FAIR TRIALS INTERNATIONAL

A Guide to

The Court of Justice of the EU

October 2012

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About Fair Trials International

Fair Trials International ('FTI') is a UK-based non-governmental organisation that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

We pursue our mission by providing assistance, through our expert casework practice, to people arrested outside their own country. We also addresses the root causes of injustice through broader research and campaigning and build local legal capacity through targeted training, mentoring and network activities. In all our work, we collaborate with our Legal Expert Advisory Panel, a group of over 80 criminal defence practitioners from 22 EU states.

Although we usually work on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, thanks to the direct assistance we provide to hundreds of people each year, we are uniquely placed to provide evidence on how policy initiatives affect suspects and defendants throughout the EU.

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The Court of Justice of the EU

Table of contents

About this Guide

This Guide provides a basic introduction to the Court of Justice of the European Union (CJEU). It explains why you, as a criminal defence lawyer, should start to see it as a regular forum for your work. It explains the preliminary ruling procedure, which will be most relevant to criminal lawyers. It also provides a short introduction to the Charter of Fundamental Rights of the EU.

It is not possible to predict exactly how and when the need to have a case referred to the CJEU may arise. However, it is important to understand its value: by convincing your court to seek the CJEU's guidance on the proper interpretation of EU law, you may be able to help the court in your country avoid falling into error.

This Guide should therefore be read alongside our other materials, notably on the European Supervision Order. If national laws in your country do not correctly reflect EU law requirements and this is detrimental to your client, getting proceedings referred to the CJEU may be one way of achieving a more helpful result.

Definitions

TFEU means the Treaty on the Functioning of the European Union, in force since 1 December 2009.

TEU means the Treaty on European Union, in its current form following the entry into force of the Treaty on the Functioning of the European Union.

The old TEU means the Treaty on European Union, as in force from 1999 to 2009, which contained Title VI on Police and Judicial Cooperation in Criminal Matters (see pp. 5-36 in this consolidated version).

TEC means the Treaty Establishing the European Community (see pp. 37 onwards in this consolidated version), in force until the entry into force of the TFEU.

EU law means any measure of law adopted under any of the Treaties, be it the TEC, the old TEU or the TFEU.

The Statute means Protocol (No 3) on the Statute of the Court of Justice of the European Union, one of the protocols to the TFEU.

The CJEU means the Court of Justice of the European Union and will be generally used to refer to body as a whole. However, where the need arises to distinguish between **the Court** itself and **the Advocate General**, those terms will be used.

Referring court refers to the judicial body making a reference for a preliminary ruling, whether that happens to be an individual judge in first-instance proceedings or a higher court.

The main proceedings means the dispute at the national level in which a question of interpretation of EU law has arisen, prompting the referring court to send a reference for a preliminary ruling to the CJEU.

Introduction

EU law and criminal process

The creation of an area in which freedom of movement is guaranteed increased the need for effective cross-border cooperation in criminal matters. The Member States have, since 1999, replaced bilateral arrangements between individual states by standardised systems ensuring swift cooperation between judicial and other authorities.

Besides the flagship measure on extradition, other instruments governing such things as pre-trial supervision measures, custodial sentences, probation decisions or cross-border evidence gathering now play a significant part in determining what happens to a defendant over the course of the criminal / penal process.

Since 2009, the Member States have also started adopting minimum standards regulating not the way in which they cooperate, but the very content of their internal criminal justice procedures. These are a pioneering initiative: a set of binding, supra-national procedural standards.

The result is that more and more aspects of national criminal law are governed by EU law, and therefore, there is increased scope for criminal defence lawyers to look to the CJEU as a way of helping their clients.

The role of Court of Justice of the EU

All EU laws on criminal matters can be interpreted by the Court of Justice of the European Union (CJEU). The Court's rulings can therefore be the difference between someone being extradited or not, or between spending two years on bail in another country and being allowed to return home pending trial. Its rulings will affect not just the case in which they arise, but many others after it, in all 27 Member States of the EU.

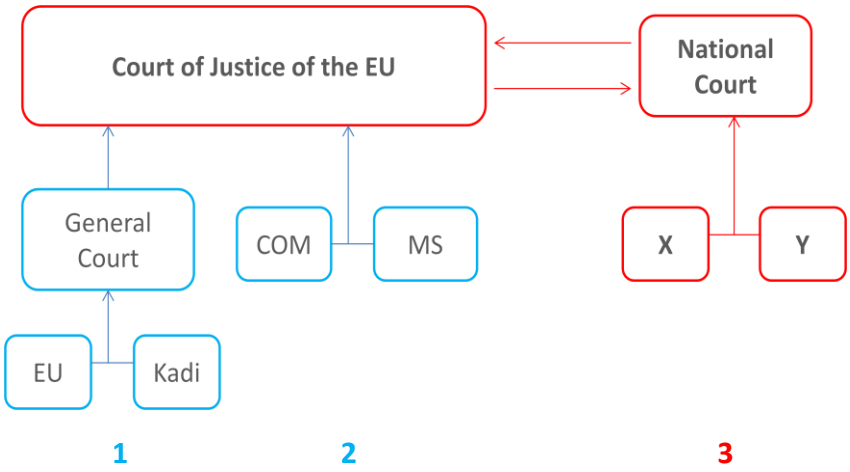
Despite this, references to the CJEU on criminal law measures are relatively few, in relation to free movement and immigration. This is perhaps partly because defence lawyers do not see the CJEU as part their regular toolkit, and judges long trained on national criminal law are not predisposed to obtaining guidance from the CJEU.

