D 2.3
French Report

Grant Agreement nº:	<847346>
Project Acronym:	CROSS-JUSTICE
Project Title:	Knowledge, Advisory and Capacity Building. Information tool for Criminal Procedural Rights in Judicial Cooperation
Website:	https://site.unibo.it/cross-justice/it
Contractual delivery date:	M24
Contributing WP	WP2
Dissemination level:	PUBLIC
Deliverable leader:	UNIBO (via subcontracting with Université Paris Nanterre)
Contributors:	UNIBO, EUI

This project is funded by the European Union's Justice Programme (2014-2020)

1 Document History

Version	Date	Author	Partner	Description
1.0	June 2021	Raphaële Parizot, Eleonora Cervellera	UNIBO, via subcontract	First draft
2.0	July 2021	Alessandra Santangelo	UNIBO	Feedbacks
3.0	December 2021-January 2022	Eleonora Cervellera	UNIBO, via subcontract	Final draft

2 Contributors

Partner	Name	Role	Contribution
Université Paris Nanterre	Raphaële Parizot	Professor	Chapter 6, 7, 8, 11. Introduction and conclusion together with E. Cervellera
Université Paris Nanterre	Eleonora Cervellera	PhD Student	Chapter 9 and 10. Introduction and conclusion together with R. Parizot
UNIBO	Alessandra Santangelo	Technical Coordinator	Entire Report Feedbacks

Disclaimer: On behalf of the University Paris Nanterre, the present deliverable has been drafted by Raphaële Parizot, professor at the University of Paris Nanterre and Eleonora Cervellera, PhD student at the University of Paris Nanterre. **For the purposes of this report, national case law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to**.

3 Table of Contents

4 Main findings/Executive summary

This study aims to analyse the current state of transposition of the European directives on criminal procedural rights of the accused into French domestic law. After presenting the procedural guarantees enshrined in the French Constitution and briefly introducing the essential features of French criminal procedure (Sect. 5), we will move on to analyse the transposition of each directive.

● The first analysis (Sect. 6) concerns Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings, which was transposed into French law by Law n°. 2013-711 of 5 August 2013. The analysis of the relevant legislation (Sect. 6.1) will lead us to conclude that the directive has generally been correctly transposed into domestic law.
The two decisions of the Court of Cassation referring to the directive will also be analysed (Sect. 6.2). In the first decision, the Court of Cassation refused to submit a prejudicial question to the Court of Justice of the European Union, considering that the 2010 Directive had been correctly transposed and that there was no breach of the right of defence, thus showing the position of the French jurisdiction regarding the state of transposition of the Directive.

● The second analysis (Sect. 7) concerns Directive 2012/13/EU Right to information in criminal proceedings, which was transposed by Law n°2014-535 of 27 May 2014. The analysis of the relevant legislation (Sect. 7.2) will lead us to conclude that the directive has globally been correctly transposed into French law. The three decisions of the Court of Cassation referring to the directive will also be analysed (Sect. 7.3). Once again, the Court of Cassation refuses to refer a question to the Court of Justice of the European Union for a preliminary ruling considering that the Directive has been correctly transposed into national law. The Court thus shows the position of the French jurisdiction regarding the state of transposition of the Directive.

● The third analysis (Sect. 8) concerns Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed. The Directive was transposed in French law by the Law

n°2014-535 of 27 May 2014 about the transposition of the directive 2012/13/EU on the right to information in criminal proceedings, the Law n°2016-731 of 3 June 2016 about fighting against organized crime, terrorism and their funding and improving efficiency and guarantees of the criminal procedure, the Décret n°2016-1455 of 28 October 2016 improving guarantees of the criminal procedure. The analysis of the relevant legislation (Sect. 8.1) will lead us to conclude that the Directive has been globally correctly transposed into French law. From a jurisprudential point of view (Sect. 8.2), in decisions relating to the directive, the Court of Cassation considers that national law conforms with the Directive. In a very recent decision, the Court confirms the annulment of the procedure pronounced by the Court of Appeal by referring as well to the Directive 2013/48/UE. (Sect. 8.2).

● The fourth analysis (Sect. 9) concerns Directive 2016/800/EU: Procedural safeguards for juvenile defendants. Domestic law already provides for special provisions applicable when a child is suspected or accused in criminal proceedings in addition to the provisions already applicable for all (adult) suspects (*Ordonnance du 2 février 1945 relative à l'enfance délinquante, replaced on the 30 September 2021 by the Juvenile Criminal Justice Code – Code de la justice pénale des mineurs)*.
The Directive has been transposed by the following texts which have amended some articles of the Ordonnance: Law n° 2019-222 of 23 March 2019 on programming 2018-2022 and reform for justice (article 94); Law n° 2016-1547 of 18 November 2016 on the modernisation of justice in the 21st century (article 31); Decree n° 2019-507 of 24 May 2019 taken for the application of the criminal provisions of Law n° 2019-222 of 23 March 2019 on programming 2018-2022 and reform for justice relating to digital procedure, investigations and prosecutions. An analysis of the relevant legislation (Sect. 9.1) will lead us to conclude that the directive has been globally correctly transposed into French law.
The analysis of the case law (Sect. 9.2), although they do not explicitly refer to 2016/800 Directive, shows ever-increasing attention and protection in the field of juvenile law.

● The fifth analysis (Sect. 10) concerns Directive 2016/1919/EU: Legal aid. The Directive which should be transposed for the 25 May 2019 has not been transposed into national law.
In the French legal system, legislation on legal aid therefore already existed before the European directive of 2016 (Loi n° 91-647 of 10 July 1991 relative à l'aide juridique and Décret n°91-1266 du 19 décembre 1991 portant application de la loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique), and the legislator has not considered necessary to transpose the directive.

An analysis of the relevant legislation (Sect. 10.1) will lead us to conclude that, despite the lack of transposition, national law is entirely in conformity with the directive. No case law relating to the directive has been found (Sect. 10.2).

● The sixth and last analysis (Sect. 11) concerns Directive 2016/343/EU: Presumption of innocence and of the right to be present at the trial. The Directive should be transposed for the 1st of April 2018 but was not yet expressly transposed in French law in 2021 and, at the moment, there is no project to transpose the text. An analysis of the relevant legislation (Sect. 11.1) will lead us to conclude that several points of the Directive are effectively provided for by French law. However, some points remain critical, especially the use of glass boxes and the lack of specific remedies in case of breach of the right to the presumption of innocence. Moreover, it follows from the three decisions of the Court of Cassation referring to the Directive that the supreme court does not consider national law to be not in contradiction with the Directive (Sect. 11.2).

In a conclusive section (Sect. 12), we will evaluate the analysis carried out, showing that the different legislative transposition techniques lead to satisfactory results in national law. Even regarding directives that have not been transposed, national law appears to be largely in line with European requirements. However, the comparison of the different transpositions will also reveal some limitations of the domestic law, as well as some points for improvement.

5 Introduction

The French Constitution of 4 October 1958 provides in its preamble "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004".

The Declaration of Human and Civic Rights of 1789, which is considered a part of the French Constitution of 1958 and therefore has constitutional status, protects several fundamental rights (liberty, equality, propriety, the presumption of innocence…) and in particular regarding our topic:

- Article 7: "No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed. Those who solicit, expedite, carry out, or cause to be carried out arbitrary orders must be punished; but any citizen summoned or apprehended by the Law must give instant obedience; resistance makes him guilty" (principle of legality applicable to the criminal procedure).
- Article 9: "As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law" (presumption of innocence).
- Article 16: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution" (the constitutional basis for defence rights).

In other words, the Declaration proclaims protection against an arbitrary power (safety) and guarantees it through to the Law: no restriction or privation of liberty is possible without a Law and cannot be carried out without following the procedure described by the Law, understood as an Act voted by the Parliament.

Moreover, in case of restriction of liberty, it is necessary to provide control by the judicial authority. Article 66 of the French Constitution provides that: "No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute". The French Constitutional Council interprets this article strictly and considers that the Constitution imposes judicial control only for the deprivation of liberty, leaving the possibility to the Parliament to organize a judicial or an administrative control for other restrictions of liberty.

The French code of criminal procedure has been adopted by a Law of 31 December 1957 and has been changed frequently since 1957 in particular under the influence of the European Convention of Human Rights and the Law of the European Union.

Historically, the French criminal system is inquisitorial. The French criminal law procedure is traditionally presented as written, secret and non-adversarial. This has changed for a long time; now the preliminary article of the code of criminal procedure provides that « *Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties* ». Now the trial is without doubt oral, public and adversarial (even if probably not at the level of the American procedure). But these remarks apply only to the trial strictly understood. On the contrary, the pre-trial is ever written[1], secret[2] and rather not adversarial. But concerning this last point, it is necessary to distinguish between the two possible frames of the investigation in the French criminal procedure:

- On one hand, **the inquiry** (*enquête*) is the investigation made by judicial police officers under the supervision of the district prosecutor (*procureur de la République*), who has a judicial role (he is a magistrate in France) without a judicial status (he is not an independent magistrate: he works under the supervision of the prosecutor general – *procureur general* – which in turn is under the supervision of the Minister of Justice[3])[4]. The inquiry is actually the common frame of the investigation in France.

[1] Each act of the investigation must be written in an official report.

[2] Art. 11 CPP: « *Except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret* ».

[3] Art. 5 Ordonnance of the 22th December 1958: « *Les magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l'autorité du garde des sceaux, ministre de la justice. A l'audience, leur parole est libre* ».

[4] The European Court of Human Rights has taken the view that owing to their status, public prosecutors in France did not satisfy the requirement of independence from the executive which, according to its well-established case law, was, like impartiality, one of the guarantees inherent in the autonomous notion of "officer" within the meaning of Article 5 § 3 (ECtHR, Moulin v. France, 23 November 2010, §. 57; ECtHR (Gd. ch.), Medvedyev v. France, 29 March 2010). But the Constitutional Council has expressed disagreement with Strasbourg in a line of cases. In an important judgment published on the 8th of December 2017 (Cons. const., n°2017-680 QPC, 8 December 2017), the Council held that, regarding the public prosecutor, the principle of independence of the judicial authority (no individual instruction, the principle of the opportunity of the prosecution…) was compatible with the powers given to the Government by the article 20 of the Constitution (« *the Government shall determine and conduct the policy of the Nation* », which includes the power to determine the prosecution policy). This is also the position of the CJEU in the context of the European arrest warrant (CJUE, 12 December 2019, C-566/19 PPU and C-626/19 PPU).

- On the other hand, **the judicial investigation** (*instruction*) is made by an investigating judge (*juge d'instruction*), who is an independent magistrate. The judicial investigation is required for the most serious offences (criminal offences) and possible for other offences, especially for complex cases.

Historically, the judicial investigation was the only possible frame to investigate. Prosecutors have developed the use of an inquiry before applying to an investigating judge. This practice was finally recognised in the code of criminal procedure and became the common frame.

Anyway, for every person suspected, the choice of the investigation frame has important effects. If the person is suspected in a judicial investigation, he is considered a party and he has complete defence rights. If the person is suspected in an inquiry, he is not considered a party; for that reason, for a long time, the code of criminal procedure denied these persons defence rights. This, even if the person was under police custody[5] during the inquiry (custody which can last until 48 hours in case of common offences)[6]. For that reason too, the person didn't have and doesn't yet have remedies at his disposal to contest this phase of the procedure.

The national authorities involved in criminal proceedings are first of all the **district prosecutor** for the inquiry and the **investigating judge** for the judicial investigation. To strengthen the judicial control during this pre-trial stage, the Law of 15 June 2000 for the protection of the presumption of innocence created a new judicial institution: **the liberties and custody judge** (*juge des libertés et de la detention, JLD*), considered as "*the Judicial Authority, [which acts as a] guardian of the freedom of the individual*". This Judge takes all deprivation of liberty decisions relating to the judicial investigation: the JLD has responsibility for ordering and extending pre-trial detention (*détention provisoire*) (art. 137-1 c. proc. pén.). During the inquiry, the "common" police custody (i.e. the police custody until 48 hours) is undertaken by the police officer under the supervision of the district prosecutor; the exceptional police custody (over 48 hours and until 144 hours in case of terrorism) is undertaken by the JLD. In addition to these "first-level" judicial authorities, there is the **investigating chamber,** which is in charge of all questions concerning the legality

[5] The art. 62-2 CPP provides that « *the custody is a coercive measure decided by a judicial police officer, under the supervision of the judicial authority, with which a person against whom there exist one or more plausible reasons to suspect that they have committed or attempted to commit a crime or an offence punished with an imprisonment remains at the disposal of the investigators* ».

[6] Duration that can be extended until 6 days in case of terrorism.

or proportionality of the acts of the pre-trial stage in case of a judicial investigation (judicial investigation without preliminary inquiry or judicial investigation after a preliminary inquiry). If there is no judicial investigation, there is no remedy provided regarding the pre-trial stage and the contestation of a breach of rights during the pre-trial stage should be presented before **the trial judge.**

The question of criminal procedural rights is a very actual topic in French law in particular under the aspect of the remedy during the pre-trial stage. We can witness an evolution on this point and the beginning of "*juridictionnalisation de l'enquête*" i.e. the introduction of a judicial control for the inquiry. The influence of European directives explains this evolution in the texts as well as in the case law. Access to the legislation (and the history of the legislation) and to the case law is quite easy in France thanks to the website Legifrance[7], which contains all case law of the *Cour de cassation* (in particular of the Criminal Chamber or *Chambre criminelle*, further called Crim.), even if a "modernisation" of the website has made the access to the data by keywords more complex. Anyway, there is no abundant case law on criminal procedural rights referring to European directives. The reason is not that there is no case law about the criminal procedural rights (on the contrary!), but, firstly, that the *Cour de cassation* is not used to refer expressly to European (or international) law, even if things begin to change and, secondly, that the judge prefers to refer to national law. Moreover, even if several directives have been expressly transposed (Directive 2010/64; Directive 2012/13; Directive 2013/48; Directive 2016/800), not all of them are totally transposed: some points remain in discussion and two of them have not been transposed at all (Directive 2016/1919 and Directive 2016/343).

[7] www.legifrance.gouv.fr.

6 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

6.1 Legislation

The Directive which should be transposed for the 27 October 2013 was transposed in French law with the Loi n°2013-711 of 5 August 2013 about several provisions of adaptation in the area of Justice in the application of the European Union Law and of the international engagements of France (Chapter 3 – Art. 4).
Globally the directive has been correctly transposed in French law.

First of all, **the subject matter and the scope** as expressed by Article 1 of the Directive are expressly mentioned in the Code of criminal procedure.
The code of criminal procedure already provided for some dispositions regarding the interpretation before the obligation of transposition of the Directive. But it was considerably completed with the law of 5 August 2013, which completely transposed the right to interpretation and translation. The preliminary article provides that if the suspected or accused person "doesn't understand the French language, he/she has the right, in a language he/she understands and until the end of the procedure, to the assistance of an interpreter, included for the meetings with his/her lawyer having a direct link with any questioning or hearing, and, except in case of an express and informed renunciation, to the translation of documents essential to the exercise of the defence and to the guarantee of the fairness of the trial that must be done or notified in the application of the code".
There is an other article in the code of criminal procedure that is dedicated to interpretation and translation (art. 803-5) and a *décret d'application n°2013-958 du 25 octobre 2013 portant application des dispositions de l'article préliminaire et de l'article 803-5 du code de procédure pénale relatives au droit à l'interprétation et à la traduction* included in Articles D 594-1 and ss. c. proc. pén. (see below).

Even if French law does not provide for the imposition of sanctions regarding minor offences by an authority other than a court having jurisdiction in criminal matters (as considered by Art. 1 §3 of the Directive), a provision of the code of criminal procedure (art. D. 594-10) provides for provisions about translation (preliminary article and article 803-5) do not apply

to specific procedures for fines (*amende forfaitaire*: payment of a fixed fine for petty offences).

In conformity with article 1 §4 of the directive, the preliminary Article of the code of criminal procedure provides for the articulation between the right to interpretation and translation and the right to defence, with the possibility assisted by an interpreter for the meetings with his lawyer having a direct link with any questioning or hearing (see below).
Moreover, since a law of 27 May 2014 (*Loi n° 2014-535 du 27 Mai 2014 portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012, relative au droit à l'information dans le cadre des procédures pénales*), Article 803-6 of the Code of criminal procedure provides for the list of the rights for any suspected or accused person under the deprivation of liberty to be notified in a document and among them the right to interpretation and translation: "*Any suspected or accused person under the deprivation of liberty should receive, at the moment of the notification of such measure, a document stating in easy and accessible words and a language that he/she understands, following rights which he/she benefits during all the procedure: (...) 4° The right to interpretation and translation*". This information is repeated at any step of the procedure (police custody, an accusation by an investigating judge, hearing before the judge).

Right to interpretation

As indicated above, the right to interpretation as required by Article 2 of the Directive is expressly provided for in the code of criminal procedure (preliminary Article).

Nevertheless, the specific hypothesis mentioned in this article regarding the appropriate assistance for persons with hearing or speech impediments is not provided for in the code of criminal procedure, more exactly that is not provided for at the same level that the generic right to interpretation. Indeed, contrary to the right of interpretation and translation, there is no general article in the legislative part of the code of criminal procedure regarding assistance for persons with hearing or speech impediments but in the part of the code adopted by decree: "*the right for suspected or accused persons to benefit the assistance of an interpreter (...) is also applicable to persons with hearing or speech impediments*" (art. D. 594-5). Moreover, such assistance is provided for any suspected or accused person at any step of the procedure:
- Art. 63-1 (inquiry but only in case of police custody): "*Where the person is deaf and cannot read nor write, he must be assisted by a sign language interpreter or by some other person*

qualified in a language or method of communicating with the deaf. Use may also be made of any other means making it possible to communicate with persons who are deaf".
- Art. 121 (judicial investigation): "*If the person under judicial examination is deaf, the investigating judge officially appoints a sign-language interpreter or another qualified person able to communicate with deaf people to help him during the inquiry*".
- Art. 345 (Assize Court): "*If the accused is deaf, the president officially appoints a sign language interpreter or any other qualified person who can talk to or communicate with deaf people, to help him during the trial. This interpreter swears an oath upon his honour and his conscience to bring his assistance to justice*".
- Art. 408 (Correctional Court): "*If the defendant is deaf, the presiding judge officially appoints a sign language interpreter or any other qualified person who can talk to or communicate with deaf people, to help him during the trial. This interpreter swears an oath upon his honour and his conscience to bring his assistance to justice*".

The necessity of a procedure to ascertain whether the suspected or accused person speaks and understands the language of the criminal procedure and if they need the assistance of an interpreter (art. 2 §4 of the Directive) is also provided for by the French law.
Article 803-5 of the Code of criminal procedure introduced with the law of 2013: "*For the application of the right for a suspected or accused person, provided for at the III of the preliminary Article, to an interpreter or a translation, this article must be applied.*
If there is a doubt on the capacity of the suspected or accused person to understand the French language, the authority which does the questioning or before which the person appears shall ascertain that the person speaks and understands this language".
Art. D. 594-1 adds that "*if the suspected or accused persons didn't ask to benefit of the assistance of an interpret but there is a doubt on the capacity to speak or to understand the French language, the authority which does the questioning or before which this person appears shall ascertain, by any mean, that this person speaks and understands this language. If it appears that the person doesn't speak or understand the French language, the assistance of the interpreter must intervene without delay*".

