

## FAQ: EU Criminal Justice Rights in the UK

August 2017

### Contents

If you are a citizen of an EU Member State, then you are an EU citizen and have a number of rights, including rights relating to criminal justice.

#### This FAQ discusses:

- Rights of suspects and accused
- Rights of juveniles
- Rights of victims
- Criminal justice rights in the UK post-Brexit

It is intended to present an outline of the main issues relating to EU criminal justice rights in the UK, and is therefore not comprehensive.

Author: Rosie Slowe, Intern,  
[binghamcentre@biicl.org](mailto:binghamcentre@biicl.org)

### Key EU Instruments in the Criminal Justice Field

#### Primary EU Law

<b>EU Charter of Fundamental Rights</b> <b>OJ C 326/02 (2012)</b>	Articles 47 and 48 set out the right to a fair trial and defence
<b>Treaty on the Functioning of the European Union</b> <b>OJ C 326/47 (2012)</b>	Article 82(2) provides that the EU can adopt Directives establishing minimum rules concerning: (a) the rights of individuals in criminal procedure (b) the rights of victims of crime

#### Secondary EU Law

Legislation		Has the UK Opted-In	
Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings OJ L 280/1 (20 October 2010)	Right of the accused to interpretation and translation	✓	
Directive 2012/13/EU on the right to information in criminal proceedings OJ L 142/1 (22 May 2012)	Right of the accused to information	✓	
Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294/1 (22 October 2013)	Right of the accused to access a lawyer and communicate with third persons	X	The Government believed that a number of provisions in the proposal went substantially beyond the requirements of the European Convention on Human Rights (ECHR) and would have an adverse impact on the UK's ability to effectively investigate and prosecute offences.
Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings OJ L 65/1 (9 March 2016)	Right of the accused to be presumed innocent and present at trial	X	The Government did not believe the case had been made for EU action in this area.
Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings OJ L 65/1 (26 October 2016)	Right of the accused to legal aid	X	The Government considered that the rules on legal aid were most appropriately determined by Member States themselves rather than at EU level.
Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ L 132/1 (11 May 2016)	Special protections for juveniles suspected or accused in criminal proceedings	X	The Government did not believe the proposal would improve on the support and protection of young people in the UK under existing legislation.

Continued

Legislation		Has the UK Opted-In	
Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime OJ L 315/57 (25 October 2012)	Common rules aimed at protecting and assisting victims of crime	✓	
Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims OJ L 101/1 (5 April 2011)	Robust protection and support for victims of human trafficking	✓	The Government initially exercised its ability to opt-out of the Directive on the basis of its view that the UK already complies with most of the provisions contained in the draft EU Directive. However, it later successfully applied to opt-in to the Directive.
Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography OJ L 335/1 (13 December 2011)	Robust protection and support for child victims of sexual exploitation and child pornography	✓	
Directive 2011/99/EU on the European Protection Order OJ L 338/2 (13 December 2011)	Mechanism for the mutual recognition of protection measures	✓	
Directive 2004/80/EC relating to compensation to crime victims OJ L 261/15 (29 April 2004)	Right of victims to compensation	✓	

## 1. Rights of Suspects and Accused

The EU works towards achieving common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspects and accused persons are protected sufficiently so as to ensure the right to a fair trial across all Member States. Common minimum standards are necessary for judicial decisions taken by one EU country to be recognised by the others, according to the principle of mutual recognition.

*Right of the accused to interpretation and translation*

**Q: What happens when someone accused of a crime faces criminal proceedings in a language he does not understand?**

**A:** In 2010, the EU adopted the [Directive on the right to interpretation and translation in criminal proceedings](#) entitling defendants to interpretation and translation services in a language they understand, thereby safeguarding the fairness of judicial proceedings throughout the EU. The Directive requires Member States to put in place the following minimum mechanisms:

- **Free Interpretation services** during police questioning, essential meetings between client and lawyer, all court hearings, and any necessary interim hearings.
- **Written translation of essential documents**, including any decision depriving a person of his liberty, any charge or indictment, and any judgment.
- **Quality control** for all translation and interpretation services and national registers of independent and qualified legal interpreters and translators.
- **Training** for judges, prosecutors and judicial staff involved in criminal proceedings to ensure they can communicate efficiently with interpreters.

