Our vision:
A world where every person's right to a fair trial is respected.

Fair Trials – Preliminary Reference Toolkit

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About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels, and Washington D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns. In Europe, we coordinate the Legal Experts Advisory Panel (LEAP) - the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: https://www.fairtrials.org/legal-experts-advisory-panel.

Fair Trials, with the support of LEAP, were instrumental in the creation of the EU Procedural Rights Directives – a suite of Directives that protect fundamental rights of defendants, such as the rights to be presumed innocent or to access legal advice – and since adoption, implementation of the Directives, together with EU legislation on cross-border criminal justice, is increasingly putting national laws and practices to the test. The Court of Justice of the European Union (CJEU) is being asked to interpret EU law and decide whether domestic norms and practices comply with the standards on fair trial rights protected by the Directives. In this context, the CJEU has the potential to play a really important role in the development and practical application of fair trial rights.

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Contact
Laure Baudrihaye-Gérard
Legal Director (Europe)
laure.baudrihaye@fairtrials.net

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I. Definitions

The **Charter** means the Charter of Fundamental Rights of the EU.

The **CJEU** means the Court of Justice of the European Union (based in Luxembourg) 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.

The "**Directives**" or the "**EU Procedural Rights Directives"** refer to the right to interpretation and translation,[1] the right to information,[2] the right of access to a lawyer,[3] the right to presumption of innocence and to be present at trial,[4] the rights of children in criminal proceedings,[5] and the right to legal aid[6].

ECHR means the European Convention of Human Rights, and **ECtHR** refers to the European Court of Human Rights based in Strasbourg.

EU law means any measure of law adopted under any of the Treaties.

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.

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** mean the dispute at the national level in which a question of interpretation of EU law has arisen, prompting the referring court to send a request for a preliminary ruling to the CJEU.

[1] 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. 1).
[2] 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).
[3] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 290, p. 1).
[4] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).
[5] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ 2016 L 132, p.1).
[6] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L297/1, p.1).

II. Introduction

Until recently, the preliminary reference procedure of the Court of Justice of the EU (**"CJEU"**) was of little relevance to most criminal law practitioners. Transitional measures in the Treaty of Lisbon, which limited the jurisdiction of the CJEU, came to an end on 1 December 2014.[7] Since then, EU acts in the field of police cooperation and judicial cooperation in criminal matters come under the full jurisdiction of the CJEU. Previously, the CJEU had required prior acceptance of Member States to deliver preliminary rulings on EU criminal law measures.

The preliminary reference procedure is set out in Article 267 of the Treaty on the Functioning of the European Union (**"TFEU"**) and promotes a uniform interpretation and application of EU law across all EU Member States, by offering the courts and tribunals of the Member States a means of bringing before the CJEU for a preliminary ruling questions of interpretation of EU law where that a decision of the CJEU is necessary to enable them to give judgment.

Therefore, when issues arise in relation to the interpretation of the EU law, it is not for the national criminal courts alone to resolve them. The interpretation of the Directives, the EU Charter of Fundamental Rights (the **"Charter"**) and other relevant principles, as well as any gaps in the EU legislative framework will be for the CJEU to resolve, via preliminary rulings on questions referred by courts in the Member States in accordance with Article 267 TFEU.

As the case law on EU measures in the field of police and judicial cooperation is still in its infancy, many EU procedural and fair trial rights have yet to be clearly interpreted by the CJEU. The EU Procedural Rights Directives and the Framework Decision on the European Arrest Warrant (**"FDEAW**")[8] in particular, are generating an increasing number of preliminary references in criminal proceedings. As more references are made, the protection of procedural and fair trial rights at an EU level can be clarified and strengthened. Fair Trials has produced a separate document mapping CJEU case law, in which you will find an overview of all the existing CJEU cases relating to the interpretation of the Directives as well as the main cases in relation to the FDEAW.

Purpose of the toolkit

To date, there are significant and important rulings by the CJEU in respect of the European Arrest Warrant, but only a limited number of requests for references have been made in relation to the EU procedural rights directives.