The right to challenge a decision finding there is no need for interpretation and, when interpretation has been provided, the possibility to complain about the quality of the interpretation (art. 2 §5) has been not exactly introduced. Art. D. 594-2 of the code of criminal procedure "only" provides the possibility to present comments that are mentioned in the file of the procedure: " *if the suspected or accused person that is under questioning challenges*

the absence of interpreting or the quality of the interpretation, she can present comments that are mentioned in the report of the questioning or hearing if they are done immediately or added to the file of the procedure if they are done later".

Regarding the use of videoconferencing (art. 2 §6), there is only one article applicable in the code: article 706-71. Since the creation of this article in 2001 (*Loi n° 2001-1062 du 15 November 2001 relative à la sécurité quotidienne*), this article provides that "*In case of necessity resulting from the impossibility for the interpreter to move, the assistance of the interpreter during a questioning or a confrontation must also be realized across means of telecommunications*".
Since the law of 2019 (*Loi n° 2019-222 du 23 March 2019 de programmation 2018-2022 et de réforme pour la justice*), the article provides that "*if the person is assisted by a lawyer or an interpreter, they can be present with the judge (...) or with the person*".

For the application of the right to interpretation to the proceedings for the execution of a European arrest warrant (art. 2§7), Article 695-24 of the code of criminal procedure provides that "*the European arrest warrant sent to the competent authority of another Member State shall be traduced in the official language or one of the official languages of the executing Member State or one of the official languages of institutions of the European Union agreed by this State*".
According to Article 695-27 of the code of criminal procedure, "*after ascertaining the identity of the person, the General prosecutor informs her, in a language she understands, of the existence and the content of the European arrest warrant against her. He also informs her that she can be assisted by a lawyer (...)*".

Finally, the necessity of an interpretation of a quality sufficient (art. 2 §8) is taken into consideration in French law through the generic rule that provides that interpreters or translators are appointed from a national list of experts recorded at the *Cour de cassation* (art. D. 594-16 c. proc. pén.). Moreover, at the level of the case, according to Article D. 594-2, "*if the suspected or accused person that is under questioning challenges the absence of interpreting or the quality of the interpretation, she can present comments that are mentioned in the report of the questioning or hearing if they are done immediately or added to the file of the procedure if they are done later*".

Right to translation of essential documents

Almost all the conditions of article 3 of the Directive do exist in French law.

In conformity with §1, the translation is by principle written and only as an exception an oral translation (preliminary article and article 803-5, see above). Moreover, according to Article D. 594-8, "*the translation must be realized within a reasonable period, to consent to exercise the right of defence*".

In application of §2 and 3, the code of criminal procedure gives a list of essential documents to be translated without prohibiting translating other documents that could be considered essential in the case. According to Article D. 594-6, "*without prohibiting the possibility for the district prosecutor or the investigation judge or for the judge, by himself or at the request of the person, to require the translation of a document considered as essential for the exercise of the defence and the fairness of the proceedings, must be translated in application for the preliminary article and of article 803-5:*
1°Decisions regarding pre-trial detentions or decisions depriving a person of his liberty in the frame of the execution of a European arrest warrant;
2° Decisions with charge or indictment before a court;
3°Judgments (...)".

As provided for in §4, "*the translation of essential documents can be limited to passages of these documents that are relevant for enabling the person to know the case against her. Relevant passages are determined, according to the step of the procedure, by the district prosecutor, by the investigating judge or by the court*" (Art. D. 594-7).

As authorized at §7, an oral translation is possible in French Law. According to the preliminary article and article 803-5, the translation is by principle a written translation and only in exceptional cases an oral translation: "*If, as an exception, an oral translation or an oral summary of the document of the procedure has been provided (...), it shall be mentioned by the report*" (art. D. 594-9).

In conclusion, all the provisions of Article 3 of the Directive are present in French law except the possibility of a waiver of the right to translation of essential documents (art. 3§8) that has not been transposed in French law.

Costs of interpretation and translation

In conformity with Article 4 of the Directive, "*Criminal justice costs are (...) 3°fees for (...) f) Interpreters translators*" (Art. R. 92 c. proc. pén.).

Quality of the interpretation and translation

As already mentioned, the quality of the interpretation and translation (art. 5 of the Directive) is provided for at a general level (list of experts, art. D. 594-16) as well as in the specific case (possibility of challenging the absence or the bad quality of an interpretation, art. D. 594-2).
As required in §3 of article 5 of the directive, there is an obligation of confidentiality: "*Interpreters and translators are required to observe confidentiality regarding interpretation and translation provided*" (Art. D. 594-16)".

Training

The necessity of training to understand better the particularities of communicating with the assistance of an interpreter (art. 6 of the Directive) has not been explicitly transposed even if the decree applicable to the National School of Magistrates (*Décret °72-355 du 4 mai 1972 relatif à l'Ecole nationale de la magistrature*) provides for since 2017 that "*The National School of Magistrates has missions a) the training of magistrates; b) the training of persons that are not part of the judicial body but that (...) contribute to judicial activity*" and could be interpreted as including interpreters. It is insufficient, but it would be interesting to check if in practice there is something concretely organised.
As regards the training of magistrates, during the initial training at the *École nationale de la magistrature*, the right to interpretation is evoked at the different stages of the procedure.
For the public prosecutor's office, the right to an interpreter is raised during the control of the regularity of police custody and the indictment before a court. Trainee magistrates are instructed on how to check the notice to the interpreter when preparing for a criminal hearing; a conference on nullities also deals with the issue and the penalties incurred in the event of procedural irregularities.
For investigating judges, a point on interpreting is specifically addressed in the context of the rights of the parties and the actions of the investigating judge. This issue is recalled in preparation for taking up office since half a day is dedicated to the rights of the parties.

For the criminal courts, the right to the presence of an interpreter at the hearing and the translation of essential procedural documents is recalled to trainee magistrates in the guide and is also developed during their studies, particularly in those relating to the preparation of hearings and the conduct of hearings, as a vigilance reflex to be acquired.
For the function of the Enforcement Judge, interpreting is dealt with very briefly during the introductory conference and the study directions in which the adversarial debate, the interviews and the Enforcement Commission are discussed.

Record-keeping

In conformity with article 7 of the directive, the French system provides for a record-keeping of the use of an oral translation: "*If, as an exception, an oral translation or an oral summary of the document of the procedure has been provided (...), it shall be mentioned by the report*" (art. D. 594-9). Given that French law does not provide the possibility of a waiver of the right to translation of essential documents (Art. 3§8), the record-keeping is limited in French law to the question of oral translation.

In conclusion, French law almost perfectly complies with the Directive of 2010.

6.2 Case law

Since 2013, there are two decisions of the Criminal Chamber of the Supreme Court that mention the Directive.
In the first one (**Crim., 12 September 2017, n°17-83874**), the *Cour de cassation* denies seeking a preliminary ruling to the Court of Justice of the European Union considering the Directive of 2010 has been correctly transposed and that there is no breach to the right to defence.
The facts concern Mr X... who was placed under investigation and then arrested; his pre-trial detention was extended several times, and lastly by order of the judge in charge of liberty and detention, against whom he appealed;
(...)
The defendant contested on appeal the violation of Article 3 of Directive 2010/64/EU of 20 October 2010 and Directive 2013/48/EU of 22 October 2013 since he had not been able to

have concrete and effective access to his lawyer in the absence of a written translation of the essential elements of the proceedings within a certain period. The judgment dismisses this argument and considers that the provisions of the Preliminary Article transposing Article 3 of Directive No 2010/64/EU of 20 October 2010 were fully respected in this case, since Mr X... was assisted at all stages of the proceedings by an interpreter who read out to him the documents produced. His counsel was able to communicate with him without difficulty and Mr X... was able to exercise his defence concretely and effectively. Moreover, the judges of appeal added that it was only by letter dated 15 August 2016 that his counsel asked for a written translation of some essential documents in the case file within a reasonable time, a request accepted by the examining magistrate on 27 September 2016 and implemented in January 2017 and that, to this day, the notion of reasonable time, which is not an autonomous concept of European Union law, appears to be respected. The judges conclude that nothing justifies the referral to the Court of Justice of the European Union for a preliminary ruling on the interpretation of the above-mentioned directives;
The Court of Cassation agrees with the reasoning of the appeal judges and dismisses the appeal. The Court of Cassation notes that the provisions of Directives 2010/64/EU of the European Parliament and of the Council of 20 October 2010 and 2013/48/EU of 22 October 2013 have been transposed into national law by Laws 2013-711 of 5 August 2013, 2014-535 of 27 May 2014 and 2016-731 of 3 June 2016 and that consequently any request for translation of essential documents accepted by the investigating judge must be complied with within a reasonable time, following the general provisions of the Preliminary Article of the Code of Criminal Procedure and the specific provisions of Article D. 594-8 of the same code, which was correctly applied by the investigating chamber; furthermore, supposing that he had not obtained authorisation to have a reproduction of the translated documents, the defendant had the possibility of consulting them through his lawyer, so that the rights of the defence were not infringed.

In the second one (**Crim., 21 February 2017, n°16-85194**), the *Cour de cassation* agrees with the decision of the investigating chamber that denies the request for the translation of a not essential document.
Mr X, a British citizen who did not understand French, requested a translation of several documents in the proceedings, but the investigating judge refused his request. The defendant appealed against this decision. The Court of Appeal acceded to the request for translation of certain documents but refused the translation of documents that were not essential to the exercise of the defence and the guarantee of the fairness of the proceedings since the

defendant's lawyer could have questions after having had access to the dossier and could request the assistance of an interpreter to prepare for the hearing; an interpreter could also be present during the examination to provide an oral translation. The Court of Cassation approved this approach and dismissed the appeal.

See also **Crim., 21 March 2017, n°17-80241** (in the chapter about the right of access to a lawyer).

7 Directive 2012/13/EU: Right to information in criminal proceedings

7.1 Legislation

The Directive which should be transposed for the 2 June 2014 was transposed in French law with the Loi n°2014-535 of 27 May 2014 about the transposition of the directive 2012/13/EU on the right to information in criminal proceedings.
Globally the directive has been correctly transposed in French law.

First of all, **the subject matter and the scope** as expressed by Article 1 of the Directive are expressly transposed and mentioned with the Law of 27 May 2014.
In conformity with article 2 of the Directive to apply the right to information during all criminal proceedings, the preliminary Article of the code of criminal procedure provides that every person suspected or prosecuted "has the right to be informed of charges brought against him and to be legally defended".

Right to information about rights

In conformity with article 3 of the directive, the code of criminal procedure provides information about rights for suspects questioned by the police under free questioning ("*audition libre*" or under police custody ("*garde à vue*").

According to Article 61-1 of the Code (for persons under free questioning), the person can be heart only after being informed by a judicial police officer:
"1°Of the nature, the date and the place of the offence which is being investigated;
2°Of his right to leave at any moment the place where he is the heart;
3°If necessary, of the right to be assisted by an interpreter;
4°Of the right to make a statement, to be interrogated or to remain silent;
5°If the offence for which he is heart is a felony or a misdemeanour punished with an imprisonment penalty, of the right to be assisted during his questioning or his confrontation, according to the conditions provided for by articles 63-4-3 et 63-4-4, by a lawyer chosen by him or, if required, appointed by the Bâtonnier of Bar; he is informed that this will be at his

expense unless he is eligible for legal aid, which conditions are reminded by any mean; he can expressly accept to continue the questioning without his lawyer ;
6° Of the possibility to benefit, if necessary for free, of juridical advice in a structure of access to the law.
The notification of this information is entered in the official report".

According to Article 63-1 of the Code (for persons under police custody), the person is immediately informed by a judicial police officer:
"1°Of his detention under police custody, of the time of the measure and the possible prolongations;
2° Of the nature, the date and the place of the offence which is being investigated and of the grounds mentioned in article 62-2 1°-6° justifying the police custody;
3° Of the right:
- To inform one of his relatives and his employer and, if the person is foreign, consular authorities, and, if necessary, to communicate with these persons according to Article 63-2;
- To medical assistance according to Article 63-3;
- To a lawyer according to Articles 63-3-1 to 63-4-3;
- If necessary, to an interpreter;
- To have access to the materials of the case mentioned in Article 63-4-1, promptly and for the maximum before the prolongation of the police custody
- To present observations to the district prosecutor or the liberties and custody judge (…);
- To make a statement, to be interrogated or to remain silent.
Where the person is deaf and cannot read nor write, he must be assisted by a sign language interpreter or by some other person qualified in a language or method of communicating with the deaf. Use may also be made of any other means making it possible to communicate with persons who are deaf.
If the person doesn't understand the French language, his rights must be notified by an interpreter, if necessary after written and immediate information.
The notification of this information is entered in the official report and signed by the person".

Regarding the way to give the information, as required by the article 3§2, Article 803-6 of the Code of criminal procedure provides that "Any suspected or accused person under the deprivation of liberty should receive, at the moment of the notification of such measure, a document stating in easy and accessible words and a language that he/she understands, following rights which he benefits during all the procedure (…)".

Letter of Rights on arrest

As required by article 4 of the Directive, and as written above, according to article 803-6 of the Code of criminal procedure "Any suspected or accused person under the deprivation of liberty should receive, at the moment of the notification of such measure, a **document** stating in easy and accessible words and in a language that he/she understands, following rights which he benefits during all the procedure:
1°The right to be informed of the nature, the date and the place of the offence which is being investigated;
2°The right, during questionings, to make a statement, to be interrogated or to remain silent;
3°The right to be assisted by a lawyer
4° The right to interpretation and translation
5°The right to access the materials of the case
6°The right that at least one person and, if necessary, the consular authorities are informed of the measure of deprivation of liberty
7°The right to a medical assistance
8°The maximum duration of the deprivation of liberty before being presented to a judicial authority
9°The right to know the conditions to challenge the legality of the deprivation of liberty or to obtain the liberty failure or refusal of the competent authorities to provide information following this Directive.
The person **can keep this document for all the duration of the deprivation of liberty**.
If the document is not available in a language understood by the person, he is informed orally of his rights in a language he understands. The information is entered in the official report. A version of the document in a language he understands is given to the person without delay".

Letter of Rights in European Arrest Warrant

In conformity with article 5 of the directive, Article 695-27 of the code of criminal procedure provides that "Any person apprehended in conjunction with the execution of a European Arrest Warrant must be brought before the territorially competent general prosecutor within forty-eight hours. During this period, the provisions of articles 63-1 to 63-7 are applicable" (see above for Article 63-1). Article 695-27 continues: "After confirming the identity of the

person, the general prosecutor informs him, in a language he understands of the existence and the content of the European Arrest Warrant issued concerning him. He also informs him that he may be assisted by a lawyer of his choice or, failing this, by a lawyer appointed ex officio by the bar, who is immediately informed by any available means. He also advises him that he may have an interview with the appointed lawyer.
The general prosecutor also informs the person he can require to be assisted in the issuing Member State by a lawyer of his choice or by a lawyer appointed ex officio; if the person requires it, he is immediately presented before the competent judicial authority of the issuing member state.
A record of this information is made in the official report, under penalty of nullity of the proceedings.
The lawyer may immediately consult the case file and freely communicate with the requested person.
The general prosecutor then informs the requested person of his choice to consent to or to oppose his surrender to the judicial authorities of the issuing member state and the legal consequences resulting from his consent. He also informs him that he may waive his right to the speciality rule and of the legal consequences of this waiver (…)".

Right to information about the accusation

In conformity with article 6 of the Directive, the preliminary article of the code of criminal procedure provides that every person suspected or prosecuted "has the right to be informed of charges brought against him and to be legally defended".
Regarding persons who are arrested or detained, the Code of criminal procedure provides such information for suspects under police custody ("*garde à vue*") as well as for suspects under pre-trial detention ("*détention provisoire*").
For suspects under police custody, article 63-1 of the Code provides that "the person under police custody is immediately informed by a judicial police officer: (…) 2° Of the nature, the date and the place of the offence which is being investigated and of the grounds mentioned at the article 62-2 1°-6° justifying the police custody".
For suspects under pre-trial detention, Article 116 of the Code provides for that "(…) After, as may be, recording the person's statements or carrying out his interrogation and hearing his advocate's comments, the investigating judge informs him:

--either that he is not placed under judicial examination; the investigating judge then advises him that he benefits from the rights of an assisted witness;
--or that he is placed under judicial examination; the investigating judge then brings to the person's attention the matters or the legal qualification of the matters of which he is accused if these matters or their legal qualification differ from those of which he has previously been informed; he informs him of his right to request steps to be taken or to apply for the proceedings to be annulled (…)".
Anyway, the information is provided on the accusation (several provisions in the code according to the way of the prosecution).

Regarding the prompt information to give of any changes in the information given, there is one provision in the code of criminal procedure. During the judicial investigation, if the investigating judge changes the qualification from misdemeanour to felony, he must inform the person: "If it appears in the course of the investigation that the matters of a which the person under judicial examination is accused based on commission of a misdemeanour amount to a felony, the investigating judge, having first informed his lawyer of his intention and received any observations from the person and his lawyer, notifies the person that a felony classification is substituted for the original classification of a misdemeanour. In the absence of this notification, the application may be made of the provisions of article 181".
In the other cases, there is no specific provision but there is relevant case law on the question. Case law considers there is a right to be informed of any changes in the information given based on the generic provision that requires to inform about accusation (art. 63-1 in case of police custody; art. 116 in case of pre-trial detention). At the moment, there is no case law based on the generic provision that requires to inform about the accusation in the case of a free suspect (art. 61-1).

Right to access to the materials of the case

In conformity with article 7 of the directive, from the moment of the judicial investigation, the suspect/accused person has an access to the materials of the case. According to Article 116, "Where he envisages placing a person (…) under judicial examination" the investigating judge informs the person he has the right to be assisted by a lawyer: "The lawyer may consult the case file at once and freely communicate with the person".

Before this step, during the inquiry, the suspected person has no right to access the materials of the case. But, if the person is under police custody, he has the right to ask that his lawyer have an access to some materials. According to Article 63-4-1, "At his request, the lawyer may consult the official report (…) about the notification of the placement under police custody and of his rights, the medical report, the report of the questionings of the suspected person. He can't ask nor realize a copy. Nevertheless, he can take notes". This is without doubt an improvement compared to the previous legislation (before 2011). But these documents are not the most useful documents to prepare the defence because these are reports related to the suspected person; therefore, the suspected person and his lawyer already know the content of these documents. Other documents can't be accessible (hearing of the victim, hearing of a witness, expert reports…). A new and shy step was realized with a law of 3 June 2016 (n°2016-731) about access to all the materials of the case. On one hand, the prosecutor can decide to communicate all or part of the materials of the case to the suspected person or the victim to receive some eventual comment. On the other hand, the law of 2016 introduces the possibility for the suspected person to ask for complete access to the materials of the case, but it is delayed access, one year after the first act realized in the inquiry (art. 77-2 CPP). One author stresses that, if it is a step toward a new philosophy in the inquiry, it is a little step[8]. After one year, the complete access doesn't make sense: the case could be already closed or could have continued with more adversarial issues.
In other words, §2 of Article 7, which requires ensuring access at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, has not been transposed.

But, in conformity with §3, complete access begins with the judicial examination or with the submission of the accusation to the judgment of a court.
If there is a judicial examination (obligatory in case of a felony), Article 116 (see above) is applicable.
If there is no judicial examination and an accusation before the correctional court, Article 393 is applicable: "In misdemeanour cases, after having ascertained the identity of the person deferred to him, having informed him of the matters of which he is accused, and having recorded his statement if he so requests, the district prosecutor may, if he considers that a judicial investigation is not necessary, proceed (…). The district prosecutor then informs the person brought before him that he has the right to the assistance of a lawyer of his choice or

[8] Sébastien Pellé, « Garde à vue et audition libre : acte final ? Bilan d'un cycle de réformes (lois du 14 avril 2011, 27 mai 2014 et 3 juin 2016), *Recueil Dalloz* 2017, p. 359 et s.

a lawyer appointed ex officio for him. The lawyer chosen, or the president of the local bar in the event of an application for an appointment ex officio, is informed forthwith.
The advocate or the person not assisted by a lawyer may consult the file immediately. The lawyer may freely communicate with the defendant".