Accordingly, the objective of this Guide is to encourage you to use the CJEU by convincing national courts that they should make a reference for a preliminary ruling. The Guide first reviews exactly what a preliminary ruling is, and then places it in the context of pre- and post-Lisbon EU laws on criminal matters. It then includes a section on the Charter and how to rely on this when disputing the interpretation of EU criminal laws or the national laws implementing these. Finally, it provides a sample scenario, with a model answer.

Overview of the CJEU

Structure / main functions

The CJEU comprises the Court of Justice, the General Court and the Civil Service Tribunal. Our focus here is the Court of Justice. The vast majority of its caseload is made up by appeals from the General Court, infringement actions and references for preliminary rulings.



Appeals (1)

Individuals directly affected by 'Union acts' can challenge these before the General Court of the EU, the EU's first-instance court, whose decisions can be appealed on a point of law to the Court of Justice. For instance, when the Council and Commission imposed sanctions on Mr Kadi further to a UN Security Council decision on freezing of suspected terrorists' assets, he challenged the decision at the Court of First Instance (now the General Court), and appealed the decision to the Court of Justice.

Actions for failure to fulfil obligations (2)

If the Commission considers that a Member State (MS) has failed to fulfil EU Treaty obligations, it can initiate proceedings ultimately resulting in an infringement action before the CJEU. The CJEU can issue declarations and fines at its discretion. For instance, in an important recent infringement action, the CJEU declared that, by reserving the profession of notary to their own nationals, several Member States had infringed Treaty provisions guaranteeing the freedom of establishment.

References for preliminary rulings (3)

The reference for a preliminary ruling is the procedure criminal lawyers are most likely to use. It starts in the national court (the dispute between X and Y in the above diagram). If the outcome of that dispute depends on the interpretation of EU law, the national court can stay proceedings and formulate a question to the CJEU. The CJEU gives its 'ruling' on the

interpretation of EU law, which is 'preliminary' to the national court's decision on the merits.

For all matters relating to preliminary rulings, a useful resource is the CJEU's own Guide to the case-law of the [CJEU] on Article [267 TFEU], which contains all major relevant judgments and orders on the nature, function and operation of the preliminary ruling procedure. The essential point at this introductory stage is the fact that it is a non-contentious proceeding designed to enable the CJEU to guide national courts on how to interpret EU law, so that they can apply it correctly. Here is an example from a 'traditional' area of EU law, free movement of workers.

Example

- Case C-424/09 *Toki* [2011] ECR I-0000 Ms Toki, a Greek national, obtained a degree in environmental engineering in the UK. She then took a research job in the field, albeit not practising as an environmental engineer, and did not register with the voluntary professional engineers' association. She subsequently applied for registration as an environmental engineer in Greece, on the basis of her diploma and professional experience in the UK. The application was refused, as Greek law allowed registration only of those who were members of the voluntary professional association. A directive prevents Member States from refusing to authorise registration where the person holds a degree from a Member State where the profession is unregulated and has completed certain work experience requirements. The Greek Court seised of Ms Toki's challenge to the refusal of her registration asked the CJEU whether the directive covered only the actual profession or the whether it also covered work such as Ms Toki's. The CJEU responded that the directive required the Member State to look, in substance, at the work carried out by the person, to determine whether it met the necessary requirements.

Note that, in the above example, the case concerned a specific provision of a directive, but it was ultimately about the principle of free movement of workers, one of the fundamental principles of the Treaties. As we will see later, fundamental rights also form part of the fundamental principles of the Treaties, and when one asks the CJEU about criminal law measures, one is likely also to be asking about fundamental rights.

Preliminary rulings, step by step

A new set of Rules of Procedure of the CJEU enters into force on 1 November 2012.
All references below are to those new rules.

Making the reference

Where does the process start?

The preliminary ruling process can only ever begin in the national court. Thus, your capacity to influence CJEU proceedings begins in the national court: you can argue for the reference to be made in the first place (if this is desirable), and ensure the court's order for reference is as useful as possible.

Which courts can make a reference?