As CJEU references can help support implementation of EU law by Member States, the objective of this toolkit is to provide practical advice and encourage criminal law practitioners to see the CJEU as a regular and accessible forum. Part II of the toolkit contains an overview of the preliminary ruling procedure. Part III includes practical guidance on drafting preliminary reference requests and Part IV focuses on the urgent procedure, the so called "**PPU procedure**". In Part V, the toolkit offers tips to

[7] Article 10(3), Protocol (No 36) on transitional provisions, Consolidated version of the Treaty on European Union (OJ 115, 09.05.2008, p. 322 – 326).

[8] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L190, p.1).

defence practitioners on how to initiate a preliminary reference requests and includes, by way of illustration, a potential EU law question that could be referred to the CJEU (see the **Annex** below). However, it is not possible to predict how and when the need to have a case referred to the CJEU may arise. 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.

Please do not hesitate to contact Fair Trials at the addresses indicated above for support in formulating and seeking a preliminary reference request in a specific case.

This toolkit should be read alongside other materials produced by Fair Trials, available here: https://www.fairtrials.org/publication/eu-law-materials.

The purpose of the preliminary reference procedure

EU law operates through a system of 'decentralised' enforcement, where the national courts are the primary driver of compliance. However, it is not for national courts alone to determine the precise nature of the rights and obligations arising under EU acts. The interpretation of the Treaties, Directives and other acts of the EU is for the CJEU to determine. In the decentralised EU judicial system, the preliminary reference procedure is a means to promote legal unity and encourage development of EU law, by creating opportunity for dialogue between national courts and the CJEU.

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 change in the criminal law and practice in your jurisdiction.

III. The three stages of the preliminary reference procedure

The CJEU has issued a set of recommendations addressed to national courts in relation to the initiation of preliminary ruling proceedings (the "**Recommendations**").[9] This toolkit draws from the Recommendations, the Rules of Procedure of the CJEU (the "**Rules of Procedure**"),[10] case law, as well as other sources, in order to provide a practical overview of the preliminary ruling procedure for practitioners.

When a national court is presented with a case which gives rise to a question on the interpretation of EU law (e.g. whether a national Ministry of Justice can issue a European Arrest Warrant),[11] the national court may, and in some cases *must*, refer to the CJEU to clarify the interpretation of EU law (**"Stage 1"**). The CJEU then decides how the relevant Union law is to be interpreted (**"Stage 2"**) and sends the case back to the national court to decide on the merits of the case (**"Stage 3"**). Each of these stages are considered in turn in this section.

Key features of the preliminary reference procedure:

- For a reference to be possible, there must be a question of EU law on which a ruling from the CJEU is necessary to enable the local court to give judgment.
- The average time to obtain a ruling on a request for a reference is 15-18 months.
- There is an urgent procedure (**"PPU"**) available under Article 267 TFEU, fourth subparagraph and Articles 107-114 of the CJEU Rules of Procedure. This will be applied where the person is in detention and the CJEU's ruling may impact upon the decision to detain (the precise test is unclear). The national court must request the procedure, setting out the reasons for it. If applied, the process could be shortened to as little as **eight-ten weeks**.
- The national court is entitled by virtue of Article 267 TFEU to make a reference **at any point** in the national procedure; a rule of national law which prevents this must be set aside.
- As well as ordinary courts, an investigating judge can refer a question; a prosecutor, however, cannot.
- Courts of last instance infringe Article 6 ECHR and Article 267 TFEU if they provide no reasoning for a refusal to refer an EU law question to the CJEU. Constitutional Courts in some countries (e.g. Germany, Slovenia) also consider the refusal to refer an EU law question to the CJEU an infringement of the constitutional right to the lawful judge. The availability of an individual right of petition to a Constitutional court is not considered a further judicial remedy, so a supreme court is required to make a reference to the CJEU if the question is not an "acte clair" / "éclairé".

[9] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings 2019/C 380/01 dated 8 November 2019 available on the following link.
[10] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65) and on 19 July 2016 (OJ L 217, 12.8.2016, p. 69).
[11] Case C-477/16 PPU, *Kovalkovas,* Judgment of 10 November 2016, paragraph 21 (EU:C:2016:861).