In the case of organised crime, there are derogatory provisions applicable to police custody. According to Article 706-88 of the code of criminal procedure, "As an exception to the provisions of articles 63-4 to 64-4-2, when the person is under police custody for an offence of organized crime, the intervention of the can lawyer can be postponed, for strong reasons bound with circumstances of the inquiry or of the judicial investigation, to consent gathering of evidence or to avert an offence to persons during 48 hours or, in case of drugs trafficking or terrorism acts, during 72 hours".
In this case, the materials that are normally accessible to the lawyer (see above Article 63-4-1) do not be accessible.

Finally, there is no specific provision known about access free of charge.

Verification and remedies

First of all, in conformity with article 8 of the directive, all information notified is entered in an official report (see above).
Secondly, regarding the right to challenge the possible failure or refusal of the competent authorities to provide information, it is necessary to distinguish according to the step of the procedure.
During the inquiry, there is no possibility to challenge the possible failure or refusal of the competent authority to provide information except for the specific and very limited provision of Article 77-2 that introduces the possibility for the suspected person to ask for complete access to the materials of the case, but it is delayed access, one year after the first act realized in the inquiry.
During the judicial investigation, the person can apply to the investigating chamber, that is the court competent to control the judicial investigation (Chambre de l'instruction).
During the judgement, the person can complain before the judge about any possible failure of the pre-trial step (except if already done before the Chambre de l'instruction).

Training

Although the transposition law did not provide for specific training concerning the objectives of the Directive, during the initial training at the National School of the magistrates (*Ecole nationale de la magistrature*), the right to information is evoked at the different stages of the procedure.
For the public prosecutor's office, the right to information is mentioned in the same terms as the right to an interpreter (see above under Sect. 6.1).
For the investigating judge, the right to information is discussed throughout the training, given the adversarial nature of the procedure (notification of all orders, particularly expert opinions, notification of rights at the end of the first appearance examination, various texts providing for the right to be informed of the progress of the case, adversarial closing procedure with reminder of rights, etc.).
For the criminal court, the right to information is also mentioned in the "preparation of the criminal court hearing" and the conduct of the hearing, regarding the notification of the rights of the accused person.
For the function of the Enforcement Judge the right to information is briefly addressed during the introductory conference (see above under Sect. 6.1).

Indicative model of Letter of Rights

Finally, regarding the indicative model letter of rights (annexe 1), we can mention that the French Ministry of Justice drew up a model Letter of Rights in French, with translations into 29 languages: http://www.justice.gouv.fr/publication/gav/forms/form_FR/form1_FR.pdf
No model for a letter of rights for persons arrested based on a European Arrest warrant has been found.

7.2 Case law

Since 2014, there are three relevant decisions of the Criminal Chamber of the Supreme Court that mention the Directive.

In the first one (**Crim., 9 April 2015, n°14-87661**), the *Cour de cassation* considers that the Directive was not applicable because, at the date of the facts, the term to transpose the Directive was not expired.

In the second one (**Crim., 4 October 2016, n°16-82309**), the *Cour de cassation* denies to seek a preliminary ruling to the Court of Justice of the European Union considering the Directive of 2012 has been correctly transposed and that there is no breach to the right to the defence about the notification of the materials facts and the access of the entire file.
Firstly, about the notification of the materials facts, the *Cour de cassation* records the decision of the chambre de l'instruction: "in order to rule out the plea of nullity of police custody based on the failure to notify the material facts giving rise to the measure, the judgment under appeal notes, in particular, that the objective set out in paragraph 28 of the preamble to Directive 2012/13 / EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings is that of a balance between, on the one hand, the fairness of procedure and respect for the rights of the defense, on the other hand, the requirements of the procedure and that thus, information on the description of the facts is recommended "taking into account the stage of the criminal proceedings at which such a description takes place ", that taking into account this necessary gradation, Article 6, § 2, of the directive requires, in the event of an arrest, the issuance of information on the grounds for the arrest, including the criminal act sanctioned imputed, while article 6, § 3, requires detailed information to the judgment stage; that the judges add that article 63-1 of the code of criminal procedure constitutes a complete and compliant transposition of article 6, § 2, of the directive in that it provides for information for the detained on " grounds for the penally sanctioned act "transposed as creating a right to information on the qualification, date and place presumed to have been committed; that the investigating chamber also retains that article 63-1 of the code of criminal procedure does not disregard the provisions of the agreements in that it organizes the information of the detained person, from the start of the measure , on the nature and the cause of the accusation brought against him, by the notification of the qualification, the date and the presumed place of the offense that the person is suspected of having committed or attempted to commit;

(…) the judgment notes that in the present case, the information given to the applicant through the qualifications of the offences, the period and the place, enabled him to become aware of the reasons for his placement in police custody following his rights and to exercise his defence normally; that the judges add that the applicant was perfectly able to discern the contours of the professional secrecy which was imposed on him in his capacity of lawyer and the cases where the necessities of his defence could release him and which he had was also duly informed of his right to silence if he feared breaching the duties of his state; Whereas in determining itself thus, the investigating chamber, which responded as it should to the brief before it, justified its decision without disregarding the provisions of the Convention and Union law invoked;

That in fact, on the one hand, the provisions of Article 5, § 2, of the European Convention on Human Rights have the sole purpose of notifying the arrested person of the reasons for his deprivation of liberty so that " it can discuss its legality before a court, on the other hand, article 6 of the directive of May 22, 2012, the preamble of which specifies that it is based on the rights set out in the Charter of Fundamental Rights of the 'European Union by developing Articles 5 and 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, requires member states to ensure that those arrested be informed of the criminally sanctioned act that they are suspected of having committed but specifies that detailed information on the accusation, in particular on the nature of their participation, must be communicated at the latest when the court is called to decide on the merits of the acc use and not necessarily from the stage of arrest, from which it follows that Article 63-1 of the Code of Criminal Procedure constitutes a complete transposition of Article 6 of the said directive; From which it follows, and without there being any reason to ask a preliminary question to the Court of Justice of the European Union, that the plea must be rejected".

Secondly, about the access of the entire file, the *Cour de cassation* considers that "to rule out the plea of nullity of the police custody based on the lack of access to the entire file, the judgment states in particular that the provisions of article 63-4-1 of the code of criminal procedure constitute a complete transposition of Article 7, § 1, of the Directive, in that it introduces the right for the detained person and his lawyer to check only the legality of the custody measure, which is understood to mean as a control on the reason for the custody which must be the suspicion of a criminal or tort punishable by imprisonment penalty, on the regular progress of the measure with in particular the notification of all the rights and the verification their effective implementation and the compatibility of the measure with the state of health of the detained person; that the judges add that the access of the lawyer only to the documents of the procedure defined by article 63-4-1 of the code of criminal procedure is not

incompatible with article 6 § 3 of the European Convention of human rights, the lack of communication of all the documents in the file, at this stage of the procedure, not being such as to deprive the person of an effective and concrete right to a fair trial, 'access to these documents being guaranteed before the investigating and trial courts;
(…) in being so determined, and since, on the one hand, Article 7, § 1, of the Directive of 22 May 2012, the preamble of which specifies that it is based on the rights set out in the Charter of Fundamental Rights of the European Union by developing Articles 5 and 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, requires, at all stages of the procedure, that access to documents relating to the case in question held by the competent authorities which are essential to effectively challenge the legality of the arrest or detention, on the other hand, § 2 and 3 of Article 7 of the said directive leave the option to Member States not to open access to all of the documents in the case until the judicial phase of the criminal trial, from which it follows that Article 63-4-1 of the Code of Criminal Procedure constitutes a complete transposition of Article 7 of the Directive, the investigating chamber justified its decision without disregarding the provisions of the agreements and of Union law invoked; From where it follows, and without there being reason to ask a preliminary question to the Court of Justice of the European Union, that the plea is unfounded".

In the third one (**Crim., 31 January 2017, n°16-84623**), the *Cour de cassation* reiterates her position:
"to rule out the means of nullity of the custody based on the lack of sufficient notification of the material facts at the origin of the measure, the judgment pronounced by the reasons given by means;
(…) in determining itself thus, the investigating chamber justified its decision without disregarding the provisions of the agreements and of Union law invoked; That in fact, on the one hand, the provisions of Article 5, § 2, of the European Convention on Human Rights have the sole purpose of notifying the arrested person of the reasons for his deprivation of liberty so that " it can discuss its legality before a court, on the other hand, article 6 of the directive of May 22, 2012, the preamble of which specifies that it is based on the rights set out in the Charter of Fundamental Rights of the 'European Union by developing Articles 5 and 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, requires member states to ensure that those arrested be informed of the criminally sanctioned act that they are suspected of having committed but specifies that detailed information on the accusation, in particular on the nature of their participation, must

be communicated at the latest when the court is called to decide on the merits of the acc use and not necessarily from the stage of arrest, from which it follows that Article 63-1 of the Code of Criminal Procedure constitutes a complete transposition of Article 6 of the said directive; From which it follows, and without there being any need to refer a question for a preliminary ruling to the Court of Justice of the European Union, that the plea must be rejected;
(…), to rule out the means of nullity of the custody based on the lack of access to the entire file, the judgment pronounced by the reasons taken up by means; Whereas, in this way, and since on the one hand, Article 7, § 1, of the Directive of 22 May 2012, the preamble of which specifies that it is based on the rights set out in the Charter fundamental rights of the European Union by developing Articles 5 and 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, requires at all stages of the procedure, that access to documents relating to the case in question held by the competent authorities which are essential to effectively challenge the legality of the arrest or detention, on the other hand, § § 2 and 3 of Article 7 of the said directive leave the Member States the option of opening access to all the documents in the case only during the judicial phase of the criminal trial, from which it follows that Article 63-4-1 of the Code of Criminal Procedure constitutes a complete transposition of article 7 of the directive;
From which it follows, and without there being any need to refer a question for a preliminary ruling to the Court of Justice of the European Union, that the complaint is unfounded".

8 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

8.1 Legislation

The Directive which should be transposed for the 27 November 2016 was transposed in French law with the Loi n°2014-535 of 27 May 2014 about the transposition of the directive 2012/13/EU on the right to information in criminal proceedings, the Loi n°2016-731 of 3 June 2016 about fighting against organized crime, terrorism and their funding and improving efficiency and guarantees of the criminal procedure, the Décret n°2016-1455 of 28 October 2016 improving guarantees of the criminal procedure.
Globally the directive has been correctly transposed in French law.

First of all, even if **the subject matter** as expressed by Article 1 of the Directive is not expressly transposed and mentioned with the legislation above indicated, **the scope** of the Directive is integrated in the French legislation.
In conformity with the article 2 of the Directive to apply the right of access to a lawyer and to have a third party informed during all the criminal proceedings, the preliminary Article of the code of criminal procedure provides for that every person suspected or prosecuted "has the right to be informed of charges brought against him and to be legally defended".
In reality, if the right to be assisted by a lawyer is full during the judicial investigation (according to the article 80-1, when the investigating judge wants to accuse the person, he puts him under judicial examination and must inform him he can be assisted by a lawyer: "On pain of nullity, the investigating judge may place under judicial examination only those persons against whom there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, in the commission of the offences he is investigating. He may proceed with the placement under judicial examination only after having previously heard the observations of the person or having given him the opportunity to be heard, when accompanied by his lawyer, either in the manner provided by article 116 on questioning at first appearance, or as an assisted witness under the provisions of articles 113-1 to 113-8") and the judgment, he is not complete during the inquiry. The right to be assisted by a lawyer is provided for during the inquiry only for persons that are suspected to have committed or attempted to commit an offence punished with an imprisonment penalty.

According to art. 61-1 for persons under free questionings, the judicial police officer must inform the person "If the offence for which he is heart is a felony or a misdemeanour punished with an imprisonment penalty, of the right to be assisted during his questioning or his confrontation, according the conditions provided for by articles 63-4-3 et 63-4-4, by a lawyer chosen by him or, if required, appointed by the Bâtonnier of Bar; he is informed that this will be at his expense, unless he is eligible for legal aid, which conditions are reminded by any mean; he can expressly accept to continue the questioning without his lawyer".
According to art. 63-1 for persons under police custody (N.B.: the police custody is possible only for persons suspected of felony or a misdemeanour punished with an imprisonment penalty), the police officer must inform the person "of the right to a lawyer according to Articles 63-3-1 to 63-4-3".

In conformity with the §2 of the Article 2, these rights apply to persons subject to European arrest warrant proceedings from the time of their arrest in France.
Article 695-27: "Any person apprehended in conjunction with the execution of a European Arrest Warrant must be brought before the territorially competent general prosecutor within forty-eight hours. During this period, the provisions of articles 63-1 to 63-7 are applicable" (see above for Article 63-1).
Article 695-27 continues: "After confirming the identity of the person, the general prosecutor informs him, in a language he understands of the existence and the content of the European Arrest Warrant issued in relation to him. He also informs him that he may be assisted by a lawyer of his choice or, failing this, by a lawyer appointed ex officio by the bar, who is immediately informed by any available means. He also advises him that he may have an interview with the appointed lawyer.
The general prosecutor also informs the person he can require to be assisted in the issuing member State by a lawyer of his choice or by lawyer appointed ex officio; if the person requires it, he is immediately presented before the competent judicial authority of the issuing member state.
A record of this information is made in the official report, under penalty of nullity of the proceedings.
The lawyer may immediately consult the case file and freely communicate with the requested person.
The general prosecutor then informs the requested person of his choice to consent to or to oppose his surrender to the judicial authorities of the issuing member state and the legal

consequences resulting from his consent. He also informs him that he may waive his right to the speciality rule and of the legal consequences of this waiver (…)".

According to the §3 of the Article 2, these rights also apply to persons other than suspects or accused persons who, in the course of questioning by the police, become suspects or accused persons
According to Art. 62 of the code of criminal procedure, "persons against whom there is no plausible reason to suspect they have committed or attempted to commit an offence are heart by the investigators without being under coercive measures.
Nevertheless, if this is necessary for the inquiry, these persons may be detained during the time strictly necessary to their questioning, without a time over four hours.
If, during the questioning, it appears that there is plausible reasons to suspect that the person has committed or attempted to commit an offence, this person must be heart in application for the article 61-1 and informations provided for to 1° to 6° of this article must be notified to this person without delay (...)".

Regarding the §4 of the Article 2 about minor offences, the French law is not very precise. If preliminary Article provides for that "every person suspected or prosecuted has the right to be informed of charges brought against him and to be legally defended", the right to be assisted by a lawyer is not provided for in a specific provision during the inquiry for minor offences (i.e. offences that are not punished with an imprisonment penalty). This approach is due to the fact that in France full rights of defence are bound to the quality of party. During the inquiry, the person is not a party even if suspected.

Finally, in conformity of the Article 2 that requires the complete application of this right when the suspect or accused person is deprived of liberty, in French law, the right of access to a lawyer is fully provided for during the judicial investigation and the judgment. During the inquiry, it is provided for all persons suspected to have committed or attempted to commit an offence punished with an imprisonment penalty. If the suspected person is deprived of liberty (i.e. under police custody), such a right is full. According to Art. 63-1, persons under police custody must be informed "of the right to a lawyer according to Articles 63-3-1 to 63-4-3".

The right of access to a lawyer in criminal proceedings

According to the preliminary Article of the code of criminal procedure, every person suspected or prosecuted "has the right to be informed of charges brought against him and to be legally defended". It includes that the exercise of rights of defence can be realised practically and effectively.

In conformity with article 3 of the Directive, this right must be realized "without undue delay".

During the inquiry, it is necessary to distinguish between the person under free questioning and the person under police custody.

If the person is heart under **free questioning**, he can be assisted by a lawyer if he is suspected of an offence punished with an imprisonment penalty. In this case, according to the article 61-1 of the code, he can "be assisted during his questioning of his confrontation, under the conditions provided for at the articles 63-4-3 to 63-4-4" (but not 63-4-2 applicable only for the persons under police custody). The articles add that "the person can expressly accept to continue the questioning without the presence of his lawyer".

If the person is under **police custody**, "From the beginning of the police custody, the person may request to be assisted by a lawyer. Where he is not in position to choose one, or if the lawyer chosen by him cannot be reached, he may request a lawyer to be appointed to him officially by the president of the bar. The president of the bar or the lawyer appointed by the president of the bar is informed of such a request forthwith and by any means available" (art. 63-1).

According to Article 63-4-2 of the code of criminal procedure, "The person under police custody may request to be assisted by a lawyer for his questionings and his confrontations. In this case, the first audition, except if it is focused on the identity elements, cannot begin without the presence of the lawyer chosen or appointed before the expiration of a delay of two hours after the information addressed under the conditions provided for by the article 63-3-1 of the request by the person under police custody to be assisted by a lawyer".

But the same article provided for exceptions:

"If this is necessary for the inquiry to immediately question the person, the district prosecutor can allow, by a written and reasoned decision, on request of the judicial police officer, that the questioning begins without waiting for the expiration of the delay provided for at the first paragraph.

As an exception, on request of the judicial police officer, the district prosecutor or the liberties and custody judge, under the distinctions provided for by the following paragraph, may allow, by a written and reasoned decision, the postponement of the presence of the lawyer during the questionings or the confrontations, if this measure is considered necessary for compelling reasons due to the particular circumstances of the inquiry, to allow the success of urgent investigations to gather or keep evidences, or to prevent a serious and imminent offence against the life or the physical integrity of a person.
The district prosecutor can postpone the presence of the lawyer only for a maximal delay of 12 hours. When the person is under police custody for a felony or a misdemeanor punished with an imprisonment penalty of 5 years at least, the liberties and custody judge can, on request of the district prosecutor, allow to postpone the presence of the lawyer after 12 hours until the 24th hour. Authorisations of the district prosecutor and of the liberties and custody judge are written and reasoned considering the facts.
When, in application of the two above paragraphs, the district prosecutor or the liberties and custody judge authorised to postpone the presence of the lawyer during questioning and confrontations, he may also, under the same conditions, decide that the lawyer cannot, for the same delay, have an access to the reports of the questioning of the person under police custody".

During the judicial investigation, the article 114 provides for that "Unless they expressly waive this right, parties may only be heard, interrogated or confronted in the presence of their advocates or when their advocates have been duly called upon".

Moreover, the French law respects the requirements of confidentiality of the conversation with the lawyer, of the effectiveness of the assistance and of the presence of the lawyer for specific acts.
The respect of the confidentiality is provided for during the inquiry (only) for the person under police custody (art. 63-4: "The lawyer chosen under the conditions of the article 63-3-1 may communicate with the person under police custody under conditions which ensure the confidentiality of the conversation. The conversation may not extend beyond thirty minutes") and during the judicial investigation and the judgment (even if there is no specific provision about the confidentiality of the communication with the lawyer in the code of criminal procedure, a general article could be mentioned, the article 715-1 that provides for that "Every communication and every ease compatible with the requirements of the security of the prison are given to the persons under judicial examination that are prosecuted to allow

the exercice of their defence". Moreover, the article 25 of the loi n°2009-1436 du 24 novembre 2009 pénitentiaire provides for that "the persons deprived of their liberty freely communicate with their lawyers".