There are special provisions that apply in the area of criminal law, applicable until December 2014, regarding the possibility of making references on the interpretation and validity of framework decisions: in short, references on framework decisions can only be sent by courts in certain countries. See the chapter in this Guide on the CJEU in the criminal sphere (in the section headed (pre-Lisbon).

An important point to note at this stage is that an investigating magistrate (*juge d'instruction*) is a competent 'court or tribunal' capable of asking questions of the CJEU; conversely, a public prosecutor is not (see Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609; Order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005).

When should/must a court make a reference?

Courts should consider making a reference whenever a case turns on an issue of EU law, unless it is *acte clair*, that is, unless the answer is patently clear from the existing body of case-law so that the CJEU's guidance is not necessary.

Again, there are special provisions in the area of criminal law, applicable until December 2014, regarding the possibility of making references on the interpretation and validity of framework decisions (see the chapter in this Guide on the CJEU in the criminal sphere).

The general rule is that a court has discretion as to whether or not to refer a question, unless it is a court against whose decisions there is no judicial remedy in the instant case, in which case it is obliged to refer the question. This does not mean the 'final court of appeal' in a country, but the court whose decision in the instant case be judicially challenged.

What should go into the reference?

As a lawyer in the main proceedings, you can help ensure the CJEU is provided with a satisfactory reference by suggesting what the referring court's order should include. It is often the practice of courts to invite counsel to agree content of a reference, which is then adopted and sent to the CJEU. Article 94 of the Rules of Procedure states that a reference for a preliminary ruling should contain the following:

- Summary of the subject matter of the dispute and the referring court's factual findings. This is important in order to enable the CJEU to understand how the issue of EU law arises in the case. Without this background it will be difficult for the CJEU to provide a useful answer.
- The tenor of the provisions of national law applicable in the case. Where appropriate this should include references to case-law explaining how these provisions are interpreted.
- The reasons which prompted the national court to inquire about the interpretation of the provisions of EU law, and the relationship between those provisions and the applicable national legislation. Essentially, explain how the question being referred arises in the case.

In addition to the points covered in Article 94 of the Rules of Procedure, it is clear that the reference needs to include:

- The questions themselves, which should ask directly about the interpretation of provisions of EU law. It is possible to ask consequential questions (ie if the answer to the previous question is X, then...).
- If appropriate, a separate request for application of the urgent (PPU) procedure (as to which, see the Chapter in this Guide on the PPU.

How should an order for reference be drafted?

The information note recommends that the order for reference 'should be drafted simply, clearly and precisely, avoiding superfluous detail', in view of the need to translate the reference. It suggests a maximum of 10 pages.

What else is there to consider at the national stage?

One thing to bear in mind is that, once the case is referred to the CJEU, all the Member States and EU Institutions will be able to intervene. Third-party organisations like Fair Trials International are not able to intervene. You may wish to contact independent organisations with an interest in the issues at play in your case, with a view to their being joined to proceedings before the national court. This will enable them to intervene before the CJEU, which will benefit from a more rounded set of submissions when taking its decision.

Procedure before the CJEU

When does the procedure before the CJEU begin?

When the national court has made an order staying proceedings, it sends it to the Registry of the CJEU, which will then 'notify' the reference to interested parties and more generally by a note published in the Official Journal of the EU. This marks the start of the CJEU procedure, which is split into the 'written procedure' and the 'oral procedure'.

How do I communicate with the CJEU?

All communications prior to the hearing will be between you and the Registry of the Court. You should send your written observations and any other communications to the Registry, at Cour de justice de l'Union européenne, Rue du Fort Niedergrünewald, L-2925 Luxembourg, Grand-Duchy of Luxembourg.

Who takes part in the procedure before the CJEU?

Under Article 23 of the Statute, when a case is received at the Registry, it is notified to the Member States, the Commission, and the EU Institution which adopted the act whose interpretation is in question (for pre-Lisbon framework decisions, this means the Council; for post-Lisbon Defence Rights Directives, this means the Council and the European Parliament). These other parties have an absolute privilege to make observations in a case, both in writing and orally. Some Member States may intervene if they believe the CJEU's decision could have effects for them. The Commission will always intervene.

What is the language of the case?

The CJEU's working language is French and all documents will be translated into French. However, each case also has its own 'language of the case'. In preliminary ruling cases, the language of the case will be the language of the country where the reference originates. This enables the parties to the case before the national court to make all their written and oral observations in their own language.

Is there legal aid available?

Yes. Under Article 115 of the Rules of Procedure, a party to the main proceedings who cannot meet the costs of the CJEU proceedings may apply for legal aid, setting out the details of the party's financial situation which entitles them to assistance. There is no 'merits' test in this context, as there is no 'winning' or 'losing' in preliminary ruling cases. If you already have legal aid in the national proceedings, include the relevant decision, which will be persuasive.

When can I submit observations?