Stage 1 of the procedure: Before the national court or tribunal

When is it useful to ask for preliminary reference?

National courts have an obligation to apply EU rights that have direct effect and to set aside national law and practice that may contravene these rights.[12] The first objective of a defendant is that the national court disregards national legislation or practice in breach of EU law, and directly applies EU rules that are more favourable. In that respect, litigants need to show that EU law is clear and that it applies to their case. In that respect, it is sometimes useful to convince a court of the clear meaning of a EU law provision by using foreign judgments giving it the same meaning.

It is only when a national court is not ready to interpret EU law as suggested by the defendant that asking for a reference may become useful. At that point, it is necessary to show the national court that there is a question or doubt as to the exact meaning of EU law and that it must be resolved by the CJEU.

Who makes the request?

Parties in proceedings before a national court do not themselves submit references directly to the CJEU. The decision whether to make a reference to the CJEU rests solely with the national court. National courts and tribunals at any instance enjoy a discretion to make a reference to the CJEU, and a superior court cannot prevent a lower court from making a reference. Equally, there is no requirement that the parties accept the reference request.

'Any court of or tribunal' of a Member State may ask such a question. The CJEU has also accepted questions from an *ad hoc* body.[13]

If the question of EU law arises before a court against whose decisions there is no judicial remedy, then the matter must be referred.

In what circumstances may a request be made?

In the event of a question of interpretation of EU law, the national court must determine whether a preliminary ruling of the CJEU is necessary to enable it to deliver judgment. This is, for example, where existing CJEU jurisprudence does not provide the necessary guidance on how to apply a provision of EU law to a new set of facts. The CJEU does not answer hypothetical questions, so it is important that the clarification is necessary for the national court to rule on proceedings.

Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining enjoy a presumption of relevance. The CJEU may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its

[12] See Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.
[13] See Case C-109/98.

object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[14]

Under Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and secondary law, including the EU Procedural Rights Directives.

It is important to note that the national court cannot formulate questions based only on the Charter. The questions need to make reference to EU law.[15]

A word of caution

A preliminary reference may not be advised when there is a conflict between a defendant's individual interest and the strategic litigation objective that the reference is seeking to achieve. Among others, it is worth taking into consideration that the reference process may take over a year and has the impact of delaying the outcome of a case that may otherwise be resolved faster. This is particularly relevant when the defendant is detained.[16]

How are the questions determined?

It is up to the national court to write the question for reference. After determining that a preliminary ruling is necessary, the national court may invite the parties to make their submissions on the questions to be asked. This provides an important opportunity for the parties to influence the way in which the questions are framed before the CJEU and lawyers should encore courts to hold a hearing on this issue.

It is important for lawyers to inform the domestic court of previous CJEU case law and show that there is a genuine question of EU law to be addressed.

Ultimately, it is for the national court to determine the final form and substance of the request.

Is the preliminary reference procedure optional or mandatory?

The decision to refer a question to the CJEU is generally at the discretion of the national court. It is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need of a preliminary ruling in order to enable it to deliver judgment, and the relevance of the questions which it submits to the CJEU.

Is there a right to a ruling on a preliminary reference?

Under Article 267(3) TFEU, a national court of last instance *must* ask the CJEU for a preliminary ruling where a genuine question of interpretation exists. A genuine question exists unless the interpretation of EU law is obvious such that there is no reasonable doubt concerning the manner in

[14] Case C-278/16, *Sleutjes*, judgment of 12 October 2017, paragraph 22.
[15] See, for instance, Case C-466/11 and C-177-178/2017 where the CJEU considered it did not have jurisdiction, as a result of Article 51(1) of the Charter, which stipulates that its provisions are addressed to the Member States only when they are implementing EU law.
[16] But see, the urgent procedure, section IV.

which the measure should be interpreted (the "acte clair" doctrine) or where the same question as already been answered by the CJEU in another case (an "acte éclairé").