The effectiveness of the assistance by a lawyer is provided for. During the inquiry, if the questioned suspect is assisted by a lawyer, the lawyer may effectively participate to the operation. According to the article 63-4-3 of the code, "the questioning or the confrontation is leaded under the supervision of the judicial police officer or agent who can, at any moment, in case of difficulty, close the operation and inform immediately the district prosecutor who informs, if necessary, the president of the bar in order to appoint an other lawyer. / At the end of any questioning or confrontation which he attends, the lawyer may ask questions. The judicial police officer or agent can't object to these questions only if they could affect the success of the inquiry. Such an objection is written in the report. / After any conversation with the person under police custody and any questioning or confrontation which he attends, the lawyer may present written remarks in which he may write the questions objected according to the second paragraph. These remarks are added to the case-file. The lawyer may address his remarks or a copy of them to the district prosecutor during the police custody". During the judicial investigation, the lawyer may present remarks beyond the investigating judge (art. 116 for the first questioning and 120 for the following questionings).

The possibility for the lawyer to attend for specific investigative acts is also provided for in the Article 61-3 of the code: "Each person against whom there is one or more plausible reasons to suspect he participated as author or accomplice to the commission of a felony or a misdemeanor punished with an imprisonment penalty, may require that a lawyer of his choice or appointed:

1°Assist him when he takes part to a reconstruction of the offence;

2°May be present during the identity parade of the suspects which he is part.

The person is informed of this right before the operation". The same provision is provided for measures of confrontation (art. 61-1, 63-4-2 for the inquiry and 114 for the judicial investigation).

French law tries to facilitate the obtaining of a lawyer. Firstly, from the beginning of the inquiry, if a person is suspected to have committed an offence punished with an imprisonment penalty, he may be informed of his right to be assisted by a lawyer (see above). Secondly, the suspects under free questionings must be informed of "the possibility to receive, if any for free, legal advices in a structure of access to law" (art. 61-1). The article 61-1 adds that "if the conduct of the inquiry allows it, when a written convocation is sent to the person of

his questioning, this convocation indicates the offence he is suspect, his right to be assisted by a lawyer and the conditions to access to the legal aid, the conditions of an appointed lawyer and places where he could receive legal advices before his questioning".

As provided for by §5 and 6 of the Article 3, **exceptions** are mentioned in the French code. Firstly, regarding the impossibility to ensure the right of access to a lawyer without undue delay after deprivation of liberty because of the geographical remoteness of a suspect or accused person, it is not exactly transposed in the code but it is included in the exceptions mentioned at the Article 63-4-2 of the code. This article provides for that "The person under police custody may request to be assisted by a lawyer for his questionings and his confrontations. In this case, the first audition, except if it is focused on the identity elements, cannot begin without the presence of the lawyer chosen or appointed before the expiration of a delay of two hours after the information addressed under the conditions provided for by the article 63-3-1 of the request by the person under police custody to be assisted by a lawyer".
But the same article provided for exceptions: "If this is necessary for the inquiry to immediately question the person, the district prosecutor can allow, by a written and reasoned decision, on request of the judicial police officer, that the questioning begins without waiting for the expiration of the delay provided for at the first paragraph.
As an exception, on request of the judicial police officer, the district prosecutor or the liberties and custody judge, under the distinctions provided for by the following paragraph, may allow, by a written and reasoned decision, the postponement of the presence of the lawyer during the questionings or the confrontations, if this measure is considered necessary for compelling reasons due to the particular circumstances of the inquiry, to allow the success of urgent investigations to gather or keep evidences, or to prevent a serious and imminent offence against the life or the physical integrity of a person.
The district prosecutor can postpone the presence of the lawyer only for a maximal delay of 12 hours. When the person is under police custody for a felony or a misdemeanor punished with an imprisonment penalty of 5 years at least, the liberties and custody judge can, on request of the district prosecutor, allow postponing the presence of the lawyer after 12 hours until the 24th hour. Authorisations of the district prosecutor and of the liberties and custody judge are written and reasoned considering the facts.
When, in application of the two above paragraphs, the district prosecutor or the liberties and custody judge authorised to postpone the presence of the lawyer during questioning and confrontations, he may also, under the same conditions, decide that the lawyer cannot, for

the same delay, have an access to the reports of the questioning of the person under police custody".
It is important to stress that in case of organized crime, such a derogation is 48 hours and, in case of drug trafficking or terrorism, until 72 hours (art. 706-88 of the code).

Secondly, regarding the existence of particular circumstances of the case that could justify temporarily derogations from the application of the rights provided for in §3 of the Article 3 of the Directive, French law provides such an exception at the Article 63-4-2 but only for the confrontation (see above the article).

Confidentiality

The confidentiality of the communication between suspects or accused persons and their lawyer is provided for the French law during the inquiry (only) for the person under police custody (art. 63-4, see above) as well as during the judicial investigation and the judgment (no specific provision but a general text, the article 715-1 the article 25 of the loi n°2009-1436 du 24 novembre 2009, see above).

The right to have a third person informed of the deprivation of liberty is provided for suspects under police custody. According to article 63-1 : "the person is immediately informed by a judicial police officer: (..) 3° Of the right: To inform one of his relatives and his employer and, if the person is foreign, consular authorities, and, if necessary, to communicate with these persons according to Article 63-2. (…)".
According to the Article 63-2, "I – Any person placed under police custody may, at his request, inform by telephone, a person with whom he resides habitually, one of his relatives in direct line, one of his brothers or sisters of the measure to which he is subjected. He may also inform his employer. When the person under police custody is a foreign, he can contact the consular authorities of his country.
Except in case of insuperable circumstances, which may be mentioned on the report, cares of investigators in application of the first paragraph must intervene within a delay of three hours maximum from the moment which the person requires it".
According to the article 63-2 of the code, in conformity with the article 5 §2 of the directive, such a right may be temporarily derogated: "The district prosecutor may, at the request of the judicial police officer, decide that the information provided for at the first paragraph will be postponed or will not be delivered if this decision is, relating to the circumstances, necessary

for the gathering or the keeping of the evidence or for preventing a serious offence to the life, the liberty or the physical integrity of a person".

When a child is suspected and questioned by the police (under "free questioning" or "police custody), the holder of parental authority must be informed.
Art. 3-1 of the ordonnance of 2 February 1945 regarding delinquent childhood (Ordonnance du 2 février 1945 relative à l'enfance délinquante): "When a child is freely questioned under Article 61-1 of the code of criminal procedure, the judicial police officer must inform by any mean the parents, the tutor, the person or the service which the child is placed".
Art. 4 II of the ordonnance: "When a child is placed under police custody, the judicial police officer, after having inform the district prosecutor or the investigating judge, must inform the parents, the tutor, the person or the service which the child is placed".

The right to communicate, while deprived of liberty, with third persons is organized by the article 63-2 of the code of criminal procedure: "II – The judicial police officer may authorise the person under police custody that requires it to communicate by a written mean, by telephone or by a physical conversation, with one of the third persons mentioned at the I of the present article, if it appears that this communication will not be incompatible with the goals mentioned at the article 62-2 and that it doesn't present a risk of commission of an offence.
In order to guarantee the order, the security and the safety of the place where the police custody is realised, the judicial police officer or agent determines the moment, conditions and duration of the communication that can not extend beyond thirty minutes and is realised under his control, if any in his presence or in presence of a person he chooses. If the request of communication regards consular authorities, the judicial police officer can't object beyond the 48th hour of the police custody.
This II is not applicable in case of a request of communication with a third person which it was decided in application of the last two paragraphs of this article he can be informed of the police custody".
For the persons under pre-trial detention, the article 35 of the of the loi n°2009-1436 du 24 novembre 2009 pénitentiaire provides for that they "can be visited by members of their family or other persons at least three times a week" with the authorisation of the judicial authority and the article 39 of the same law that they have, with the autorisation of the judicial authority the possibility to communicate by telephone.

The right to communicate with consular authorities is provided for at the article 63-1 of the code for suspect under police custody. Any suspect under police custody is immediately informed by a judicial police officer: "3° Of the right: To inform one of his relatives and his employer and, if the person is foreign, consular authorities, and, if necessary, to communicate with these persons according to Article 63-2. (…)".
According to the Article 63-2, "I – (…) When the person under police custody is a foreign, he can contact the consular authorities of his country.
Except in case of insuperable circumstances, which may be mentioned on the report, cares of investigators in application of the first paragraph must intervene within a delay of three hours maximum from the moment which the person requires it".
According to the article 63-2 of the code, "II – The judicial police officer may authorise the person under police custody that requires it to communicate by a written mean, by telephone or by a physical conversation, with one of the third persons mentioned at the I of the present article, if ti appears that this communication will not be incompatible with the goals mentioned at the article 62-2 and that it doesn't present a risk of commission of an offence.
In order to guarantee the order, the security and the safety of the place where the police custody is realized, the judicial police officer or agent determines the moment, conditions and duration of the communication that can not extend beyond thirty minutes and is realized under his control, if any in his presence or in presence of a person he chooses. If the request of communication regards consular authorities, the judicial police officer can't object beyond the 48th hour of the police custody.
This II is not applicable in case of a request of communication with a third person which it was decided in application of the last two paragraphs of this article he can be informed of the police custody".

General conditions for applying temporary derogations are provided for at the Article 63-4-2 of the code regarding the impossibility to ensure the right of access to a lawyer without undue delay after deprivation of liberty because of the geographical remoteness of a suspect or accused person (art. 3§5 of the Directive) and the existence of particular circumstances of the case that could justify temporarily derogations from the application of the rights (art. 3§6 of the Directive): "If this is necessary for the inquiry to immediately question the person, the district prosecutor can allow, by a written and reasoned decision, on request of the judicial police officer, that the questioning begins without waiting for the expiration of the delay provided for at the first paragraph.

As an exception, on request of the judicial police officer, the district prosecutor or the liberties and custody judge, under the distinctions provided for by the following paragraph, may allow, by a written and reasoned decision, the postponement of the presence of the lawyer during the questionings or the confrontations, if this measure is considered necessary for compelling reasons due to the particular circumstances of the inquiry, to allow the success of urgent investigations to gather or keep evidences, or to prevent a serious and imminent offence against the life or the physical integrity of a person.
The district prosecutor can postpone the presence of the lawyer only for a maximal delay of 12 hours. When the person is under police custody for a felony or a misdemeanor punished with an imprisonment penalty of 5 years at least, the liberties and custody judge can, on request of the district prosecutor, allow to postpone the presence of the lawyer after 12 hours until the 24th hour. Authorisations of the district prosecutor and of the liberties and custody judge are written and reasoned considering the facts.
When, in application of the two above paragraphs, the district prosecutor or the liberties and custody judge authorised to postpone the presence of the lawyer during questioning and confrontations, he may also, under the same conditions, decide that the lawyer cannot, for the same delay, have an access to the reports of the questioning of the person under police custody".

The same is provided for regarding the right to have a third person informed of the deprivation of liberty (art. 5§3 of the Directive) at the article 63-2 of the code: such a right may be temporarily derogated: "The district prosecutor may, at the request of the judicial police officer, decide that the information provided for at the first paragraph will be postponed or will not be delivered if this decision is, relating to the circumstances, necessary for the gathering or the keeping of the evidence or for preventing a serious offence to the life, the liberty or the physical integrity of a person".

It is important to stress that the temporary derogations are not submitted in French law to the possibility of a judicial review contrary to the article 8§2 of the Directive.

Regarding **the possibility to waive** (art. 9 of the Directive), there are not many provisions in the code. Article 114 relating to the judicial investigation expressly mentioned the waive: "Unless they expressly waive this right, parties may only be heard, interrogated or confronted in the presence of their lawyers or when their lawyers have been duly called upon". Article 695-44 relating to the European arrest warrant provides for that "The requested person may

not be heard or interrogated except in the presence of his lawyer or where the latter has duly been called for, unless the person has expressly waived this right". Such a provision doesn't exist during the inquiry, but the waiver is recognized in the case law (for a recent example, Crim., 2 March 2021, n°20-85491).

The right of access to a lawyer in European arrest warrant proceedings is provided for at the article 695-27 of the code: "Any person apprehended in conjunction with the execution of a European Arrest Warrant must be brought before the territorially competent general prosecutor within forty-eight hours. During this period, the provisions of articles 63-1 to 63-7 are applicable.
After confirming the identity of the person, the general prosecutor informs him, in a language he understands of the existence and the content of the European Arrest Warrant issued in relation to him. He also informs him that he may be assisted by a lawyer of his choice or, failing this, by a lawyer appointed ex officio by the bar, who is immediately informed by any available means. He also advises him that he may have an interview with the appointed lawyer.
The general prosecutor also informs the person he can require to be assisted in the issuing member State by a lawyer of his choice or by lawyer appointed ex officio; if the person requires it, he is immediately presented before the competent judicial authority of the issuing member state.
A record of this information is made in the official report, under penalty of nullity of the proceedings.
The lawyer may immediately consult the case file and freely communicate with the requested person.
The general prosecutor then informs the requested person of his choice to consent to or to oppose his surrender to the judicial authorities of the issuing member state and the legal consequences resulting from his consent. He also informs him that he may waive his right to the speciality rule and of the legal consequences of this waiver (…)".

Remedies

There are general remedies in French law.
For the breaches of rights during the judicial investigation, the remedy is beyond the investigating chamber.

For the breaches of rights during the inquiry, the remedy is beyond the investigating chamber (in case of judicial investigation) or beyond the judge. It is important to stress there is no specific remedy if the person remains suspect without becoming accused. The absence of specific remedies risks making national law non-compliant with European expectations. However, it is possible to note some progress, participating in what the doctrine calls the "*juridictionnalisation*" of the investigation. Thus, since the law of 23 March 2019, Article 802-2 CPP provides for that "*the person who has been the subject of a search or a home visit pursuant to the provisions of this Code and who has not been prosecuted before an investigating or trial court at the earliest six months after the act was carried out may, within one year of the date on which he or she became aware of the measure, apply to the liberty and custody judge to have it annulled*". There is no doubt that this is a progressive step, but it is limited to one act of the procedure: the search. For the rest, there is no appeal possible as long as the person is not prosecuted.

8.2 Case law

There is only one decision relating to a European procedure (**European arrest warrant**).
Crim., 26 February 2020, n°20-80813:
"8. To rule out the plea of nullity, based on the lack of transmission by the Attorney General of the request for the appointment of a lawyer in the Member State issuing the warrant, and to order the surrender of Mr S., l The judgment under appeal states that the penalty of nullity provided for by article 695-27 of the Code of Criminal Procedure concerns only the absence of any mention in the report of the obligation to notify the requested person of his right to seek a lawyer in the country of issue of the European arrest warrant and that this obligation to inform has been respected.
9. The judges add that the postponement of the examination of the case to seven days was ordered in the interest of the rights of the defense, a period during which the lawyer in the issuing Member State was able to assist the lawyer in the executing Member State by providing it with information and advice in order to guarantee the effective exercise of the rights of the person whose surrender is requested.
10. They conclude that the purpose of the European directive transposed to article 695-27 of the code of criminal procedure has been respected, the delay invoked in the transmission of Mr S.'s request to the foreign authorities not adversely affecting him. in the absence of infringement of the rights of the defense.

11. (…) the investigating chamber justified its decision.
12. Firstly, article 695-27 of the Code of Criminal Procedure does not penalize the delay in sending a request for the appointment of a lawyer in the State issuing the warrant.
13. Secondly, no infringement of the rights of the defense can result from the mere delay in communicating this request to the judicial authority issuing the arrest warrant, since the return has been ordered to allow the exercise of these rights.
14. Thirdly, the applicant retains, throughout the proceedings, the right to request an end to his pre-trial detention".

There are two decisions relating to a **domestic case** (about the link between the right to translation and the right to a lawyer): **Crim., 12 September 2017**, n°17-83874 (see above in the chapter about translation) and **Crim., 21 March 2017, n°17-80241**. In the latest decision, the *Cour de cassation* considers "it follows from the judgment under appeal and from the documents of the procedure that Mr. Mubarak X ..., indicted on the aforementioned counts and placed on April 7, 2016 under a committal warrant, appeared before the judge of freedoms and detention on 23 November 2016 for the purpose of extending the pre-trial detention, which was ordered for a period of four months; that he appealed against this decision;
in order to reject the request for annulment of this order, the judgment retains that the provisions of the preliminary article transposing article 3 of directive 2010/64/EU have been fully respected in this case, MX. having been assisted by an interpreter at all stages of the procedure, his counsel having been able to communicate with him without difficulty and Mr X ... having been able to exercise his defense in a concrete and effective manner; that the judges add that it was only by letter, dated August 15, 2016, that his counsel requested the written translation of some essential documents of the file, request accepted by the examining magistrate on 27 September 2016, and that, to date, the concept of reasonable time, which does not constitute an independent concept of European Union law, appears to be respected; that the judges conclude that nothing justifies the referral to the Court of Justice of the European Union of the preliminary questions relating to the interpretation of the aforementioned directives and that the request for annulment of the order extending the pre-trial detention of the November 23, 2016 will be rejected;
the judgment does not incur the complaints referred to by means of, since, on the one hand, the provisions of directives n°2010/64/EU (…) of 20 October 2010 and n°2013/48/EU of 22 October 2013 were transposed into domestic law by laws n °2013-711 of 5 August 2013, n°2014-535 of 27 May 2014 and n°2016-731 of 3 June 2016, that subsequently any request

for the translation of essential documents accepted by the examining magistrate must be satisfied within a reasonable time, in accordance with the general provisions of the preliminary article of the Code of Criminal Procedure and the specific provisions of article D.594-8 of same code and that the rights of the defense have therefore not been infringed, and that, on the other hand, the investigating chamber has made the exact application of these principles;
finally, that to note the need for the detention of Mr X ... and confirm the decision of the judge of freedoms and detention, the court of appeal was determined by considerations of law and of fact meeting the requirements of articles 137-3, 143-1 and following of the Code of Criminal Procedure; From which it follows, and without there being any reason to ask a preliminary question to the Court of Justice of the European Union, that the plea must be rejected; And considering that the stop is regular in the form; DISMISSES the appeal".

In a very recent decision of 2 March 2021 – **Crim., 2 March 2021**, n° 20-85.491, the Court of Cassation confirms the annulment of the procedure pronounced by the Court of Appeal by referring as well to the Directive 2013/48/UE.
Mr X was placed in police custody and assisted by a lawyer but was then notified of an extension of his custody on various charges for other offences. When he was notified of his rights, he again asked to be assisted by a lawyer. He was heard on these facts in the presence of his lawyer but did not have the benefit of a prior meeting with him. He was charged with those offences and requested that the proceedings be annulled.
The Court of Cassation dismissed the Advocate General's appeal and confirmed the annulment of the proceedings pronounced by the Court of Appeal.
According to the Court of Cassation, "it follows from Articles 6(3) of the European Convention on Human Rights, 48(2) of the Charter of Fundamental Rights of the European Union, 3(3)(a) of **Directive No 2013/48/EU of the Parliament and of the Council of 22 October 2013**, Preliminary, 63-3-1, 63-4 and 65 of the Code of Criminal Procedure that, in order to guarantee the effective and concrete right to the assistance of a lawyer at the investigation stage, any person being heard in relation to acts which he/she is suspected of having committed or attempted to commit has the right, if he/she has asked to be assisted by a lawyer, to meet with the lawyer beforehand and in confidence. It follows that a person in police custody who is heard in the context of proceedings for an offence other than that for which he or she was taken into custody and in respect of whom there are reasonable grounds for suspecting that he or she has committed or attempted to commit that offence shall benefit

from the right to a lawyer, after being informed of their right to be assisted by a lawyer and if they have declared their wish to exercise it, the right to communicate with the lawyer under conditions which guarantee the confidentiality of the interview, for a period not exceeding thirty minutes, before any hearing on the new facts. (...)
13. The judges added that Mr X. had asked to be assisted by a lawyer at the time of notification of the extension of the initial prosecution, but that he had not been able to talk to him before his hearing on the new facts alleged, and that this situation had necessarily affected his rights".