## *Right to information*

### **Q: Do suspects of a criminal offence have the right to be informed of their rights and the charges against them?**

**A:** Yes, and promptly! The [Directive on the right to information in criminal proceedings](#) requires Member States to put in place the following minimum rules:

- **Information about procedural rights** must be provided to suspects in order for them to be exercised effectively. Arrested persons must be informed in writing, in a comprehensible language, of their procedural entitlements, including: the right to a lawyer or free legal advice; the right to be informed about the accusation; the right to interpretation and translation; and, the right to remain silent. This so-called 'Letter of Rights' will also contain information on, inter alia, access to case materials or the possibility to challenge the lawfulness of the arrest.
- **Information about the accusation** must be promptly given to suspects or accused so that they understand the criminal act they are suspected or accused of having committed. Further, arrested persons should be informed about the reasons for their arrest.
- **Access to documents and material evidence** must be given to suspects or accused in order to safeguard the fairness of the proceedings and enable them to prepare a defence.

## *Right to access a lawyer and communicate with third persons*

### **Q: With whom are suspects allowed to communicate?**

**A:** In 2013 a [Directive on the right of access to a lawyer and the right to communicate with third persons and consular authorities while deprived of liberty](#) was adopted. It provides that all suspects – no matter where they are in the EU - will have the right to be advised by a lawyer in criminal proceedings and in European arrest warrant proceedings, and may communicate with their family and consular authorities on arrest and during detention.

The directive guarantees this by: providing a right of access to a lawyer from the first stage of police questioning and throughout criminal proceedings; allowing a right to adequate, confidential meetings with the lawyer; making sure that, when suspects are arrested, somebody such as a family member can be made aware of that arrest and that there is an opportunity for suspects to communicate with their family; allowing suspects abroad to be in contact with their country's consulate and receive visits. If you are subject to a European Arrest Warrant, you have the right to legal advice in both the country where you were arrested and your home country. The UK did not opt in to this Directive.

## *Right to be presumed innocent*

### **Q: Is a presumption of innocence guaranteed?**

**A:** Yes. Although the right to be presumed innocent exists in all Member States, the Presumption of Innocence Directive was adopted in 2016 to ensure that this right is applied equally across the EU. The Directive clarifies that the burden of proof for establishing guilt is on the prosecution, and it prohibits public authorities and judicial decisions from making any public references to guilt before an accused is proven guilty. It ensures suspects and accused are guaranteed the right to remain silent and not self-incriminate, as well as the right to be present at their trial. The Directive will apply in participating Member States from April 2018; however, the UK did not opt in to this Directive.

## Right to legal aid

### Q: What if you cannot afford to cover the costs of the proceedings?

**A:** If you are a suspect or accused, you have the right to financial support through legal aid. In 2016 the EU adopted the [Legal Aid Directive](#) in order to harmonise the provision of legal aid across Member States. The new rules, which will apply across participating Member States as of May 2019, ensure that suspects and accused have the right to legal aid at the early stages of criminal proceedings, at the latest before questioning by the police. Member States may apply a means test, a merits test or both to determine whether legal aid has to be granted; however, the UK did not opt in to this Directive.

## 2. Rights of Juveniles

### Q: How are children who are suspected or accused of a criminal offence protected?

**A:** As juveniles are particularly vulnerable during all stages of criminal proceedings, the 2016 [Procedural Safeguards for Children in Criminal Proceedings Directive](#) guarantees a number of special protections. These include: being quickly informed of their legal rights; being assisted by a parent or another appropriate person; being assisted by a lawyer, with no prison sentence able to be imposed if legal assistance was not given during trial; and, being detained separately from adults if sent to prison. The Directive will apply in participating Member States as of June 2019; however, the UK did not opt in to this Directive.