As from the date the case is notified by the Registry, the 'written procedure' begins. The parties to the case, the Commission and the EU Institution(s) that authored the act in question then have **two months** to submit written observations. Because of the delays inherent in posting observations across the EU, there is an additional 10 day grace period.

What do I need to know about written observations in CJEU proceedings?

The CJEU relies heavily on written pleadings, as these can be carefully translated and studied closely. The written procedure is therefore important: by the time a case comes to a hearing, the Judges and Advocate General will already have formed a view of the likely answer to the case. The CJEU's Guidance note to Counsel recommends that pleadings be 'clear, concise and complete'. They will have to be translated, so clarity is important.

You must, in principle, submit the signed original of your pleadings. However, a new system for lodging pleadings – 'e-Curia' – enables electronic copies to be deemed originals. You need to register and create an account in order to be able to use this system: see the e-Curia decision and the e-Curia conditions of use for more information.

What happens once the written part of the procedure is closed?

Each case lodged at the CJEU is allocated to a 'Jugde-Rapporteur', that is, the judge who will actually write the Court's judgment. When the written part of the procedure is closed, the Judge-Rapporteur puts together a preliminary report, which will include recommendations as to which formation of the Court to assign the case to, whether to dispense with a hearing and whether to dispense with an Opinion of the Advocate-General. The Advocate-General also gives a view on those matters and the Court then decides, at its weekly general meeting of all 27 judges, whether to proceed as proposed.

The Judge-Rapporteur can, in the time following the close of the written procedure, request the parties involved in the case to submit further information. S/he can also send specific questions to be addressed at the hearing. This again shows the extent to which cases are considered on the basis of written observations.

What Chamber will hear the case?

The Court sits in Chambers of three or five judges, and sometimes as a Grand Chamber of 13 judges. Cases are allocated to the Chambers of three or five insofar as the difficulty and importance of the case do not justify their being heard by the Grand Chamber. Several references for preliminary rulings relating to the Area of Freedom, Security and Justice (including on judicial cooperation in criminal matters) have been heard by the Grand Chamber.

Will there always be a hearing?

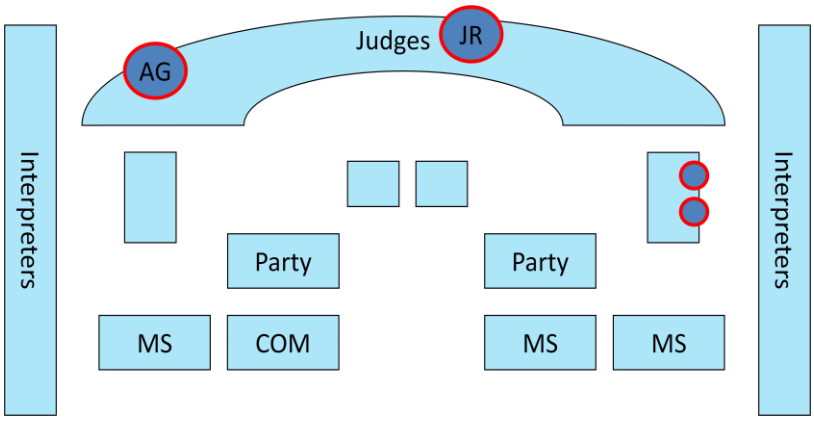
There is not an automatic right to a hearing: under Article 76(1) of the Rules of Procedure, you need to request a hearing within three weeks of being notified of the reference by the Registry. The Member States and EU Institutions involved can also request a hearing. However, even if you request a hearing, under Article 76(2) the Court can decide not to hold a hearing if it considers itself sufficiently informed.

Note that, until the new Rules of Procedure were adopted, the CJEU used to produce a 'Report for the Hearing', which summarised the order for reference and the parties' arguments. The Report for the Hearing will be abandoned from 1 November 2012.

What do I need to know about CJEU hearings?

The CJEU has produced some advice to counsel appearing before the Court, highlighting several points, to which we add our own comments:

- Several of the judges will be listening to your submissions through interpretation. Speak at a measured pace, using clear language, to facilitate interpretation.
- If questions have been asked prior to the hearing, address them: do not simply reiterate points already well rehearsed in your written pleadings.
- The hearing is the opportunity to pick up on points made by other parties in their observations, so make sure you do this.
- The Advocate General (AG) and Judge-Rapporteur (JR) will each have a *référendaire* (judicial clerk) sitting at the desk to the right below the bench (marked in blue on the diagram below). It is worth noting their reaction to your submissions, as they will actually draft the Judgment and Opinion.



What happens after the hearing?

After the hearing, the oral procedure remains open until the Advocate-General has given his/her Opinion on the case. The Opinion consists of a set of reasoned written submissions, a short summary of which is read out in court on the day of publication. The Opinion will always be translated into the language of the case.

What do I need to know about Advocates-General's Opinions?