9 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

9.1 Legislation

The Ordonnance of 2 February 1945[9] regarding delinquent childhood (*Ordonnance du 2 février 1945 relative à l'enfance délinquante*, further called Ordonnance) already provides for special provisions applicable when a child is suspected or accused in criminal proceedings in addition to the provisions already applicable for all (adults) suspects.
The Directive which should be transposed for the 11 June 2019 has been transposed by the following texts which have amended some articles of the Ordonnance: Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (article 94) ; Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle (article 31) ; Décret n° 2019-507 du 24 mai 2019 pris pour l'application des dispositions pénales de la loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice relative à la procédure numérique, aux enquêtes et aux poursuites.
Globally the French law is in conformity with the directive even if some provisions are not explicitly transposed.

First of all, **the subject matter** (art. 1) and **the scope** (art. 2) of the Directive are explicitly transposed by *Loi n°2019-222,* which added article 11-3 of the *Ordonnance*: "When a child is detained on the frame of a national arrest warrant or a European arrest warrant, the judicial police officer must, from the beginning of this retention, inform parents, tutor, the person or the service to which the minor is entrusted".
It is important to stress that in French criminal law, according to Article 122-8 of the criminal code, "Minors able to understand what they are doing are criminally responsible for the felonies, misdemeanours or petty offences of which they have been found guilty, and are subject to measures of protection, assistance, supervision and education according to the conditions laid down by specific legislation. This legislation also determines the educational measures that may be imposed upon minors aged between ten and eighteen years of age, as

[9] It is important to stress that the *Ordonnance* will be abrogated and substituted by the *Code de justice des mineurs* from 30 September 2021.

well as the penalties which may be imposed upon minors aged between thirteen and eighteen years old, taking into account the reduction in responsibility resulting from their age".
Special provisions apply to persons which are children at the moment of the offence even if the person reaches the age of 18 when he is arrested or judged. There are some exceptions:
-The principle of the separation in detention (art 12 of the directive) between children and adults is excluded when the person reaches the age of 21 (art. D. 93 of the code of criminal procedure).
-The principle of a judgement with a restricted public (art. 14 of the Directive) can be excluded if the person became an adult and requires it, except if there is another child who is judged together (art. 306 et art. 400 Code of criminal procedure).
Contrary to §4 of Article 2 of the Directive, there is no specific provision in the *Ordonnance* about children who were not initially suspected or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority, but Article 62 of the Code of Criminal Procedure is applicable: if during the hearing of a person who is freely heard, there are plausible grounds for suspecting that he or she has committed or attempted to commit an offence, that person must be heard following Article 61-1 of this Code. Article 3-1 introduced by the 2019 law expressly refers to Article 61-1.
Finally, in conformity with the directive, the *Ordonnance* provides rights for children who are suspects or accused in a criminal proceeding, whatever offence has been committed.

Definitions

Regarding definitions provided in article 3 of the Directive, they are *de facto* implemented in the civil code, which defines "child", "holder of parental responsibility" and the meaning "parental responsibility. According to article 388 of the Civil Code, "A minor is an individual of either sex who has not yet reached the full age of eighteen years.
Concerning the doubt on minority, art. 388 civil code provides that any doubt about the minority benefits the party concerned.
Art. 371-1 civil code defines parental responsibility as « a set of rights and duties whose aim is the interests of the child. It belongs to the parents until the child reaches the age of majority or emancipation to protect the child's safety, health and morals, to ensure his or her education and to enable his or her development, with due respect for the child's personality. Parental authority is exercised without physical or psychological violence. Parents shall involve the child in decisions concerning him or her, according to his or her age and degree of maturity".

Right to information

Article 4 of the Directive has been entirely and explicitly transposed by *Décret n° 2019-507* which created article D594-18 of the code of criminal procedure. This article provides for the minor's right to information and to be accompanied by his or her legal representatives at hearings to be held during the proceedings: "I.- When a minor is informed that he is suspected or prosecuted, the notification of his rights carried out on the occasion of a free hearing, detention, police custody or a first appearance under Articles 61-1, 63-1 or 116 shall also include information, in simple and accessible terms, of the following rights:
1° The right to have the holder of parental authority informed and the right to be accompanied by him/her during his/her hearings or questioning, except in the special circumstances set out in II of Article 4 and II of Article 6-2 of *Ordonnance*.
2° The right to the protection of his or her private life is guaranteed by the prohibition to broadcast the recordings of his or her hearings, by the holding of hearings in camera and by the prohibition to publish the minutes of the hearing proceedings or any element allowing his or her identification.
II- When they are handed over to a juvenile, summonses to appear before a court for examination and judgment shall contain, in addition to information on the rights mentioned in I, information on the following rights: 1° The right to attend hearings; 2° The right to be accompanied by the holder of parental authority during the hearings; 3° The right to a personalised educational assessment; 4° The right to benefit from legal aid under the conditions laid down by Law No. 91-647 of 10 July 1991 on legal aid.
III- When the minor is placed in detention, the document handed over to him/her in the application of Article 803-6 also includes information on the following rights:
1° The right to have the holder of parental authority informed and the right to be accompanied by him/her during hearings or interrogations;
2° The right to the protection of his private life is guaranteed by the prohibition to broadcast the recordings of his hearings, by the holding of the hearings in camera and by the prohibition to publish the report of the hearing proceedings or any element allowing his identification ;
3° The right to limitation of the deprivation of liberty and the use of alternative measures to detention, including the right to periodic review of detention;
4° The right, during the deprivation of liberty, to special treatment about his or her minority, including the right to education and the effective and regular exercise of the right to family life, the right to preserve his or her physical and mental development;
5° The right to be detained separately from adult detainees;

6° The right to preserve one's health, as well as respect for the right to freedom of religion or belief.
IV- The rights provided for in 1°, 2°, 5° and 6° of III shall also be notified in case of detention or custody.
V.- The rights referred to in I shall also be notified to a minor who is detained in connection with a warrant for his or her appearance, bringing or arrest, or when he or she is apprehended in the execution of a European arrest warrant according to Articles 133-1 or 695-27.
The rights referred to in II shall be notified to the minor apprehended in the execution of a European arrest warrant according to Article 695-27.
VI-Where the decision taken in respect of a minor is subject to appeal, the minor and his or her parents shall be informed of the existence of that appeal and of the time limit within which it may be lodged.
VII-Whenever information is given to the minor according to this article, it shall also be given by any means and as soon as possible to the holders of parental authority or to the adult mentioned in article 6-2 of Order No. 45-174 of 2 February 1945 on juvenile delinquency".

Right of the child to have the holder of parental responsibility informed

Article 5 of the Directive has been explicitly transposed by *Loi n° 2019-222* creating article 6-2 of the *Ordonnance* that provides:
"I. - A minor suspected or prosecuted under the provisions of this *Ordonnance* shall have the right:
1° That the holders of parental authority receive the same information as that which must be communicated to the minor during the proceedings;
2° To be accompanied by the holders of parental authority:
(a) At each hearing during the proceedings;
(b) At hearings or questioning if the authority carrying out this act considers that it is in the best interests of the child to be accompanied and that the presence of these persons does not prejudice the proceedings; during the investigation, the hearing or questioning may begin in the absence of these persons after two hours from the time they were notified.
II. - Information shall not, however, be issued to holders of parental authority and the minor shall not be accompanied by them when such issue or accompaniment takes place:
1° Would be contrary to the best interests of the minor ;
2° Is not possible because, after reasonable efforts have been made, none of the holders of parental authority can be reached or their identity is unknown ;

3° Could, based on objective and factual elements, significantly compromise the criminal proceedings.
III. - In the cases provided for in II, the juvenile may designate an appropriate adult, who must be accepted as such by the competent authority, to receive this information and to accompany him or her during the proceedings. Where the juvenile has not designated an adult or where the designated adult is not acceptable to the competent authority, the public prosecutor, the juvenile court judge or the investigating judge shall take into account the best interests of the child, designate another person to receive such information and accompany the juvenile.
This person may also be a representative of a competent child protection authority or institution, including an ad hoc representative on the list drawn up according to Article 706-51 of the Code of Criminal Procedure.
The adult designated in the application of this III may request a medical examination of the juvenile in police custody. If it has not been possible to contact this adult from the outset of police custody, the medical examination of the juvenile shall be compulsory.
IV. - If the conditions mentioned in II of this article are no longer met, for the rest of the procedure, the information shall be given to the holders of parental authority and they shall accompany the minor.
V. - The procedures for the application of this article shall be laid down by decree. This decree shall in particular lay down the procedures for appointing the persons mentioned in the second paragraph of III of this Article. It shall also specify, without prejudice to the notification of rights according to this order and Articles 61-1, 63-1, 116 or 803-6 of the Code of Criminal Procedure, the other rights of which the minor suspected, prosecuted or detained, the holders of parental authority or the adult designated according to III of this Article must be informed during the proceedings*"*.

Assistance by a lawyer

It is necessary to distinguish between the person under police custody and the person under free questioning.

For minors placed in police custody, the *Loi de modernisation de la justice du XXIe, of 18 November 2016* rewrote article 4, IV, of the *Ordonnance* of 2 February 1945, now article L413-9 *Code de la justice pénale des mineurs*. Under the new law, when a child is under police custody, a lawyer **must assist** him from the beginning of the police custody:

"From the beginning of police custody, **the minor must be assisted by a lawyer**, under the conditions laid down in Articles 63-3-1 to 63-4-3 of the Code of Criminal Procedure. The minor shall be informed immediately of this right. Where the minor has not requested the assistance of a lawyer, this request may also be made by his or her legal representatives, who shall then be informed of this right when they are informed of the custody according to paragraph II of this article. If the minor or his or her legal representatives have not appointed a lawyer, the public prosecutor, the investigating judge or the judicial police officer must, as soon as police custody begins, inform the President of the Bar by any means and without delay so that he or she can appoint one *ex officio*".

For minors heard freely, on 8 February 2019, the *Conseil constitutionnel* declared the provisions on free hearings for minors unconstitutional (*Conseil constitutionnel*, 8 February 2019, n° 2018-762-QPC). The causes of the unconstitutionality were noted by the Conseil in the absence of a lawyer, the lack of information of legal representatives, and the impossibility of requesting a medical examination during the free hearing. Instead of providing for the minor to be assisted by a lawyer during this procedure, as has been the case for police custody since the *Loi n° 2016-1547 du 18 November 2016* (transposing the same 2016 directive), the *Loi n° 2019-222* provides that when the investigation concerns a crime or offence punishable by imprisonment and the minor or his or her legal representatives have not appointed a lawyer, the competent authority may appoint one (new article 3-1 of the *Ordonnance:* "When a minor is heard freely in the application of article 61-1 of the Code of Criminal Procedure, the officer or agent of the judicial police must inform the parents, the tutor, the person or the service to which the minor is entrusted, by any means).
The same applies when the operations provided for in Article 61-3 of the same code are carried out.
When the investigation concerns a crime or an offence punishable by imprisonment and the minor has not requested the assistance of a lawyer according to the same articles 61-1 and 61-3, this request may also be made by his or her legal representatives, who shall then be notified of this right when they are informed according to the first two paragraphs of this article. Where the minor or his or her legal representatives have not requested the appointment of a lawyer, the public prosecutor, the juvenile judge, the investigating judge or the officer or agent of the judicial police must inform the President of the Bar by any means and without delay so that he or she may appoint one ex officio, unless the competent magistrate considers that the assistance of a lawyer does not appear proportionate in view of the circumstances of the case, the seriousness of the offence, the complexity of the case and

the measures likely to be adopted in relation to it, it being understood that the best interests of the child always remain a primary consideration"). This appointment is therefore not automatic, since it is subject to a proportionality test which requires the assistance of the lawyer to be assessed with regard to "the circumstances of the case, the seriousness of the offence, the complexity of the case and the measures likely to be adopted in relation to it, being understood that the best interests of the child always remain a primary consideration". This proportionality test that is now required originates in the 2016 Directive, in its article 6§6. which precisely provides that derogations from the assistance of a lawyer may be made, "provided that the right to a fair trial is respected".
There is, therefore, no obligation for the minor to be assisted by a lawyer during the unrestricted hearing, nor is there any change to Article 4-1 of the *Ordonnance*, which still provides that "the minor being prosecuted" (and not just suspected) is assisted by a lawyer. Article L12-4 of the new *Code de la justice pénale des mineurs* confirms this position providing that a minor who is prosecuted or convicted is assisted by a lawyer.

Article **61-1** of the Code of Criminal Procedure concerning the free hearing of adults has also been amended by the *Loi n° 2019-222* to take into account evolutions concerning minors. At the beginning of the article, it has been added that "Without prejudice to the specific guarantees applicable to minors, the person in respect of whom there are plausible grounds for suspecting (...)".

Finally, it is important to stress that there are no specific provisions organising the assistance by a lawyer and so it is regulated by the same rules as for adults (see above under the Directive 2013/48/EU).

Right to an individual assessment

The *Ordonnance* does not provide for such a specific provision, but the Preliminary Article of the new *Code de justice des mineurs* will provide that "The present code regulates the conditions under which the criminal responsibility of minors is implemented, taking into account the mitigation of this responsibility according to their age and the need to seek their educational and moral recovery through measures appropriate to their age and personality, pronounced by a specialised court or according to appropriate procedures".

The necessity to examine the juvenile's personality is a **fundamental principle recognised by the laws of the republic** laid down by the *Conseil constitutionnel* in 2002, establishing "the need to seek the educational and moral rehabilitation of minors through measures appropriate to their age and personality, ordered by a specialised court or following appropriate procedures" (*Conseil constitutionnel*, Decision of 29 August 2002, n° 2002-461 DC, since reiterated, in particular, on 3 March 2007, n°2007-553 DC, 10 March 2011, n°2011-625 DC, 8 July 2011, n°2011-147 DC, 4 August 2011, n°2011-635 DC).
Personality analysis of the juvenile is provided for in Article 8 of the *Ordonnance*, which establishes that the juvenile judge shall take all necessary steps and make all investigations to ascertain the truth and to obtain knowledge of the personality of the juvenile and the appropriate means for his or her rehabilitation. The juvenile judge will collect, through all investigative measures, information relating to the personality and the social and family environment of the juvenile.
Loi n° 2011-939 du 10 août 2011 sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs also created a unique file of personality (art. 5-2 of the *Ordonnance*) whose purpose is to collect all the elements relating to the personality of a minor during the various investigations to which he may be subjected, both in the criminal and civil (educational assistance) context. This file, which is computerised and updated, is meant to enable the participants in the procedure, and the juvenile judge, in particular, to have a rapid and complete knowledge of the investigations already carried out and of the minor's situation.

The Law of 10 August 2011 also introduced into the *Ordonnance* an article 5-1 providing that before taking any decision imposing educative measures, educational sanctions or penalties, investigations into the personality of the minor must have been carried out.
It results from Article **2** of the *Ordonnance* that the personality of the juvenile determines the pronouncement of an educative sanction (10 to 18 years of age) or a penalty (13 to 18 years of age).
Art. **5-1** *Ordonnance* provides that before any decision pronouncing surveillance and educative measures or, where appropriate, an educative sanction or punishment against a juvenile criminally responsible for a crime or misdemeanour, the necessary investigations must be carried out to have sufficient knowledge of his or her personality and social and family situation and to ensure the conformity of the criminal decisions to which he or she is subject.

Article **5-2** of the *Ordonnance* provides that the file containing all the information concerning the personality of a minor collected in the course of the investigations to which he is subject is opened as soon as an investigative measure relating to personality is ordered or if the minor is subject to preliminary probation, placement under judicial supervision, house arrest with electronic surveillance or placement in pre-trial detention.

Article **8** of the *Ordonnance* details all the measures that the juvenile judge may carry out to investigate the personality of the minor. According to this article, the juvenile judge shall take all necessary steps and carry out all useful investigations to establish the circumstances of the case and to determine the personality of the juvenile and the appropriate means for his or her re-education.
To this effect, he or she shall carry out an investigation, either informally or in the manner provided for in Chapter I of Title III of Book I of the Code of Criminal Procedure. In the last case, and if urgency so requires, the juvenile judge may hear the minor on his or her family or personal situation without being required to observe the provisions of the second paragraph of Article 114 of the Code of Criminal Procedure.
The judge may issue all useful warrants or prescribe judicial supervision following the rules of ordinary law, subject to the provisions of Articles 10-2, 11 and 11-3.
He will collect, through any investigative measure, information relating to the personality and the social and family environment of the minor.
The juvenile judge shall order a medical examination and, if necessary, a medical-psychological examination. He shall decide, where appropriate, on the placement of the juvenile in a reception centre or observation centre or prescribe a day-time activity measure under the conditions defined in Article 16ter.
However, he may, in the interests of the juvenile, order any of these measures or prescribe only one of them. In such cases, he must issue a reasoned order.
Once these measures have been taken, the juvenile court judge may, either ex officio or at the request of the public prosecutor's office, communicate the file to the prosecutor.
Before deciding on the merits of the case, the judge may order the juvenile concerned to be placed under provisional probation to rule after one or more trial periods of which he or she shall determine the duration.
After detailing all the measures that the juvenile judge may carry out to investigate the personality of the minor, provides for the possibility, in the interest of the minor, to order none of these measures or to prescribe only one of them. In such a case, the judge gives a motivated order.

Right to a medical examination

This right has been explicitly transposed in article 6-2 of the *Ordonnance*, created by *Loi n° 2019-222* and that provides that the appropriate adult designated in the application of this article may request a medical examination of the minor in police custody. If this adult could not be reached at the beginning of police custody, the medical examination of the minor is mandatory.
The juvenile's lawyer can also request that the juvenile undergo a medical examination. Law n°2019-222 introduced this possibility in article **4 III** of the *Ordonnance* « (…) The juvenile's lawyer may also request that the juvenile be examined by a doctor ».

A minor of sixteen years of age receives systematically a medical examination from the beginning of police custody; for minors over sixteen years of age, their legal representatives are informed of their right to request a medical examination (Art. 4 III *Ordonnance*). The provisions of Article 63-3 of the Code of Criminal Procedure on the medical examination of adults in police custody are applicable. As provided in article 63-3, the medical certificate is placed in the file.

Audio-visual recording of questioning

This requirement is contained in VI of Article 4 of *Ordonnance* which provides that interrogations of minors in police custody as mentioned in Article 64 of the Code of Criminal Procedure are subject to audio-visual recording.
The legislator now draws the consequences of the absence - frequent, notably for technical reasons - of the compulsory audio-visual recording of the minor, by specifying that in this case "no condemnation may be pronounced on the only basis of the minor's declarations if they are contested".

Limitation of deprivation of liberty

Regarding police custody, in principle, a juvenile aged between 10 and 13 years cannot be taken into custody. However, in exceptional cases and if there are serious and corroborating

grounds for suspecting that he or she has committed or attempted to commit an offence, he or she may be held at the disposal of a judicial police officer. It can only be decided in the presence of a crime or offence punishable by at least five years imprisonment and, since the 2011 reform, on one of the grounds provided for in Article 62-2 of the Code of Criminal Procedure. Detention is subject to the prior agreement and control of a magistrate.
However, minors aged 13 or over may be placed in police custody. While the provisions relating to information and rights are modified in this case, those relating to the initial duration of police custody refer to ordinary law: in principle, police custody of a minor therefore lasts 24 hours. It may be decided to extend this initial period, but subject to conditions that derogate from ordinary law.
Article 4 of the *Ordonnance* makes the extension of the police custody of a minor aged 13 or over subject to several conditions of substance and form. In terms of substances, for a minor aged between 13 and 16 years, the extension may not take place for an offence punishable by less than five years' imprisonment. On the other hand, it is always possible for minors aged 16. As regards form, the extension always presupposes prior presentation of the minor to a magistrate, public prosecutor or investigating judge at the place where the measure is to be carried out, and no derogation from this principle is permitted.