## 3. Rights of Victims

### Q: What does the EU do to protect victims of crime?

**A:** The EU guarantees that all victims - irrespective of their nationality, country of residence or the seriousness of the crime involved - are afforded a minimum level of rights across the EU without discrimination. It acts to ensure that victims: are recognised and treated with respect and dignity; are protected from further victimisation and intimidation from the offender and further distress when they take part in the criminal justice process; receive appropriate support throughout proceedings and have access to justice; and, have appropriate access to compensation.

### Q: What legislation has the EU adopted to this effect?

**A:** The EU has adopted several legal instruments setting up common rules aimed at protecting and assisting victims of crime. General minimum standards to address the rights and needs of victims in criminal proceedings were first established through the 2001 [Council Framework Decision on the standing of victims in criminal proceedings](#). However, the Framework Decision proved ineffective and was later replaced by the 2012 [Victims' Rights Directive](#). The Directive considerably strengthens the rights of victims and their family members to information, interpretation and translation, support services and protection. It also strengthens victims' procedural rights in criminal proceedings. The Directive also requires that the Member States ensure appropriate training on victims' needs for officials who are likely to come into contact with victims. Further, it encourages cooperation between Member States and coordination of national services acting in this field.

Further, specific EU legislation has been adopted in order to establish robust protection and support for [victims of human trafficking](#) and [child victims of sexual exploitation and child pornography](#).

**Q: Can victims continue to benefit from protection measures if they move to another Member State?**

**A:** In 2011, so as to ensure that a victim who had been granted a protection order in one Member State continues to benefit from this protection if they move or travel to another, the EU adopted a [Directive on the European Protection Order \(EPO\)](#), under which victims benefiting from a domestic protection order can request a EPO. Such an order entitles the victim to the same protection in any Member State to which they move or travel.

**Q: How are victims' rights to compensation ensured at the EU level?**

**A:** The 2004 [Directive on compensation to crime victims](#) ensures that each Member State has a national scheme in place which guarantees fair and appropriate State compensation to victims of intentional violent crimes. It also provides that persons can apply for State compensation when they have fallen victim to crime abroad, and receive assistance to do so. Further, Article 16 of the Victims' Rights Directive provides the right to obtain a decision on compensation within a reasonable time in the course of criminal proceedings, and encourages mechanisms to recover compensation awards from the offender.

## 4. UK Criminal Justice Rights post-Brexit

**Q: How has EU law in the criminal justice field been transposed into domestic law?**

**A:** As noted by [Professor Williams](#), 'the UK had already been given a great deal of flexibility and had taken a very à la carte approach to the [criminal justice] measures available'. The Treaty of Lisbon gave prominence to EU action in the area of criminal justice. Further, it altered the legal framework for EU law in this field, bringing it within the ordinary legislative procedure and the ECJ's jurisdiction. The UK only agreed to these major changes in exchange for two opt-outs: the first enables the UK to determine - on a case by case basis - which post-Lisbon legislative measures it opts-in to or opts-out of; the second take the form of a 'block' opt-out for all legislation adopted pre-Lisbon, with the UK subsequently able to opt-in to individual legislative measures. The UK invoked the latter in 2013, and indicated 35 measures where it wished to opt back in.

Post Lisbon, the UK opted-in to all victims' rights Directives, but was more selective when it came to EU legislation ensuring the rights of suspects and accused. While the UK opted-in to EU directives ensuring rights to interpretation, translation and information, it did not opt-in to the Directive on the right to access a lawyer as it believed this would have an adverse impact on the UK's ability to investigate and prosecute offences effectively. The UK also did not opt-in to the Directive on strengthening the presumption of innocence or the Directive on legal aid because the government was of the opinion that such matters were best left to Member States to determine. The Directive on procedural safeguards for juvenile offenders was also not opted-in to because the Government considered that existing domestic legislation in this regard was sufficient. All measures to which the UK did opt-in to have since been implemented into national law by way of secondary legislation.