The Advocate-General's Opinion is a non-binding advisory document recommending to the Court that it decide the case in a particular way. The Advocate-General is a Member of the Court, just like the Judges, but does not take part in deliberations. His role is to 'assist the court', in complete impartiality and independence. The Advocate-General's Opinion will generally include a more complete assessment of the law and will engage with extra-judicial academic debate on the law. It represents an opportunity for dissent in a system which does not currently allow for dissenting judgments. It also acts as a quality control mechanism, ensuring the Chamber deciding the case takes account of an authoritative, independent view before giving its decision.

What happens after the Advocate-General's Opinion?

After the Advocate-General has delivered his/her Opinion, the oral part of the procedure closes and the Chamber will start its deliberations and give its own judgment. The Judgment will not include as much reasoning as the Opinion, in part because it represents a committee judgment incorporating the views of all the judges. Note that, under Article 102 of the Rules of Procedure, it is for the referring court to decide as to the costs of preliminary ruling proceedings.

Back in the national court

What happens after the CJEU proceedings are complete?

It is important to emphasise that the CJEU's ruling only supplied an interpretation of the relevant provisions of EU law. Once that is done, it is still incumbent upon the national court to apply the ruling to the facts before it and decide the case on the merits.

In some cases, for instance involving a proportionality assessment, this may still leave some room for argument so you should remember that, even if the outcome of the CJEU proceedings is not what you had hoped for, there is still scope for you to mitigate its effects and defend your client's interests.

The urgent procedure (PPU)

The average time for consideration of a preliminary ruling, in 2011, was of about **16 months**. This can be a long time to wait for someone who is in detention. Accordingly, since 2008, the CJEU has had in place an urgent procedure for preliminary rulings, called the 'PPU' (*procédure préjudicielle d'urgence*). In 2011, the average time for consideration of these cases was just **3 months**. This quicker procedure is important for criminal lawyers.

The procedure is reserved for cases relating to the 'area of freedom security and justice', that is, EU laws relating to asylum and immigration and judicial cooperation in civil and criminal matters. There is no exhaustive set of criteria stating when it is to apply. However, Article 267 TFEU now states that if a question of EU law is raised 'in a case pending before a court or tribunal of a Member State *with regard to a person in custody*, the CJEU *shall* act with the minimum of delay' (emphasis added).

The urgent procedure is based on Article 23a of the Statute and the detailed rules are provided by Articles 107 to 114 of the Rules of Procedure (applicable from 1 November 2012). The key features are as follows:

- In principle, the PPU is applied at the request of the referring court, which must set out the matters of fact and law which establish the urgency and justify the application of this 'exceptional' procedure. You therefore need to convince the national court to make its own request for the application of the PPU procedure.
- The CJEU designates a five-judge chamber to deal with PPU cases on a rotating basis. That chamber decides whether to accede to the PPU request.
- If the PPU request is accepted, the reference is only notified to the Member State concerned (as opposed to all Member States), as well as the EU institution that adopted the legislation in question.
- The decision to deal with the reference under the urgent procedure will lay down shorter time limits for those parties to submit observations, and can specify the issues to be covered in observations and maximum lengths (saving translation time).
- The decision is also sent to other interested parties (that is, the Member States), who are informed of the likely date of the hearing so that they can make observations on that occasion (ie not in writing, again, to save translation time).
- The Chamber must 'hear' the Advocate-General. The current practice is for the Advocate-General to issue a 'view' which is published and notified to the parties at the same time as the Judgment.

The CJEU's information note suggests that the referring court include a separate note requesting the application of the PPU and referring clearly to Article 107. This is important in order to make sure the Registry notices the request.

The CJEU in the criminal sphere

The CJEU has a role to play wherever the EU legislates. The more the EU adopts laws governing criminal matters, the more relevant the CJEU is going to be for defence lawyers. The possibilities for involving the CJEU depend on the type of instrument in question.

Pre-Lisbon

Applicable EU laws

From 1999 to 2009, the old TEU included a title called 'Police and Judicial Cooperation in Criminal Matters' (Title VI). This was the 'third pillar' of the European Union, an area in which the Member States wished to cooperate while retaining maximum control over domestic law. It included Articles 34 and 35 of the old TEU. Article 34 provided a legal basis for framework decisions, of which 34 were adopted. Notable examples include:

- The EAW Framework Decision
- The ESO Framework Decision
- The Framework Decision on Mutual Recognition of Custodial Sentences
- The Framework Decision on Mutual Recognition of Probation Decisions
- The Framework Decision on the European Criminal Records Information System

CJEU jurisdiction

The CJEU is able to interpret framework decisions like any other measure of EU law. However, courts in your country will not necessarily be able to send questions on the interpretation of Framework Decisions to the CJEU. Under Article 35(2) of the old TEU, the courts of the Member States did not have jurisdiction to refer questions to the Court of Justice of the European Communities (as it then was) unless the Member States had 'accepted' its jurisdiction by a declaration.