Regarding the pre-trial detention, for minors, the periods of pre-trial detention are defined in article 11 of *Ordonnance*. Detention is prohibited for minors under the age of thirteen. However, it is possible to detain a minor beyond that age, but with distinctions aimed at reducing the length of detention as much as possible, depending on the minor's age (Juvenile Criminal Justice Code (CJPM), Article L. 334-1 renewed and states the principle that: "Minors under thirteen years of age may not be placed in pre-trial detention").
Article 11 of the *Ordonnance* specifies that pre-trial detention is possible only on the condition that this measure is indispensable or that it is impossible to take any other measure and on the condition that the obligations of judicial supervision provided for in Article 10-2 and the obligations of house arrest with electronic surveillance are insufficient.

Alternative measures

Article 11 of the *Ordonnance* specifies that pre-trial detention is possible only on the condition that this measure is indispensable or that it is impossible to take any other measure and on the condition that the obligations of judicial supervision provided for in Article 10-2 and the obligations of house arrest with electronic surveillance are insufficient.

Specific treatment in the case of deprivation of liberty

The *Ordonnance* provides, in article 20-2, paragraph 4, that the imprisonment of sentenced minors is carried out in a special section of a juvenile institution or a specialised penitentiary establishment for minors. Juveniles must be held in an appropriate detention centre: a specialised juvenile prison (EPM *établissement pénitentiaire pour mineur*) or a juvenile department of a pre-trial detention centre or penalty institution.
Juveniles should be strictly separated from adults and provided with an individual cell. As provided for in article R. 57-9-11 of the code of criminal procedure, exceptionally, a detainee who reaches the age of majority in detention may be kept in a juvenile unit or a specialised penitentiary establishment for minors. He shall have no contact with remand prisoners under the age of sixteen.
He may not be kept in such an establishment beyond the age of eighteen years and six months.
According to Article D514-1, the public services of the judicial youth protection service ensure the continuity of educational care for detained minors. In collaboration with the services in charge of following up with the minor, they implement an individualised educational programme for each detained minor. They carry out, for them, the tasks assigned to the Prison Integration and Probation Service (Service pénitentiaire d'insertion et de probation or SPIP) by the provisions of articles D. 460 to D. 465 and D. 573.
The provisions of Articles R. 57-8-8 and following of the Code of criminal procedure relating to visits apply to minors detained. The provisions of articles R. 57-8-21 and following of the Code of criminal procedure relating to telephone in prison apply to detained minors.
No specific provision concerning the respect of minors' freedom or religious belief, but art R57-9-3 code of criminal procedure is the provision common to all prisoners. It applies to minors detained.
The new article **D. 15-6-1**, as amended by *Décret n°2019-507* explicitly introduces that minors placed in detention or police custody shall be separated from adults.
The principle is immediately limited by the second part of the article, which specifies that a minor shall not be separated from adults if:
- it is in the best interests of the child not to be separated from them
- exceptionally, if such separation does not appear possible, on the condition that how minors are brought into the presence of adults is compatible with the best interests of the child.

Right to protection of privacy

When the minor is prosecuted, Article 14 of the *Ordonnance* prohibits the publication of the record of the proceedings of juvenile courts, any text or illustration concerning the identity and personality of juvenile offenders by any means of communication. Offences are punishable by a penalty of €15,000. In addition, this text provides that the judgment may be published but without the name of the minor being indicated, even with an initial, on pain of a penalty of €15,000.

When the minor is a victim, the text of Article 39 bis of the Act of 29 July 1881 punishes with a penalty of 15,000 euros "the fact of disseminating, by any means, information relating to the identity or allowing the identification of a minor who is a victim of an offence".

To protect the minor, it has been decided to limit the publicity of proceedings before the juvenile court and the juvenile assize court (before the juvenile court, art. 14 *Ordonnance* is applicable). Only the victim, whether or not he or she is a civil party, witnesses of the case, close relatives, the minor's legal representative or guardian, members of the bar, representatives of patronage societies and services or institutions dealing with children, and probation officers shall be allowed to attend the proceedings.

Article 4 of the *Ordonnance* punishes under paragraph IV the diffusion of the video recording of the interrogations of the juvenile under police custody.

Right of the child to be accompanied by the holder of parental responsibility during the proceedings

Law n° 2019-222 introduced a new article **6-2** in the *Ordonnance* providing for a minor's right to information and to be accompanied by his or her legal representatives for the hearings that will be held during the procedure (see above).

Right of the children to appear in person, and participate in, their trial

About the right to participate in his/her trial, there is no express provision in the code of criminal procedure and this right has been indirectly recognised across case law of the Court of cassation that considered breach this right proclaimed by the European Court of Human rights sentences denying the right to be present to persons detained.
Nevertheless, the code of criminal procedure provides for the possibility to use a means of the videoconference to judge the person (but only if he/she agrees, see art. 706-71 code of criminal procedure.)
Article 489 of the code of criminal procedure provides that the judgment by default is deemed non-existent in all its provisions if the defendant applies to set aside its enforcement.

European arrest warrant proceedings

This hypothesis had explicitly taken into consideration by *Loi n° 2019-222* which added article 11-3 of the *Ordonnance*: "When a child is detained on the frame of a national arrest warrant or a European arrest warrant, the judicial police officer must, from the beginning of this retention, inform parents, tutor person, responsible for the child. III and IV of Article 4 *Ordonnance* are applicable".

Right to legal aid

Legal aid is not automatically granted to the minor. It is, therefore, necessary to consider the minor's assets and resources, or above all the situation of his or her parents. On this point, it is irrelevant who appointed the lawyer. However, article 5 of the law of 10 July 1991 on legal aid allows minors whose parents are not interested to be assisted under legal aid, independently of their parents' resources.

Remedies

Although there is no specific appeal, the interests of the child are ensured by a special juvenile chamber for criminal matters, which has jurisdiction to examine appeals against decisions of the juvenile judge and the juvenile criminal court. Each court of appeal has a juvenile

chamber. A member of the Court of Appeal responsible for child protection presides over this chamber or sits as a reporting judge.

Training

Although the transposition law did not provide for specific training about the objectives of the Directive, several points concerning juvenile law are provided during the initial training at the National School of the magistrates (*Ecole nationale de la magistrature*).
The prosecution functions of minors are worked under the format of practical lessons in the public prosecutor's office for minors with details of the specific rights to be notified to minors according to the nature of the hearings as well as the different penal strategies that can be taken.
For the investigating judge, in the initial period, the specificities are briefly mentioned during the training sessions dedicated to other topics: rights of the parties, acts of the investigating judge or coercive measures; but in preparation for taking up the post, a whole day is devoted to minors who are authors and victims.
For the criminal court, as the lessons relate to the hearing of adults, the attention of student magistrates is focused on the criterion of personal competence, which is the basis for the possibility of referring a case to the criminal court.
For the Juvenile Judge, the issues of assistance from an interpreter and the right to translation of the essential documents in the case file are addressed during the study period at the same time as the first examination and the judgment hearings. At this stage, these rights are recalled in the training manuals and the vigilance of trainee magistrates is called upon to check whether interpreting is necessary before the acts or hearings.
The issue of the rights to information of minors suspected or prosecuted and their right to be assisted by a legal representative or an appropriate adult, who must receive the same information as the minor, is taught in the training manuals and recalled during the training sessions. At this stage, the appointment of an appropriate adult, introduced by the law of 23 March 2019 transposing the directive of 11 May 2016 on this point, is briefly mentioned, while the presence and information of the legal representative are further emphasized.

Concerning the specific training for the staff of law enforcement authorities and of detention facilities who handle cases involving children provided for in the directive, art. D514 Code

of criminal procedure provides that within each penitentiary establishment receiving minors, a multidisciplinary team includes representatives of the different services working with incarcerated minors to ensure their collaboration and the individual monitoring of each detained minor.
The multidisciplinary team is headed by the director of the establishment or his or her representative. It includes at least, in addition to its president, a representative of the supervisory staff, a representative of the public sector of the judicial protection of juveniles and a representative of the national education system. It may include, where necessary, a representative of the health services, a representative of the Prison Integration and Probation Service or any other person involved in the care of juvenile detainees.
The multidisciplinary team meets at least once a week.

Assessment of transposition

The problem of inconsistency regarding the assistance of the minor from the beginning of police custody is now resolved by the 2016 law. From now on, the minor **must** be assisted by a lawyer. The minor, or missing his or her legal representatives, must make a request. In the absence of a request, the minor will receive a lawyer appointed by the court.
Regarding the right to a lawyer and the right to be informed of the legal representatives, the 2019 law, as one author points out[10], "faithfully incorporates the provisions of the directive into national law" and takes into account the decision of the *Conseil constitutionnel* of 8 February 2019 on the free hearing of minors. The principle of separation from adults and the right to information and to be accompanied by the holders of parental authority are enshrined in domestic law. At first reading, it is possible to observe that new Article 6-2 of the *Ordonnance*, together with Article D. 594-18 and D. 15-6-1 of the Code of Criminal Procedure are almost a literal reproduction of Articles 4, 5 and 12 of the Directive[11].
Moreover, with the new *Loi n° 2019-222* transposing the directive, the concept of the **best interests of the child** enters into French juvenile criminal law.

[10] GALLARDO E. "*L'intérêt supérieur de l'enfant dans la loi du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice*", *Revue de science criminelle et de droit pénal comparé* 2019, p. 758. "La loi de 2019 (…) s'attache à inscrire en droit interne, fidèlement, les dispositions de la directive, tout en prenant acte de la décision du Conseil constitutionnel du 8 février 2019 relative à l'audition libre".
[11] Now articles L311-1 to L311-5, D413-3 and D423-4 *Code de la justice pénale des mineurs.*

9.2 Case law

Conseil constitutionnel 8 février 2019, n° 2018-762- QPC (Question prioritaire de constitutionnalité)
On 8 February 2019, the *Conseil constitutionnel* declared the provisions on free hearings for minors unconstitutional. The causes of the unconstitutionality were noted by the *Conseil* in the absence of a lawyer, the lack of information of legal representatives, and the impossibility of requesting a medical examination during the free hearing. Instead of providing for the minor to be assisted by a lawyer during this procedure, as has been the case for police custody since the *Loi n° 2016-1547 du 18 novembre 2016* (transposing the same 2016 directive), the *Loi n° 2019-222* provides that when the investigation concerns a crime or offence punishable by imprisonment and the minor or his or her legal representatives have not appointed a lawyer, the competent authority may appoint one.

Conseil constitutionnel Décision n° 2018-768 QPC du 21 mars 2019
On 21 March 2019, two days before the *Loi n° 2019-222* came into force, the *Conseil constitutionnel* deduced for the first time from the 10th and 11th paragraphs of the Preamble to the 1946 Constitution the requirement to protect the **best interests of the child**, imposing that minors present on national territory benefit from the legal protection attached to their age. This decision uses the expression "best interests of the child" for the first time.
§ 5 *According to the tenth and eleventh sections of the Preamble of the Constitution of 1946: "The Nation shall provide the individual and the family with the conditions necessary to their development. - It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure.*"
§ 6 *This results in an obligation to protection of the best interest of the child. This obligation requires that minors present on the national territory benefit from the legal protection attached to their age. It follows that the rules related to determining the age of an individual must be bound by the necessary guarantees so that minors are not incorrectly considered as adults.*

Crim., 10 April 2019, n° 19-80.344
It can be deduced from the first paragraph of Article 9 of the *Ordonnance*, relating to delinquent children, that in the absence of specific derogatory provisions for minors, those of Article 179 of the Code of Criminal Procedure relating to continued detention are

applicable. The investigating judge, when referring a minor aged over thirteen and under sixteen to the juvenile court under a criminal charge, may therefore keep him or her in detention until he or she appears before that court.

Crim., 11 December 2019, n° 18-84.938

In this judgment, the *Cour de cassation* objects to the fact that a minor is unduly considered as an adult. Mr X was brought before the criminal court. He argued that the court was not competent to hear the case on the grounds of his minority. The criminal court rejected this exception and, by recognizing him as an adult, declared him guilty and sentenced him to one year in prison. The court of appeal did the same, stating that the defendant's bone age had been determined to be 19 years according to the X-ray bone examination carried out and that he should therefore be held as an adult. Mr X then appealed to the *Cour de cassation*, which allowed the appeal.

The *Cour de cassation* criticised the Court of appeal for three reasons. Firstly, for not having respected the subsidiary criteria of the bone examination. Paragraph 2 of Article 388 of the Civil Code states the subsidiary nature of a bone examination, which can only be ordered if the person in question has no valid identity documents and if the age he alleges is not plausible. In this case, the respondent had provided an identity document, which the Court of appeal should have had examined before proceeding with a bone test.

Secondly, the Court of appeal was criticised for not having specified which judicial authority had authorised the examination and for not having recognised the defendant's refusal.

Lastly, the *Cour de cassation* criticises the Court of appeal for not having specified the elements that justified setting aside the existing doubt about the defendant's age. The correlation made by the judges between the result of the examination indicating the age of 19 and the variations in the defendant's identity during the proceedings was therefore insufficient to remove any doubt. On the contrary, several elements indicated his minority, including a birth certificate and an educational assistance procedure. **Given that there was a clear doubt, the minor status of the young man should be retained, making him liable to the juvenile court**[12].

[12] Article 388 of the Civil Code specifies that bone X-ray examinations to determine the age, which must specify the margin of error, cannot on their own determine whether the person concerned is a minor. Doubt benefits the person concerned.

Crim., 21 January 2020, n° 19-86.957

Article 145 of the Code of Criminal Procedure provides that, when the defendant is a minor, the debate is held and the judge decides in closed session. In this case, an individual was prosecuted for offences committed when he was a minor and when he was an adult. The question that arises is whether the public nature of the hearing before the liberty and custody judge could be a cause for nullity. The investigating chamber rejected the request for nullity, because the person concerned was also being investigated for acts committed when he was an adult. The *Cour de cassation* refuses the reasoning of the Court of appeal that, to reject the plea of nullity of the pre-trial detention decision based on the violation of the principle of restricted publicity states that the person concerned is also being investigated for acts committed when he was an adult. The *Cour de cassation* states that it follows from Article 145 of the Code of Criminal Procedure that when the person under investigation **was a minor at the time of the facts or of any of them**, the debate before the liberty and custody judge to place him or she in pre-trial detention is carried out and the decision is taken in closed session. Nevertheless, in this case, the *Cour de cassation* dismissed the appeal because Mr X. could not complain about it since, on the one hand, he was an adult at the time of the debate and, on the other hand, neither he nor his lawyer had raised any objection to the public nature of the hearing before the liberty and custody judge.

Crim., 17 June 2020, n° 20-80.065

Under Article 4, II, of *Ordonnance*, when a minor is placed in police custody, the judicial police officer must, as soon as the public prosecutor or the judge in charge of the information has been notified of this measure, inform the parents, the tutor, the person or the service to which the minor is entrusted.

In this matter, a minor was placed in police custody for having committed violence against an educator of the home where the minor had been entrusted. This same educator was designated by the minor as his legal representative according to Article 4, II of the *Ordonnance*. The *Cour de cassation* overturned the decision of the Court of appeal, which refused to declare the police custody invalid. Firstly, the *Cour* stated that it was not up to the minor to designate the person who was to be informed of the police custody measure and who would necessarily be involved in making choices in terms of the minor's defence. Secondly, the *Cour* states that information about the minor's custody cannot be given to a person designated both as the minor's legal representative and as the presumed victim of his or her violence, since this does not guarantee the conduct of a procedure that respects the opposing interests involved.

Conseil constitutionnel, Décision n° 2018-744 QPC of 16 November 2018

The *Conseil constitutionnel* declared the provisions of the *Ordonnance*, as they were in force in 1984, to be contrary to the Constitution, as they did not provide sufficient guarantees to ensure that the rights of persons in police custody, especially minors, were respected. The declaration will therefore take effect on the date of publication of this decision. It applies to all cases not definitively decided on that date. It will be up to the judge to assess the consequences of this declaration of unconstitutionality in the criminal proceedings that gave rise to the priority question of constitutionality referred to the *Conseil constitutionnel*.

Crim., 19 February 2019, n° 18-83.360

In this matter, the *Cour de cassation*, referring to the recent declaration of unconstitutionality relating to the legal regime applicable to minors between 1974 and 1993, concluded that the police custody of a minor in 1984 was irregular, in particular, because of the lack of notification of the right to legal counsel and the right to silence.

This cases-law, although they do not explicitly refer to the 2016/800 Directive, shows ever-increasing attention and protection in the field of juvenile law. The *Conseil constitutionnel* has an important influence, as its decisions **anticipate legislative interventions** in this field (free hearing of a minor[13] and best interests of the child[14]) or **implement current guarantees** to measures adopted under a previous regime (police custody of minors[15]).

The *Cour de cassation*, for its part, has **specified the scope of certain provisions** in the criminal law of minors. The *Cour* clarified, first of all, that the protection of the best interests of the child must always prevent a minor from being unduly considered as an adult. To do this, it reminds judges of the strict respect of the conditions and legal guarantees for the use of bone examination and specifies that any doubt must always benefit the minor[16]. If there is any doubt about the individual's minority, as provided for in Article 3 of the Directive[17], he or she should therefore be considered a minor and tried by the competent juvenile courts. The specific legislation on juvenile criminal law will be applied.

[13] Conseil constitutionnel Décision, n° 2018-762- QPC du 8 février 2019.
[14] Conseil constitutionnel Décision n° 2018-768 QPC du 21 mars 2019.
[15] Conseil constitutionnel, Décision n° 2018-744 QPC du 16 novembre 2018.
[16] Crim., 11 December 2019, n° 18-84.938.
[17] Article 3 of the directive provides that "Concerning point (1) of the first paragraph, where it is uncertain whether a person has reached the age of 18, that person shall be presumed to be a child".

Furthermore, in the best interests of the child, even if this principle is not explicitly mentioned, the *Cour de cassation* specifies that it is not up to the child to decide the person to whom the police custody measure should be communicated[18].

The *Cour de cassation* has also specified that the debate for the placement in pre-trial detention must take place in the judge's chambers even if the defendant has reached the age of majority when the accusation also concerns offences committed when he was a minor[19]. The guarantees applicable to minors can therefore be extended to a person who has reached the age of majority when some of the acts were committed when the person was a minor.

[18] Crim., 17 June 2020, n° 20-80.065.
[19] Crim., 21 January 2020, n° 19-86.957.

10 Directive (EU) 2016/1919: Legal aid

10.1 Legislation

The Directive which should be transposed for the 25 May 2019 has not been transposed.
In French legal system, the main legislation concerning legal aid is Loi n° 91-647 of 10 July 1991 (Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique) and Decree n° 91-1266 of 19 December 1991 implementing Law n° 91-647 of 10 July 1991 (Décret n°91-1266 du 19 décembre 1991 portant application de la loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique). A legislation on legal aid therefore already existed before the European directive of 2016.
No national implementing measure for Directive 2016/1919 of 26 October 2016 on legal aid for suspects and defendants in criminal proceedings and for persons whose surrender is requested in connection with proceedings relating to the European Arrest Warrant has been adopted. As a result, no article of the directive has been explicitly transposed into national law.