**Q: What impact will Brexit have on the rights of suspects and accused?**

**A:** As with most predicted consequences, the answer to this question is not yet known. In respect of the measures that the UK opted-in to, so far as they have already been implemented into domestic law, it is doubtful that there will be any appetite for them to be reversed. However, for the most part the UK has chosen not to opt-in to key legislation introduced to establish common minimum standards for the procedural rights of suspects and accused across the EU. While this is ostensibly irrelevant in terms of domestic entitlements, because [UK law and practice regarding rights of the defence has been regularly cited in Brussels and in other Member States as a benchmark](#), there has been missed opportunity for improvement in procedural rights, as articulated by Dimitrios Giannouloupoloulos. The Right to Information Directive filled an important gap in existing domestic legislation because it led to the introduction of a revised 'Letter of Rights' and created a new obligation on police to provide sufficient information to suspects prior to interview as well as documents essential for challenging the lawfulness of arrest or detention.

Opting-in to the Access to a Lawyer Directive would have led to a broadening of the right to legal assistance, by extending its application to investigative and evidence gathering beyond merely questioning of the suspect. Similarly, the Presumption of Innocence Directive would have presumably necessitated reopening the discussion about the courts' power to draw adverse inferences from silence, a feature of UK criminal justice that one hardly comes across in other parts of the world but that has been taken as a given in the English Law of Evidence and criminal procedure. Further, considering recent controversial cuts to legal aid in the UK, opting in to the Legal Aid Directive would have provided a useful external point of reference to the relevant debate.

Attention ought to be paid to the fact that, while the UK has not transposed numerous Directives recognising defendants' fair trial entitlements, it has opted-in to a significant number of EU Directives designed to enhance judicial and police cooperation and facilitate the fight against crime. This is concerning because the EU planned both sets of Directives combined to improve the balance between measures that facilitate prosecution and those that protect procedural rights of suspects and accused. Nevertheless, while the right to fair trial as enshrined in the EU Charter of Fundamental Rights will cease to be applicable once the UK has left the Union, this fundamental entitlement is, at present, sufficiently protected pursuant to Article 6 of the Human Rights Act.

### Q: What impact will Brexit have on victims' rights?

**A:** : Victims' rights seem less susceptible to removal in post-Brexit Britain considering the UK willingly chose to opt-in to every EU Directive in this regard. As these Directives have been transposed into domestic law, their provisions are set to be preserved in the short term by the proposed 'Great Repeal Bill'. In the longer term, however, there is a risk of divergence of standards between the protections of victims domestically and in the other 27 Member States – either by way of a failure to match new provisions introduced at EU level, or by way of domestic repeal. Whilst at the time of their adoption UK law extended beyond a number of the minimum standards laid down in the Directives, the EU has made support for victims of crime a priority policy area and further measures are planned; victim's rights in the UK may therefore fall behind. While it is difficult to predict with any certainty which particular victims' rights might further be at risk of repeal as a matter of domestic law, potentially costly measures such as guarantees concerning translation might be thought to be vulnerable.

Cross border concerns also bear consideration. While EPOs can currently be used to ensure that victims of crime are granted equivalent protection across Member States, it is unclear whether this measure, or any equivalent, will be available after Brexit. Although the Government recently chose specifically to opt-in to the EPO legislation, suggesting that the UK may wish to retain the mechanism for the mutual recognition of protection measures, given that EPOs restrict fundamental rights of those to whom they are subject, it may be hard to justify retention if the UK is no longer closely associated to the Member States whose Orders it would be enforcing, and vice versa. Further, the original genesis for the principle of mutual recognition was free movement; it addresses the difficulty that free movement of people opens up the possibility of free movement of criminals. The retention of the EPO mechanism may therefore be affected by the extent to which, following withdrawal, the UK accepts the core EU principle of freedom of movement and, if so, on what terms.