Countries that have accepted the CJEU's jurisdiction: Austria, Belgium, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain and Sweden.

If you are not in one of these countries, even if you convince your court to make a reference, it may well be dismissed by the CJEU as inadmissible. Member States also had the option of reserving the capacity to make a reference on framework decisions to courts whose decisions were final (only Spain took this approach).

In addition, the CJEU's involvement in areas governed by framework decisions has been limited because it has not been possible for the Commission to bring actions against the Member States for failure to fulfil their obligations under framework decisions. The

Commission's enforcement powers arose from Article 226 TEC, which, by definition, did not cover measures adopted under the old TEU.

The situation thus organised was preserved by transitional provisions in Protocol 36 to the TFEU. Under Article 10 of that protocol, the powers of the CJEU are to remain the same as they were under the old TEU. This ceases to have effect if the framework decision is amended or replaced, and in any event after five years.

Framework decisions in CJEU case-law

According to their legal basis, framework decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They cannot entail direct effect, that is, they take effect only through national law and cannot be relied on directly.

The legal force of framework decisions is clarified by the CJEU's important ruling in Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285. In that case, an Italian schoolteacher was accused of using violent disciplinary measures. The prosecutor asked for the evidence taken from the alleged victims (minors) at the preliminary stage to be proved at the trial without cross-examination. A 'special enquiry procedure' allowed this, but this procedure was reserved for sexual offences cases. The CJEU held that the Victims Framework Decision, which entitles vulnerable witnesses to give evidence in favourable conditions, required the Italian court to consider making this procedure available to the complainants, notwithstanding its exclusion under the letter of national law. National courts had to interpret national law 'as far as possible in light of the wording and purpose of the framework decision, in order to attain the objectives which it pursues' (paragraph 43), though national courts could not be required to go so far as to interpret national *contra legem* (paragraph 47).

The effect of the decision is that the interpretation given to a provision of a framework decision must, as far as possible, be read into national laws. Defence lawyers acting in EAW cases have therefore increasingly sought to convince national courts to obtain the CJEU's guidance on the interpretation of the EAW Framework Decision: see, inter alia, Case C-66/08 *Kozlowski* [2008] ECR I-6041; Case C-123/08 *Wolzenburg* [2009] ECR I-9621; Case C-306/09 *I.B.* [2010] ECR I-10341; Case C-42/11 *Lopes De Silva Jorge* [2012] ECR I-0000.

Post-Lisbon

Applicable EU law

Under Article 82(2)(b) TFEU, to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters, the EU can adopt directives establishing minimum rules regarding the rights of individuals in criminal procedure. On the eve of the entry into force of the TFEU, the Council adopted a resolution

called the 'Roadmap', identifying six measures by which it proposed to exercise this new competence:

- Measure **A**: Right to translation and interpretation in criminal proceedings
- Measure **B**: Right to information in criminal proceedings
- Measure **C**: Access to a lawyer and legal aid in criminal proceedings
- Measure **D**: Right to communication to family and consular services
- Measure **E**: Special safeguards for vulnerable suspects
- Measure **F**: Green paper on pre-trial detention

Measures A and B have already been adopted: see Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 185), and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1). Measure C is, at the time of writing, in final negotiations (in relation to access to a lawyer only). See our Fact Sheets on these measures, within this online training programme. We will refer to these measures as the 'Defence Rights Directives'.

CJEU jurisdiction

Under Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and secondary law like directives. 'Any court of or tribunal' of a Member State may ask such a question. If the question of EU law arises before a court against whose decisions there is no judicial remedy, then the matter must be referred. The special arrangements regarding the CJEU's jurisdiction discussed in relation to framework decisions are irrelevant for the purposes of the Defence Rights Directives.

Importantly, the Commission's enforcement powers, now contained in Article 258 TFEU, cover all measures adopted under the TFEU, including the Defence Rights Directives. Accordingly, it will be possible for the Commission to bring Member States before the CJEU where they fail to implement directives. But even if it declines to exercise that power, there is a great deal you can do as a lawyer, using the CJEU's case-law, to ensure the Defence Rights Directives are properly respected in individual cases.

Directives in the CJEU's case-law

Like framework decisions, directives impose obligations but leave to the Member States the choice of form and methods. However, unlike framework decisions, directives can entail direct effect, that is to say, they can be relied on directly against the state (and thus in criminal proceedings), regardless of national law. A provision of a directive is directly effective where (i) the deadline for implementation has passed (ii) it is clear, precise and unconditional, and does not call for additional executing measures (Case 41/74 *van Duyn* [1974] ECR 1337). Even if national law conflicts with the directly effective provision of the

directive, it falls to be set aside in accordance with the principle of the supremacy of EU law (see Case 70/77 *Simmenthal* [1978] ECR I-1453).