A directive deemed already transposed

The French legislator has not retained the obligation to transpose the directive, considering that the directive had already been transposed into national law. On the *Légifrance* website, it is specifically stated that "this directive [directive 2016/1919] enters into force on 24-11-2016. It shall be transposed into national law by the Member States by 25-05-2019 at the latest. Complete transposition of this directive by the following texts: Law n° 91-647 of 10 July 1991 relating to legal aid; decree n° 91-1266 of 19 December 1991 implementing Law n° 91-647 of 10 July 1991 relating to legal aid; decree n° 2005-790 of 12 July 2005 relating to the rules of ethics of the legal profession".

National legislation largely conforming to the directive

Although there has been no transposition, there are relevant provisions in national law containing *de facto* the same guarantees provided by the Directive. Almost all articles of the Directive can be considered transposed into national law. In some cases, national legislation seems to offer more extensive protection than the directive.

Regarding **the subject matter,** it is possible to observe that national law appears to be **fully in line** with the Directive.
In French law, legal aid in criminal proceedings was amended by law n° 91-647 of 10 July 1991: legal aid is no longer limited to civil parties and persons civilly liable but is now extended to **all parties before all criminal jurisdictions**. Legal aid is granted in ex gratia or contentious proceedings, as a claimant or defendant in front of any jurisdiction, as well as during the procedure for hearing minors provided for by article 388-1 of the Civil Code and during the procedure for appearing in court upon prior recognition of guilt (*reconnaissance préalable de culpabilité*) provided for by articles 495-7 et seq. of the Code of Criminal Procedure.
Even if there is no specific article providing for legal aid for persons whose surrender is requested, the requested person has the right to the assistance of a lawyer of his or her choice or, missing that, one assigned by the court, as provided for in article 695-27 of the Code of Criminal Procedure. If the conditions for receiving legal aid are satisfied legal aid is granted.
The application is therefore broader than what is provided for in the Directive (suspected and accused person and person subject to a European Arrest Warrant). French law grants legal aid to any party before any jurisdiction.

Regarding the **scope,** national law appears to be **fully in line** with the Directive.

Indeed, legal aid must be granted to:

- Person deprived of liberty
Since the reform of police custody (law of 14 April 2011), from the beginning of police custody, the person can ask to be assisted by a lawyer. If the person is unable to choose a lawyer or if the lawyer chosen cannot be contacted, he or she may request that one be appointed by the President of the Bar Association. The appointed lawyer may assist the person placed in police custody during an initial interview limited to 30 minutes, but also during hearings and confrontations (art. 63-3-1). If the conditions for receiving legal aid are met, legal aid is granted.

- Person required or permitted to attend an investigative or evidence-gathering act, including identity parades, confrontations and reconstruction of the scene of a crime.
The person questioned in police or gendarmerie offices other than police custody must be informed of the option available to him or her between the free choice of counsel and the designation by the President of the Bar of his or her motion. The Law n°2014-535 amended article 64 of the 1991 law, which provides for the granting of legal aid if the lawyer is assisted in this situation (hearing, confrontation or investigation measures). The police or gendarmerie shall inform the person that, unless he or she satisfies the conditions for the granting of legal aid, the costs of a lawyer shall be charged to him or her if he or she applies for the designation of a public-appointed lawyer.

- Person required to be assisted by a lawyer following Union or national law
Even if there is no specific text law of 10 July 1991 providing for legal aid to be granted to a suspect or an accused person who is required to be assisted by a lawyer following Union or national law, the law generally provides that when the conditions for obtaining legal aid are satisfied, the charges which would be incurred by the beneficiary of legal aid if he did not have this aid are borne by the State (art. 24 Law n° 91-647 of 10 July 1991 concerning legal aid).

- Persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
During the hearing of a person heard freely, where it appears that there are plausible grounds for suspecting that he has committed or attempted to commit an offence, he may either be taken into custody or be kept under the regime of free hearing (art. 62 code of criminal procedure). Even if she is not taken into police custody, she shall have the right to the assistance of a lawyer. If the conditions for receiving legal aid are satisfied, legal aid is granted.

Definition

Legal aid covers all charges relating to the proceedings, procedures or acts for which it has been granted, including the charges relating to investigative measures. It is a financial aid that enables persons without resources or on a limited income to benefit from the payment by the State of all or part of the lawyer's fees and the costs of the proceedings.

Article **2** of the 1991 law provides that « Natural persons with insufficient resources to assert their rights in legal proceedings may receive legal aid. This aid is total or partial.
Exceptionally, legal aid may be granted to non-profit legal entities having their registered office in France and not having sufficient resources (…) ».

Legal aid in criminal proceedings

National law appears to be **fully in line** with Article 4 of the Directive.
Following the directive, Article 2 of law n° 91-647 of 10 July 1991 provides for legal aid to be granted to natural persons with insufficient resources to assert their rights in legal proceedings. This aid is total or partial. Exceptionally, legal aid may be granted to non-profit legal entities having their registered office in France and not having sufficient resources.
The scope of legal aid provided for in law n°91-647 of 10 July 1991 is broader than in the Directive. Indeed, the national law on legal aid is addressed to all "natural persons with insufficient resources to assert their rights in legal proceedings", and not only to the suspected or accused person.
Following the directive, French law applies a **mean test and a merit test** to determine whether legal aid is to be granted.
Firstly, aid is granted only if the person cannot cover the legal fees.
The aid may be total or partial according to a means test, the level of which can be modified at the beginning of each year (Decree No. 91-1266 of 19 December 1991 implementing Law No. 91-647 of 10 July 1991 on legal aid details the conditions of resources - 1st section of the decree - and the ceiling of resources - Article 98). As provided for in the directive, are taken into account relevant and objective factors, such as the income, capital and family situation of the person concerned. According to article 4 of law n° 91-647 of 10 July 1991, all resources are considered, including those of the spouse and persons usually living at home (unless the action is brought against the applicant for aid). The movable or immovable property even if they do not produce any income is also taken into account but excluding those which could not be sold or pledged without 'causing serious trouble to the person concerned.
Secondly, aid may be granted only to persons whose action does not appear to be manifestly inadmissible, unfounded *or abusive due in particular to the number of requests, their repeated or systematic nature* (Conditions in italics have been added by law n°2019-1479 of 28 December 2019).

However, this last condition (merit test) is not required of the defendant, the person civilly liable, the witness, the suspect, the accused person, the condemned person and the person subject to the procedure of *comparution sur reconnaissance préalable de culpabilité*.
In criminal proceedings, the "means test" provided for by Directive 2016/1919, which is set out in Article 7 of the Law of 10 July 1991, according to which the action "does not appear to be manifestly inadmissible, unfounded or abusive due in particular to the number of requests, their repeated or systematic nature " (Article 7 of the Law) does not apply to the defendant to the action, the civilly liable person, the witness, the suspect, the accused or condemned person and the defendant in the procedure of *comparution sur reconnaissance préalable de culpabilité* (the person subject to the procedure of prior recognition of guilt).
The exception provided for in national law appears to be broader than the Directive. The Directive provides that the merit test shall be deemed to have been met (a) where a suspect or an accused person is brought before a competent court or judge to decide on detention at any stage of the proceedings within the scope of the Directive and (b) during detention. However, in domestic law, the exception concerns the defendant to the action, the person liable under civil law, the assisted witness, the person under investigation, the defendant, the accused, the convicted person and the person who is the subject of the proceedings on prior admission of guilt (*comparution sur reconnaissance préalable de culpabilité*). This exception, although certainly including the hypotheses provided for in the Directive, also includes other situations.

Legal aid in European arrest warrant proceedings

- No specific article provides for legal aid for persons whose surrender is requested. The requested person has the right to the assistance of a lawyer of his or her choice or, in failing that, one assigned by the court, as provided for in article 695-27 of the Code of Criminal Procedure. **If the conditions for receiving legal aid are satisfied, legal aid is granted.**

- No specific article providing for legal aid for persons who are the subject of European arrest warrant proceedings to conduct a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State following Article 10(4) and (5) of Directive 2013/48/EU. The requested person has the right to the assistance of a lawyer of his or her choice or, in failing to find one, one assigned by

the court, to assist the lawyer in the executing Member State, as provided for in article 695-17-1 of the Code of Criminal Procedure (provision introduced by law n°2016-731 of 3 June 2016 - art. 63). **If the conditions for receiving legal aid are satisfied, legal aid is granted.**

Decisions regarding the granting of legal aid

Following Article 6 of the Directive, in French law, a specifically competent authority exists to decide on legal aid. The authority specifically competent to decide on the application for legal aid is the **legal aid office**. Articles 12-17 of the 1991 law regulate the organisation of legal aid offices.
Following Article 6 of the Directive, the applicant must be informed in writing if his request for legal aid is refused in full or in part. *As laid down in article 50 of* Decree n° 91-1266 of 19 December 1991 implementing Law n° 91-647 of 10 July 1991 concerning legal aid, a *copy of the decision of the office, the section of the office or their president is notified to the applicant by the secretary of the office or the section of the office by simple letter in the case of admission to full legal aid, and through any device enabling the date of receipt to be certified in other cases.*
The notification of the decision refusing legal aid, granting it only partially or withdrawing the benefit of legal aid specifies how the applicant may appeal against the decision. (...).

Remedies

Following article 8 of the Directive, the applicant has an effective remedy in the event of a breach of their rights under this Directive. As laid down in article 23 of the law n° 91-647 of 10 July 1991, appeals against the decisions of the legal aid office may be made by the person concerned when the benefit of legal aid has been refused, has been granted only partially or has been withdrawn (Articles 56 to 60 of the decree provide detailed rules for appeals against the decisions of the offices).

Vulnerable persons

As provided for in article 9 of the directive, the particular needs of vulnerable suspects, accused persons and requested persons are taken into account by law n°91-647 of 10 July

1991. In particular, domestic law excludes the application of the means test in some situations involving vulnerable persons.
The means test applies to all those applying for legal aid, regardless of nationality, except for **three categories** who are entitled to legal aid without any income or assets test:
- Minors whose parents lose interest: article 5 of the law n°91-647 of 10 July 1991 on legal aid, allows minors whose parents lose interest to be assisted by legal aid, regardless of their parents' resources.
- Victims of crimes and deliberate attacks on their life or integrity (attempted murder, acts of barbarism, rape, also committed in a terrorism context (art. 9-2 of the law on legal aid);
- Exceptionally, persons whose "situation appears particularly worthy of interest regarding the object of the dispute or the expected charges of the trial" (art. 6 law on legal aid): these persons must then demonstrate that their resources, although above the thresholds for legal aid, are insufficient to ensure their defence.

Legislation that is almost entirely in conformity with the directive

The de facto/indirect implementation of this directive by the pre-existing internal legislation can be considered largely satisfactory. Indeed, the 1991 Law on Legal Aid, in combination with the 1991 Decree and the provisions of the Code of Criminal Procedure, sets out almost all the provisions of the Directive.

Only a few points of the Directive seem to have no correspondence with national law:

-No specific provision in national law concerning the fact that the Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police or another law enforcement authority, or before carrying out the investigative or evidence-gathering measures referred to in Article 2(1)(c).
-No specific provisions concerning the quality of legal aid services and training (**Article 7 Directive**), except for the possibility of replacing the assigned lawyer when circumstances so justify. As provided for in article 103 of the decree n°91-1266 of 19 December 1991, *If the lawyer has been designated by legal aid, it is possible to change the lawyer if serious reasons are given (...).*
Although no specific training is provided for in the law or decree, the initial training of the National School of Magistrates (*Ecole nationale de la magistrature*) provides some (few) items concerning legal aid.

There is no training on legal aid during the public prosecutor's office training.
For the criminal court, legal aid is mentioned throughout the training sessions (on the referral to the criminal court, on the deliberation).
For the function of the Enforcement Judge the right to legal aid is briefly addressed during the introductory conference (see above Sect. 6.1).

In any case, no provision in the domestic legal aid legislation contrasts with the Directive.

As an author explains[20], the French approach to the question of redaction of criminal provisions issued from union law is characterised by the intention to make as few changes as possible to criminal law and criminal procedure. As a result, if the entire European requirements are already ensured in national law, no measures will be adopted. This is the case of the directive on legal aid.
Beyond what has been formally affirmed by the legislator, who has retained the internal normative in conformity to the point of not requiring any transposition, the national legislation appears to be effective in conformity or even more guaranteed. The directive is only addressed to suspected or prosecuted persons, whereas French law has a more general scope of application. Under French law, this right is granted to any party before a jurisdiction at any stage of the proceedings. For this reason, there are no specific articles granting legal aid to the person deprived of liberty or the person placed under a European warrant. As long as the person concerned has a right to be assisted by a lawyer and is eligible for legal aid, legal aid is granted.
Differentiation based on the person's role in the trial (suspect, accused, assisted witness) or on his/her situation (vulnerable person, minor) is only related to the relaxing of the criteria to be taken into account to assess his/her eligibility for legal aid.

10.2 Case Law

No case law.

[20] Eliette Rubi-Cavagna, « La transposition des directives de l'Union européenne en droit pénal français », *Archives de politique criminelle*, 2019/1 (n° 41), p. 147-171.

11 Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial

11.1 Legislation

The Directive should be transposed for the 1st April 2018 but was not yet expressly transposed in French law in 2021 and, at the moment, there is no project to transpose the text.

Of course, several points of the Directive were effectively provided for by the French law.

First of all, **the subject matter and the scope** as expressed by Chapter I of the Directive do exist in French Law.
Regarding the subject matter, ***the presumption of innocence*** is proclaimed at a constitutional level and expressly provided for in the first article of the code of criminal procedure. According to Article 9 of the Declaration of Human and Civic Rights Of 26 August 1789 (which has a constitutional status): "*As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law*". In the code of criminal procedure, the preliminary article, introduced by a law of 15 June 2000, provides for that "*III. Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute*".
The right to be present at the criminal trial is also guaranteed in national law. Every person prosecuted has the right to participate in the trial and has the right to be not present. About the right to participate in his/her trial, there is no express provision in the code of criminal procedure and this right has been indirectly recognised across case law of the Court of cassation considered a breach of this right proclaimed by the European Court of Human rights sentences denying the right to be present to persons detained. Nevertheless, the code of criminal procedure provides for the possibility to use a videoconference to judge the person (but only if he/she agrees and anyway not beyond the Assize Court, see art. 706-71 c. proc. pén.). About the possibility to be not present, the code of criminal procedure admitted it together with the possibility to judge a person, not present (art. 379-2 and 487 c. proc. pén.).

The scope is the same at the European and national level. More, the French law applies the principle to "*every person suspected or prosecuted (...) as long as his guilt has not been established*", that is to all persons (natural and legal persons) and, not only as at the European level, just for natural persons.

Secondly, the content of such principles is globally complied by the French law but some relevant differences must be stressed.

Presumption of innocence

As required by article 3 of the Directive, the preliminary Article of the code of criminal procedure provides that "*Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established*". Even if it is not required by the Directive, it is important to stress that the French text doesn't mention that the presumption of innocence exists until a definitive judicial decision on guilt.

The prohibition of public references to guilt before any decision on guilt (art. 4 of the Directive) is guaranteed in French law by the secret character of the preliminary step of the criminal procedure. *"Any person contributing to such proceedings*" (magistrates, police) "*is subjected to professional secrecy*" (art. 11 c. proc. pén.) and is therefore not authorised to express an opinion on the guilt of the suspect or the accused person. Moreover, even if, as authorised by article 4 §3 of the Directive, "*to prevent the dissemination of incomplete or inaccurate information, or to quell a disturbance to the public peace, the district prosecutor may, on his motion or at the request of the investigating court or parties, publicise objective matters related to the procedure that convey no judgement as to whether or the charges brought against the defendants are well-founded*" (art. 11 c. proc. pén.), he is never authorised to present the person as guilty.
The necessity to provide for appropriate measures in case of breach of this obligation (art. 4 of the Directive) does also know an expression in French law. Art. 9-1 of the Civil Code provides for that: "*Everyone is entitled to the presumption of innocence. When, before any sentence is pronounced, a person is publicly portrayed to be guilty of acts that are subject to an inquest or preliminary judicial investigation, the judge, even by summary proceedings and without prejudice to the right to recover indemnification for an injury suffered, may prescribe any measures, such as the insertion of a correction or the circulation of a communiqué, to put an end to the infringement of the presumption of innocence, at the*

expense of the natural or juridical person responsible for that infringement". Moreover, it is strictly forbidden to realize surveys of opinion to know if the person is guilty or not guilty and/or about the penalty that could be pronounced. Such an act is an offence punished with a fine of 15 000 euros (art. 35ter of the Act about the press of 1881).

The prohibition of physical presentation of suspects and accused persons as being guilty before being condemned except in case of necessity for security reasons (art. 5 of the Directive) is also taken into consideration in French law.
Regarding coercive measures in general, the preliminary Article provides for that: "*The coercive measures to which such a person may be subjected are taken by or under the effective control of the judicial authority. They should be strictly limited to the needs of the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity*".
Regarding the use of measures of physical restraint that Directive 2016/343 strictly limits, France legislation provides that "*No one may be forced to wear handcuffs or shackles unless he is considered to be a danger to others or himself, or liable to attempt to escape. In either case, all necessary measures compatible with the security requirements must be taken to prevent a person who is handcuffed or shackled from being photographed or filmed*" (art. 803 French Code of criminal procedure). Moreover Art. 35ter of the Act about the press of 1881 punishes with a fine of up to 15 000 euros the diffusion without the consent of the person of the image of a suspected or accused person with handcuffs or shackles or which is under pre-trial detention.
Regarding more specifically the use of glass boxes, there is no specific legal provision but the important practice of such boxes and some case law (see for example Crim., 28 November 2018, n°18-82010; Crim., 10 April 2019, n°18-83053). It is important to stress that this point is the most discussed point in France and the main critique regarding the absence of transposition of the directive in France. The union of the French lawyers (Syndicat des avocats de France, SAF) has indeed denounced the 3 May 2012 French position in a letter addressed to the European Commission that answered the 12 June 2018 indicating that she will analyse the state of the French Law before to decide an infringement procedure before the Court of Justice of the European Union (no news from this date). The union also tried several procedures in France regarding the infringement of transposition of the directive without success.
The *Conseil d'Etat*, the 16 October 2020 (CE, 6ème chambre, 16 October 2020, 423954), considers that the application of the SAF is not admitted. Firstly, the existing provisions in

French law are sufficient: the preliminary Article provides for a principle of strict necessity for coercive measures that can be accepted only under the control of a judge; art. 309 and 318 of the code of criminal procedure regarding the hearing before the Assize court provide for that "*the president maintains order in court and conducts the proceedings*" and that "*the accused appears free and only in the company of guards to prevent his escape*"; art. 304 of the code record the principle of the presumption of innocence in the jurors 'oath. Consequently, the president of the court, in the application of his power to maintain order, must guarantee the balance between the security of the participants in the trial and the necessity to impeach the accused person to escape or to communicate with a third party on one hand, and the respect of the defence rights on the other hand. Moreover, the Directive doesn't prohibit the use of glass boxes and authorises such use in case of necessity. Secondly, the accused person can contest a breach of the presumption of innocence together with the remedy against the decision of guilt.
The *Conseil d'Etat* recently reiterated its position and validated the installation of glass boxes (CE 6ème - 5ème joint chambers, 21 June 2021 - n° 418694)[21]. The high administrative court rejects the appeal against the refusal to abrogate the decree of 18 August 2016, which specifies the terms and conditions for installing glass boxes in hearing rooms.