Courts of last instance infringe Article 6 ECHR if they provide no reasoning for a refusal to refer an EU law question to the CJEU.[17]

Moreover, in several Member States,[18] the obligation of a court of last instance to refer is further reinforced by a constitutional guarantee, allowing the affected party to sue in constitutional court for an arbitrary refusal to refer.[19]

The 2018 *Accor* ruling[20]

Complaints from the affected parties of a French Conseil d'État judgment led the European Commission to institute infringement proceedings against France for, *inter alia,* the failure of its court of last instance to make a reference to the CJEU. The resulting case and ruling of the CJEU has the potential to significantly impact the preliminary reference procedure. In October 2018, in *European Commission v French Republic,*[21] the CJEU delivered a ground-breaking ruling, finding for the first time a violation of Article 267(3) TFEU by a national court of last instance.

The French Conseil d'État had delivered judgments relating to the tax treatment of sub-subsidiaries, distinguishing and departing from a previous CJEU ruling[22] on the grounds that the French scheme was different from the British scheme in that ruling. The Commission received complaints about the scheme, and ultimately brought an action against France under Article 258 TFEU for, *inter alia*, the failure of its court of last instance to make a reference to the CJEU.

The CJEU held that the Conseil d'État, a court against whose decisions there is no judicial remedy under national law, violated Article 267(3) TFEU by failing to make a reference to the CJEU, as the existing case law was not so obvious as to leave no reasonable doubt as to the correct interpretation. France had argued that the answers to the questions before the Conseil d'État could be clearly inferred from the case-law. However, the CJEU pointed out that the interpretation the Conseil d'État took in its rulings was at odds with the interpretation the CJEU ultimately arrived at in the case, which itself implied a reasonable doubt as to the interpretation.

[17] Dhahbi v. Italy, App. No. 17120/09 (Apr. 8, 2014), Schipani and others v. Italy, Appl. No. 38369/09, (July 21, 2015). See, most recently, Repcevirag Szövetkezet v. Hungary, App.No. 70750/14 (Apr. 30, 2019), in which the ECtHR considered that it was not competent to assess the merits of the reasoning of the Hungarian court, according to which the issue did not raise any question of interpretation that would fall under the jurisdiction of the CJEU.

[18] Germany, Austria, Spain, Czech Republic, and Slovenia.

[19] See, in more detail: Lacchi, 2015. *Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU,* 16 German Law Journal No. 6 (2015*)*.

[20] Case C-416/17, *European Commission v French Republic,* Judgment of the Court of 4 October 2018 (ECLI:EU:C:2018:811).

[21] Case C-416/17, *European Commission v French Republic,* Judgment of the Court of 4 October 2018 (ECLI:EU:C:2018:811).

[22] Case C-35/11, *Test Claimants in the FII GroupLitigation*, Judgment of the Court of 13 November 2012 (EU:C:2012:707).

Stage 2 of the procedure: before the CJEU

Key stages of the procedure before the CJEU:

Decision on urgency – If the urgent or expedited procedure is requested, the CJEU will quickly make an order as to whether the procedure is justified. Typically, pretrial detention will justify an expedited procedure.

Written submissions – After the request for a preliminary reference is lodged before the CJEU, the parties in the national proceedings are invited to make their written submissions. These can be made by mail to the Registry of the CJEU, or using the CJEU's electronic filing platform, *e-Curia.*

Oral hearing – Depending on the needs of the case, an oral hearing may be held, giving the parties an opportunity to make their arguments in person. This is a public hearing.

Advocate General Opinion – After all the submissions are made, the Advocate General (**"AG"**) assigned to the case will give his/her opinion.[23] An AG is only required to give an opinion if the Court considers that the case raises a new point of law. Although the opinion of the AG does not bind the Court, it is very often followed by the Court.

Decision of the CJEU and return to the Referring Court – Soon after the AG gives the opinion, the Court gives a ruling on the preliminary reference, in response to the national court's question(s). The Court interprets EU law and outlines the legal test to be applied (where necessary), but does not decide on the case itself. Therefore, after the Court makes its judgment, the case is returned to the national referring court to make a decision on the merits of the case.