The general principle is that a directive is directly effective from the deadline specified for its implementation. However, note that before the deadline for implementation has passed, the Member States must not adopt measures that will compromise seriously the objective of the directive (Case C–129/96 *Wallonie* [1997] ECR I-7411).

2014

The old TEU, containing Title VI on Police and Judicial Cooperation in Criminal Matters (the legal basis for framework decisions) ceased to exist when the Treaty of Lisbon entered into force on 1 December 2009. The legal effects of the instruments adopted under those provisions were preserved for five years, that is, until 1 December 2014. So the special arrangements for references for preliminary rulings from criminal courts continue to apply until then. However, from that date, the courts or tribunals of any Member State will be able to make references to the CJEU on the interpretation of framework decisions, and the Commission will be able to bring infringement proceedings against countries that have not properly implemented framework decisions.

The Charter of Fundamental Rights

Both the pre-Lisbon framework decisions and the post-Lisbon Defence Rights Directives, like any EU law, fall to be interpreted in accordance with the Charter of Fundamental Rights. This section provides a brief overview of the key provisions of the Charter.

Legal force

The starting point for a methodical argument invoking the Charter should be Article 6(1) TEU (in its current version, in force since December 2009), which states:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... *which shall have the same legal value as the Treaties*" (emphasis added).

This statement is generally seen as confirming that the Charter has the status of 'primary law', like free movement or citizenship. This means that it imposes overriding obligations. You must therefore show that the national authority you are challenging is bound by these.

Application to national authorities

Article 6(1) TEU continues:

> "... The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

So, turning to Title VII of the Charter, one finds provisions explaining when it applies. Article 51(1) provides:

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties" (emphasis added).

Thus, the Charter applies to Member States when they 'implement Union law'. In accordance with Article 6(1), for help interpreting this we should have due regard to the explanations referred to in the Charter (an instruction repeated by the Charter itself at Article 52(7)). The Explanation on Article 51 – Field of Application states:

> "As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the

> Union is only binding on the Member States when they act in the scope of Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925; Case C-306/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules' (Case C-292/97 *Karlsson and Others* [2000] ECR I-2737'. Of course this rule, as enshrined in the Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing national law."

Thus, where a situation is governed by EU law, the Member States are bound to respect fundamental rights as contained in the Charter. For instance, if a Member State is extraditing someone to another Member State in accordance with the scheme established by the EAW Framework Decision, it must respect Charter rights. Equally, national law within the scope of a given piece of EU legislation such as the Defence Rights Directives will need to be read and applied in accordance with the Charter.

Interpretation of the Charter Rights

How do you identify the actual obligations the Charter imposes? How does a national authority work out what it is supposed to do in order to abide by its Charter obligations? Again, for the answers, in accordance with Article 6(1) TEU, we turn to Title VII of the Charter, and the Explanations. Article 52(3) of the Charter (part of Title VII) states:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The Explanation to this provision states that:

> "[Article 52(3)] is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR.
>
> ... The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the Court of Justice of the European Union ..."

So, you can refer to the case-law of the European Court of Human Rights in order to work out what the Charter requires. In the area of criminal law, the CJEU has paid close attention to the case-law of the ECtHR, but at least one Advocate General's Opinion suggests that there could well be cases where the CJEU departs from that case-law. The interpretation of Charter provisions is therefore fertile ground for the use of the preliminary ruling procedure.

Example scenario

The objective of this exercise is not to find a legal solution to the case but to show how the need for a reference could arise in a regular criminal case, and how to make it. There are some questions to guide you through the process.

Joseph K. is accused in Spain of having masterminded a large-scale social security fraud by using his position within the Employment Office to approve payments to people he knew to be employed, keeping a proportion for himself. Joseph K. is arrested further to a complaint by a co-worker and is brought before a judge who orders his provisional detention while the investigation is carried out. Joseph K. denies the offence, stating that if any fraud has taken place someone else in the Employment Office must be responsible.

Under Spanish criminal procedure, in principle, the parties in criminal proceedings have access to all information relating to the investigation. However, the *Juez de instrucción* (investigating magistrate) may, at the request of the prosecutor, declare part of the proceedings secret on a monthly, renewable basis. This power is applied in Joesph K.'s case and the investigation has now been proceeding for over a year without Joseph K.'s lawyer having access to the materials in the case-file. Joseph K. remains in detention. His lawyer has made several applications for release but these have been dismissed on the basis, inter alia, that there is strong evidence that he has committed a serious offence. Under Spanish law, he could remain detained for up to two years, which could be extended by a further two years.

What is the issue in the case?

Joseph K. is not able to access the case materials which form the basis of the allegation against him. This is clearly impeding his ability to prepare for trial but, more urgently, it is also preventing him from challenging his detention.

How is EU law relevant?

Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings [NB – to be transposed by October 2014], entitled 'right of access to the materials of the case', provides that 'where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers'.

Accordingly, the decision of the *Juez de instrucción* to declare the proceedings secret is within the scope of EU law. This means that the *Juez* must also have regard to the Charter of Fundamental Rights of the EU, in particular Articles 6, 47 and 48 which protect the rights to liberty, a fair trial and the rights of the defence.

Could the Juez de instrucción make a reference in this case?

Yes. The case-law of the CJEU is quite clear that an investigating magistrate is a 'court or tribunal' for the purposes of Article 267 TFEU, the legal basis on which references for a preliminary ruling.

In relation to framework decisions adopted on the basis of the pre-Lisbon TEU, Spain made a declaration under Article 35(2) TEU stating that it accepted the jurisdiction of the CJEC but that only courts against whose decisions there is no judicial remedy could make a reference. This would not cover a *Juez de instrucción*, whose decisions can be appealed.

However, these special arrangements (which will in any event last only until December 2014) are irrelevant to the Defence Rights Directives, which were adopted under the TFEU and can be the subject of a reference by 'any court or tribunal', under Article 267 TFEU.

Is the Juez de instrucción required to make a reference in this case?

No. The *Juez de instrucción* is not a court or tribunal against whose decisions there is no judicial remedy, so, under Article 267 TFEU, the *Juez* has a discretion as to whether to refer the matter or not.

What if the Juez de instrucción refuses to make a reference?

If you were to appeal the *Juez de instrucción*'s order for secrecy, raising the EU law issue identified, you could again argue for the reference to be made by the appeal court. If there is no judicial remedy against the decisions of that court, then that court would be required to make the reference unless the answer is clear from the CJEU's case-law.

What should go into the reference?

As a lawyer in the main proceedings, you can help the CJEU by ensuring the referring court sends the right kind of reference including the right information. The reference in this case would need to include:

- Concise but sufficient factual background, to enable the CJEU to understand how the case arises. You should ensure that the procedural history of the case is covered so that the CJEU is made aware that the failure to provide case materials is affecting Joseph K.'s ability to apply for release from detention.
- A description of the national law, indicating the provisions of national law, and perhaps an indication of how they have been interpreted by the higher courts.
- A description of the issue of EU law identified. Here, there is a rule of national law which, at least as it has been applied in the present case, appears to be in conflict with a requirement of the Directive on the right to information in criminal proceedings. That provision, interpreted in line with the case-law of the ECtHR, clearly requires enough access to case materials to enable the accused to challenge their detention. The

question is whether the directive requires the Juez to do anything differently in order to give effect to EU law.

- A formal question, for instance, "is Article 7 of the Directive on the right to information in criminal proceedings, read in conjunction with Articles 6, 47 and 48 of the Charter, to be interpreted as permitting a Member State to withhold all case materials during the investigatory phase of criminal proceedings, where the person is in detention?"
- A separate request for the urgent procedure (PPU) to be applied, mentioning Article 107 of the Rules of Procedure of the Court of Justice. See the following question.

Could the urgent preliminary ruling procedure (PPU) be applied in this case?

Possibly. Article 267 TFEU requires the CJEU to handle a case with the minimum of delay where a person is in custody. Joseph K. is in detention so the case is, broadly, within the category of cases eligible for the application of the PPU. Under Article 107 of the Rules of Procedure (applicable from 1 November 2012), the referring court has to set out the matters of fact and law establishing the urgency and justifying the application of the PPU. The case can be considered urgent because the CJEU's answer to the question may lead to further disclosure by the *Juez*, which may in turn have an incidence on detention.

However, it is not the case that the CJEU's answer could lead directly to release from detention. Contrast this with, for instance, the situation where someone is detained pending extradition under a EAW Framework Decision. There, the CJEU's answer on the interpretation of that framework decision could mean non-execution of the EAW, and thus the end of detention. Here, regardless of the CJEU's answer, there will still be criminal proceedings ongoing and possible grounds for Joseph K.'s detention. It could therefore be worth trying to convince the *Juez* to say explicitly in the reference that the CJEU's answer could have an incidence on continued detention.

What would the 'language of the case' be in this case?

As the proceedings originate in Spain, the language of the case would be Spanish. This means that you can submit your written and oral observations at the hearing in your own language. The Commission, which will intervene in the case, will also make its observations in Spanish. Other governments that intervene can submit observations in their own language.

Your written observations will be translated into French, so make sure they are clear. At the hearing, make sure you speak clearly and at a measured pace, as it is likely that several judges will be listening to you through an interpreter.

Which Chamber will hear the case?

The Chamber will depend on the complexity and importance of the case. Because of the potential importance of cases concerning the influence of EU law on national criminal

procedures, it is possible the case could be referred to the Grand Chamber. If the PPU request is accepted, the case will be hanlded by the designated Chamber of five judges.