The principle of burden of proof on the prosecution (art. 6 of the Directive) is provided for in the French legislation. It is a consequence of the presumption of innocence that the prosecution must realize the investigation and the defence could remain passive during the criminal proceeding, but it must be stressed that sometimes the prosecution has to seek not only inculpatory evidence but also exculpatory evidence. In France, since 2016, it is not only the investigative judge but also the prosecutor that must investigate "*à charge et à décharge*" (art. 81 of the code of criminal procedure for the judge d'instruction and art. 39-3 for the procureur de la République).
Even if it is not in the culture of the French criminal procedure, the suspect/accused person can take part in the search for evidence and request, during the investigative stage, to instruct an expert (art. 156 of the code of criminal procedure).
The benefit of the doubt for the suspect or accused person is expressly provided for in the jurors 'oath. According to article 304 of the code of criminal procedure, "*The president gives the following address to the jurors who are standing bare-headed: 'You swear and promise*

[21] For an analysis of French case law, voir Raphaële Parizot, « Box vitrés : feu de tout bois au nom de la présomption d'innocence », note about CE, 16 October 2020, n°423954 et Crim., 18 November 2020, n°20-84893, *Revue de science criminelle et de droit pénal comparé* 2021, p. 120.

to examine with the most scrupulous attention the charges which will be brought against X ....; to betray neither the interests of the accused nor those of society which accuses him, nor those of the victim; to refrain from communicating with anyone until after your finding; to heed neither hatred nor malice, nor fear nor affection; to remember that the accused is presumed innocent and that he has the benefit of the doubt; to decide according to the charges and defence arguments following your conscience and your innermost conviction, with the impartiality and resolution that befit a free man of integrity, and to preserve the secrecy of deliberations, even after the end of your service'.
Each juror being called individually by the president answers, raising his hand: 'I swear it' ".

The right to remain silent (art. 7 §1 of the Directive) is provided for at a lot of key stages of the procedure. Indeed, during all the criminal procedure, the person has the choice « *to make a statement, to be interrogated or to remain silent*" (art. 61-1 c. proc. pén. for free interrogation and 63-1 for police custody; art. 116 for the investigating judge; art. 328 for the Assize Court). The Criminal Chamber of the Cour de cassation has considered that the right to remain silent must be notified even if the legislator does not provide for it[22] and, at the same time, the Constitutional Council has repeatedly stressed the importance of this right and has censured the provisions of the Code of Criminal Procedure that do not provide for it[23].

The right not to incriminate (art. 7 §2 and 3 of the Directive) is not provided for in the code (the only reference to this right can be found in the preliminary article but under a specific redaction: "*no decision of guilt can be pronounced against a person on the only basis of declarations made without the assistance of a lawyer*"), but case law recognises a principle of fairness applied to the search of evidence. The provocation to commit an offence is forbidden because contrary to the right not to incriminate oneself. In the respect of article 7 §3, according to important and relevant case law, the French police can elaborate a stratagem

[22] Crim., 14 May 2019, n°19-81408 ; Crim., 8 July 2020, n°19-85954 ; Crim., 24 February 2021, n°20-86537 ; Crim., 11 May 2021, n°21-81277 ; Crim., 26 May 2021, n°20-86382.
[23] Cons. const., 4 March 2021, n°2020-886 QPC (art. 396 CPP) ; Cons. const., 9 April 2021, n°2021-895/901/902/903 QPC (art. 199 CPP) ; Cons. Const., 30 September 2021, n°2021-935 QPC (art. 145 CPP) ; Cons. Const., 30 September 2021, n°2021-934 QPC (art. 394 CPP).

to gather evidence if the stratagem is not unfair (*Assemblée plénière de la Cour de cassation*, 9 December 2019, n°18-86767).

Regarding the consequences of the behaviour of the suspect or accused person, French law doesn't provide specific articles. There is no specific provision to taking into account, when sentencing, the cooperative behaviour of suspects and accused persons but according to the principle of personalization of the penalty, the judge can of course take into account the behaviour of the offender. However, except for the provision of the preliminary article ("*no decision of guilt can be pronounced against a person on the only basis of declarations made without the assistance of a lawyer*"), there is nothing in the legislation about the impossibility of using the right to remain silent or not to incriminate oneself against the suspects or accused persons.

Finally, in the respect of article 7§6, for minor offences the French code provides for the possibility of written and not adversarial proceedings (ordonnance pénale – art. 495 and 524 c. proc. pén.; amende forfaitaire – art. 495-17 and 529 c. proc. pén.).

Right to be present at the trial

As mentioned above, ***the right to be present at the trial*** himself (art. 8 Directive) does exist in French law. The first sentence of the code of criminal procedure is that: "*Criminal procedure should be fair and adversarial*" (preliminary article). Consequently, every person prosecuted has the right to participate in the trial and has the right to be not present.
About the right to participate in his/her trial (art. 8§1), there is no express provision in the code of criminal procedure and this right has been indirectly recognised across case law of the Court of cassation that considered breach this right proclaimed by the European Court of Human rights sentences denying the right to be present to persons detained. Nevertheless, the code of criminal procedure provides for the possibility to use a videoconference to judge the person (but only if he/she agrees and anyway not beyond the Assize Court, see art. 706-71 c. proc. pén.).
According to the possibility to be not present (art. 8§2 b)), the code of criminal procedure admitted such a procedure and provides for that, in case of absence of an accused person correctly informed of his trial, the person can be represented by a lawyer. According to Art. 410 c. proc. pén.: "*The defendant lawfully cited in person must appear unless he produces*

an excuse which is acknowledged as valid by the court before which he is called. The defendant is under the same obligation where it is proved that although he was not cited in person, he was apprised of the lawful citation concerning him in the cases covered by articles 557, 558 and 560.
Where these conditions are fulfilled, the defaulting and non-excused defendant is tried by adversarial hearing subject to notification, unless the provisions of article 411 have been applied.
If an advocate is present to conduct the defendant's defence, he must be heard if he so requests, even outside the case provided for by article 411"[24].
Regarding the enforcement of a decision taken in the absence of the person, the code of criminal procedure provides that "*The judgment made by default is served by a bailiff, following the provisions of articles 550 onwards*" (Art. 488 c. proc. pén);
"*Where an immediate prison sentence is imposed, the court issues an arrest warrant against the accused, unless one has already been issued*" (Art. 379-3 c. proc. pén.).
Finally, as authorised by the Directive (art. 8§5), a distinct hypothesis of the exclusion of the suspect or the accused person where necessary is provided for by the code of criminal procedure. According to article 404, "*Where in the course of the hearing a person present disturbs order in any manner, the presiding judge orders his expulsion from the courtroom.*
If in the execution of this decision he resists the order or causes a commotion, he is immediately placed under a detention warrant, tried and punished with imprisonment of between two months and two years, without prejudice to any penalties provided by the Criminal Code for perpetrators of contempt or violence committed against judges or prosecutors.
He is then forced to leave the courtroom by the police upon the order given by the presiding judge".
According to article 405 "*If order at the hearing is disturbed by the defendant himself, the provisions of article 404 apply to him.*
The defendant, even when at liberty, who is expelled from the courtroom is held at the court's disposal under guard by the law enforcement authorities until the end of the hearing. He is then brought back to the hearing where judgment is passed in his presence".

[24] This article applies to *délits* but the same provision does exist for *contraventions* (art. 544) and for *crimes* (NB: French criminal law knows three types of offences: *crimes*, *délits* and *contraventions*).

In case of absence, ***the right to a new trial*** (art. 9 of the Directive) is precisely provided for in article 379-4 of the code of criminal procedure. Indeed, the person can be judged again beyond the same judge (it is not an appeal). According to article 489 c. proc. pén.: "*The judgment by default is deemed non-existent in all its provisions if the defendant applies to set aside its enforcement. He may, however, limit this application to the civil provisions of the judgment*". According to article 379-4 c. proc. pén.: "*If the accused convicted in the circumstances covered by article 379-3 surrenders to custody or if he is arrested before the limitation-period for the sentence has expired, the decision of the assize court is rendered void in every respect, and a new examination of the case is carried out following the provisions of articles 269 to 379-1. The arrest warrant issued against the accused following article 379-3 or granted before the decision imposing the conviction acts as a committal order and the accused remains in custody until his appearance before the assize court. This must take place within the time limit provided for by article 181, as calculated from his placement in detention, failing which he is immediately released.*
Nevertheless, in a time limit of one month from the date of his arrest or of his surrendering to custody, the accused convicted can accept the decision of the assize court and renounce, in the presence of his lawyer, to a new examination of his case (...)".

Remedies (art. 10 Directive)

This point is another source of a critic of French law because, even if there are some possibilities of remedies (see above), there is no specific remedy.
About the hypothesis of the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself (art. 10§2), even if there is no specific provision in French law, case law develops the idea, as required by the directive, that if the breach to fundamental rights as defence right lead to cancel the evidence. Indeed, case law recognises a principle of fairness applied to the search for evidence. The provocation to commit an offence is forbidden because contrary to the right not to incriminate oneself. In the respect of article 7§3, according to an important and relevant case law[25], the French police can elaborate a stratagem to gather evidence if the stratagem is not unfair. In this case, after receiving the threat of a 'sex tape' in which he would appear, a person complained about an attempt of extortion. To discover the identity of the authors, the public prosecutor authorised a judicial police officer to negotiate by telephone with the suspects, pretending to be the representative of the supposed victim. The question

[25] Assemblée plénière de la Cour de cassation, 9 December 2019, n°18-86767.

posed to the plenary session of the Court of Cassation was whether and under what conditions public authorities may use a stratagem to prove the evidence of an offence. According to the Court, "*The stratagem employed by a public official to establish an offence or identify its perpetrators does not in itself constitute an infringement of the principle of fairness of evidence. The only thing that is prohibited is a stratagem which, by circumventing or abusing a procedural rule, has the object or effect of vitiating the search for evidence by infringing one of the essential rights or fundamental guarantees of the person suspected or prosecuted*". With this ruling, the Court of Cassation appears to be relatively permissive with police stratagems. Any ploy used by the public authorities to gather evidence of an offence is not in itself an unfair procedure; it only becomes so if a procedural rule is circumvented, thereby infringing the rights of the accused (the rights of the defence).

11.2 Case law

Since 2018, there are three decisions of the Criminal Chamber of the Supreme Court that mention the Directive.
The first one (Crim., 11 December 2018, n° 18-85460) was focused on the obligation during the preliminary step of the procedure to be careful in the way they present the person: « If the investigating judge, when deciding on a request for release, the extension of pre-trial detention or the continued detention of an accused person, cannot present the detained person as being guilty of the acts of which he or she is accused, it is up to them to give concrete reasons for the need for detention and the inadequacy of other security measures, to refer to the evidence, proof and consistent facts found in the proceedings against the person concerned, without infringing the principle of the presumption of innocence, as reaffirmed, inter alia, by the Preliminary Article of the Code of Criminal Procedure and by European Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 ».

In the two other decisions (Crim., 28 November 2018, n°18-82010 ; Crim., 10 April 2019, n°18-83053), the use of glass boxes was contested on the basis on the Directive but the Criminal Chamber of the *Cour de Cassation*, without referring to the directive, considers there is no problem: "The Court considers that "the questions raised are not serious, since the provisions of article 318 of the Code of Criminal Procedure do not prevent the application of the provisions of article 309 of the same Code, according to which it is for the President of the Assize Court, within the framework of his police powers, to ask questions on his own

initiative or at the request of the public prosecutor, a party or his lawyer, and under the supervision of the Court of Cassation, to ensure, on a case-by-case basis, a balance between, on the one hand, the safety of the various participants in the trial and, on the other hand, respect for the rights of the defence; the practical arrangements for the appearance of the accused before the court must allow the accused, in a dignified and appropriate space, or outside the court, to participate effectively in the proceedings and to talk confidentially with his lawyers".

The *Conseil d'Etat* (Supreme Court of the administrative order) has the same position (CE, 16 October 2020, 423954) as explained above.

12 Concluding remarks

After a complete analysis of the transposition of each directive, we can conclude that, overall, French law plays the game of transposition, even if not everything is not perfect. First of all, a distinction must be made between transposed directives (Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings; Directive 2012/13/EU Right to information in criminal proceedings; Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed and Directive (EU) 2016/800: Procedural safeguards for juvenile defendants) and those that have not been transposed (Directive 2016/1919/EU: Legal aid and Directive 2016/343/EU: Presumption of innocence and of the right to be present at the trial).

- Regarding the directives that **have been transposed**, a distinction must first be made between those that have been expressly transposed (Directives 2010/64/EU and 2012/13/EU) and those that have been less explicitly transposed because they are not indicated as such in the title of the law or the heading (Directive 2013/48/EU and 2016/1919). From a legislative point of view, it would be preferable the use of explicit transposition, which contributes to simplify the already complex process of assessing the conformity of domestic law with the directives. Explicit transposition can constitute a factor of clarity and intelligibility.

  Anyway, the analysis carried out shows that, in general, the transposition provisions comply with the directives and meet the expectations of European law. A careful evaluation of the domestic law in relation to the different directives also allows us to consider that certain points, often details, are missing in the internal legislation. To provide just some examples, as regards the Directive 2010/64/EU (Sect. 6.1) the possibility of a waiver of the right to translation of essential documents (§8) has not been transposed in French law. As far as the Directive 2012/13/EU, Article 7, which requires ensuring access at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, has not been transposed (Sect. 7.1). Furthermore, there is no specific provision, except for the judicial investigation, about the right to be informed in case of changes in the information given, as provided for in the directive (Sect. 7.1). Concerning the Directive 2013/48/EU, the impossibility of judicial review in case of temporary derogation from the assistance of a lawyer is contrary to provisions of article 8§2 of the Directive itself (Sect. 8.1).
  However, it should be noted that often these points are also not very clearly regulated by the directive either.

An overall assessment of domestic law in relation to the directives also leads us to reflect on deeper issues to be improved in the spirit of the directives, which are common and transversal to several domains. The most important question in this perspective is the question of remedies.

It is indeed important to stress that French law almost does not provide for specific remedies in the event of a breach of a right under the Directive, but only general remedies (classic recourses). Among the few cases where the applicant has a specific remedy in the event of a breach of his rights, there is the possibility, under article 23 of the law n°91-647 of 10 July 1991, that an appeal against the decisions of the legal aid office may be made by the person concerned when the benefit of legal aid has been refused, has been granted only partially or has been withdrawn (Articles 56 to 60 of the decree provide detailed rules for appeals against the decisions of the offices). Another case of specific remedy must be mentioned: it is the specific civil protection of the presumption of innocence provided for by article 9-1 of the civil code, "*Everyone is entitled to the presumption of innocence. When, before any sentence is pronounced, a person is publicly portrayed to be guilty of acts that are subject to an inquest or preliminary judicial investigation, the judge, even by summary proceedings and without prejudice to the right to recover indemnification for the injury suffered, may prescribe any measures, such as the insertion of a correction or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expense of the natural or juridical person responsible for that infringement*". But the remedy is rarely used[26].

Otherwise, there is no specific remedy but only general remedies, such as the remedy provided for by article 802 of the code of criminal procedure: "*In the event of a violation of the forms prescribed by law on pain of nullity or failure to observe essential formalities, any court, including the Court of Cassation, which is seised of an application for annulment or which notes such an irregularity of its own motion may pronounce the nullity only when the effect of the latter has been to harm the interests of the party concerned*". It is true that the Cour de cassation has developed an important case law on the basis of this provision. For example, regarding the right to remain silent, the Court considered that the lack of notification of such right consents to "*the person concerned, in accordance with Article 802 of the Code of Criminal Procedure, from claiming in the course of the proceedings, in the event of the use of statements irregularly collected before the liberty and custody judge, that his or her interests in the administration of*

[26] Cf the report above mentioned about « La présomption d'innocence : un défi pour l'Etat de droit », 2021, p. 61 and s.

evidence have been prejudiced by the courts ordering a committal for trial or a conviction, in which case the judges must assess the fairness of the proceedings in their entirety"[27]. Does the absence of specific remedies in the legislation risk make national law non-compliant with European expectations?
The question arises even more strongly because of the lack of possible remedies during the investigation phase. During the investigation phase, not only there are no specific remedies in case of violation of the rights contained in the directives, but no remedies are possible at all. Indeed, if the person is suspected in an inquiry, he/she is not considered a party. This is because the person didn't have and doesn't yet have at his/her disposal remedies to contest this time of the procedure. An appeal may only be submitted if he/she becomes accused (and thus is a party to the proceedings). For the breaches of rights during the judicial investigation (the person is then a party), the remedy is beyond the investigating chamber. For the breaches of rights during the inquiry, the remedy is beyond the investigating chamber (in case of judicial investigation) or beyond the judge. It is important to stress that there is no specific remedy if the person remains suspect without becoming accused. The absence of such a remedy may have important consequences, especially since most of the rights protected by those directives find their natural place in the investigation phase and during the first phase of the proceedings.

- Concerning the directives that **have not been effectively transposed**, they are not perceived as problematic in France, since the French executive considers that these directives have already been transposed by the existing law. In general, the analysis of the relevant internal legislation shows a substantial conformity with the directives. The pre-existing legislation on legal aid in France seems to have an almost larger scope than the Directive 2016/1919/EU, which fully justifies the lack of transposition. Concerning the presumption of innocence, although domestic law appears to be globally in line with Directive 2016/343, some compliance issues arise. On the one hand, the absence of a specific remedy for the violation of the presumption of innocence is a cause for criticism. On the other hand, the regime for the use of glass boxes and the question of compatibility with the presumption of innocence is also a source of heated discussion (Sect. 11.1). Precisely why we do not understand why there is no law on the subject, given the agitation of the jurisprudence on these points and given the interest shown by the executive[28].

[27] Crim., 11 May 2021, n°21-81277.
[28] Cf the report submitted in October 2021 to the Minister of Justice by the working group on the presumption

From a case law perspective, there are very few decisions in this matter, as can be seen from the small number of judgments referring to the subject of the directives that we have included in the analysis. This can only be explained by the fact that most professionals are still unfamiliar with European law. This is partly because in the few cases where the Cour de cassation has had to review the conformity of French law with EU law, French law appears to be a satisfactory reflection of EU law[29]. However, this is mainly because French practitioners are still relatively unfamiliar with EU law. It is therefore important to raise awareness in France of the importance of being familiar with EU criminal law.
This is even more surprising given that the National School of Magistrates includes elements on the rights provided for in the directives. Indeed, as we have seen in the various directives relating to training (Sect. 6.1; 7.1; 9.1; 10.1), initial training focuses on procedural rights, to a different extent depending on the right and on the procedural phase concerned. Moreover, in addition to the continuing education system, which already offers training in our field, French magistrates can access specific training offered by the ERA (Academy of European Law). Anyway, it could be noticed that the rare judgments in which the Court of Cassation was seized of a conventionality control, it is considered the French provisions to be in compliance with the directive (Sect. 6.2; 7.1; 8.2, 11.2).

of innocence: « La présomption d'innocence: un défi pour l'Etat de droit ».

[29] See Crim., 4 October 2016, n°16-82309; Crim., 31 January 2017, n°16-84623: the *Cour de cassation* denies seeking a preliminary ruling to the Court of Justice of the European Union considering the Directive of 2012 has been correctly transposed and that there is no breach to the right to defence about the notification of the materials facts and about the access of the entire file. Cf. also Crim., 12 September 2017, n°17-83874: the Court of Cassation notes that the provisions of Directives 2010/64/EU of the European Parliament and of the Council of 20 October 2010 and 2013/48/EU of 22 October 2013 have been transposed into national law by Laws 2013-711 of 5 August 2013, 2014-535 of 27 May 2014 and 2016-731 of 3 June 2016.