results in finding further evidence, will this evidence be excluded?).

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Presumption of Innocence Directive ([2016/343/EU](#))

- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?
- 4) How is the exclusionary rule applied? Is it mandatory and strictly enforced (i.e. if a violation of the right is ascertained, will the evidence automatically be excluded)? Or can the authorities apply discretion, whether to exclude the evidence or decide to conduct a balancing of interests in order to decide whether to exclude the evidence? If yes, what interests does/must the judge put in balance?

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Presumption of Innocence Directive ([2016/343/EU](#))

- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?
- 5) Will the trial judge or jury have access to and knowledge of the evidence that has been excluded (for example because the evidence was presented to them prior to taking the decision to exclude it)?

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- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?
- 6) Can the violation of the procedural right have any other consequences either in this or other related procedures? For example, criminal, civil or disciplinary liability of the person violating the right, state liability, reduction of the sentence, monetary compensation, repeating the proceeding, weighing the evidence obtained differently to other evidence, or other consequences or informal remedies? Please provide a brief explanation, we may follow up this up with more detailed questions in due course.

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Presumption of Innocence Directive ([2016/343/EU](#))

- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?
- 7) What is the legal means to pursue the exclusion of the evidence obtained in violation of procedural rights (for example, request to the prosecutor or judge, raising the complaint at the appeal stage)? Will the proceedings continue but will the evidence possibly be excluded, or will the case return to the procedural stage before the violation occurred?

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- 8) Are the legal means outlined in question 7 applied in practice? If not, are they not applied at all or are they applied unevenly? Why, in your opinion, are they not or not consistently applied?

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Presumption of Innocence Directive ([2016/343/EU](#))

- m. Right to remain silent and right not to incriminate oneself (Article 7 of the Directive)?

- 9) Do you consider any of the legal remedies provided in law and practice effective for the remedying the violation that occurred? If not, please tell us why and if possible, give examples of situations that you have seen in which the remedy provided was not sufficient to provide an effective remedy for the violation.

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10) Were any of the provisions or practices on the remedies introduced as a result of the transposition of the Directives?

- a. Right to Interpretation and Translation Directive ([Directive 2010/64/EU](#))?
- b. Right to Information Directive ([2012/13/EU](#)) ?



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- c. Access to a Lawyer Directive ([2013/48/EU](#))?
- d. Directive on Presumption of Innocence ([2016/343/EU](#)) ?