When does the procedure before the CJEU begin?

When the national court has made an order staying proceedings, it sends the request for a preliminary reference to the Registry of the CJEU at the following address.

Rue du Fort Niedergrunewäld
2925 Luxembourg
LUXEMBOURG

The CJEU Registry will then 'notify' the reference to interested parties and more generally by a note published in the Official Journal of the EU.

How long does the process take?

In terms of timing, lodging a request for a preliminary ruling requires national proceedings to be stayed until the CJEU gives judgment.

[23] There are eleven AGs to the CJEU, who are tasked with providing impartial opinions concerning the Court's cases. The AGs are independent, and effectively have free reign, and so their opinions often go into more extensive analysis of the law than the judgments of the Court, which are limited by the case and often by the need to compromise between a panel of multiple judges.

The average length for a preliminary request is 18 months. However, importantly for criminal practitioners, there are expedited[24] and urgent[25] procedures available, the latter of which is frequently used where an individual is in custody. The urgent procedure is explained in more detail below.

Who takes part in the procedure before the CJEU?

The parties in the national proceedings all take part in the CJEU procedure (including any third parties).

Under Article 23 of the Statute of the CJEU,[26] when a case is received at the Registry, it is notified to the Member States, the European Commission, and the EU Institution which adopted the act whose interpretation is in question (for the Procedural 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 are the costs?

Preliminary ruling proceedings are free of charge, and it is for the national court to decide as to the allocation of costs.[27]

Is there legal aid available?

Importantly for criminal law practitioners, the CJEU may itself grant legal aid, to the extent that any aid received under national rules does not cover costs incurred before the CJEU.[28]

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.

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 (see address indicated above). You must, in principle, submit the signed original of your pleadings. However, the "e-Curia" system for lodging pleadings enables electronic copies to be deemed originals. You need to

[24] Article 105 of the Rules of Procedure.
[25] Article 107 of the Rules of Procedure.
[26] Available on the following link.
[27] Article 102 of the Rules of Procedure.
[28] Articles 115, 116, 117, and 118 of the Rules of Procedure.

register and create an account in order to be able to use this system: see the eCuria decision and the e-Curia conditions of use for more information.[29]

What is the language of the case?

The CJEU's working language is French and all documents will be translated into French by the CJEU. 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.

What do I need to know about written pleadings 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' and not to exceed 20 pages. They will have to be translated, so clarity is important.

It is also important to explain the key facts of the case (particularly to show how they can be distinguished from facts on any previous CJEU ruling on a similar issue) and outline the procedure (especially as the CJEU may not be as familiar with criminal procedure).

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

Each case lodged at the CJEU is allocated to a 'Judge-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.

Will there always be an oral hearing?

There is not an automatic right to a hearing. The Court may decide not to grant an oral hearing. In such case, written pleadings may be the only opportunity to influence the outcome of the case. The written pleadings generally have more impact than oral pleadings on the Court.

[29] For further information, please also refer to CCBE's Guide on using the electronic filing system of the European Union Courts, 2019.

What do I need to know about CJEU hearings?

As there is only one round of written pleadings, this is the opportunity to raise points in reply. The CJEU has produced advice to counsel appearing before the Court,[30] highlighting several points:

- Several of the judges will be listening to your submissions through interpretation. Speak at a measured pace, using clear language, to facilitate interpretation.
- Oral hearings typically are limited to 10-15 minutes per party.
- 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.

You should also be aware that the submissions will be simultaneously translated, and it is worth sending your submissions in advance to the CJEU's interpreters so that they can prepare in advance (which will speed up the interpretation process).

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?

An Advocate General is not assigned to all cases. Putting forward an argument based on fundamental rights may lead the case to the assignment of an Advocate General.

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 or her 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.

[30] See above and the CCBE guidance to advocates appearing before the Court of Justice in appeal proceedings, 2016.

Stage 3 of the procedure: back to the national court

What happens after the CJEU proceedings are complete?

It is important to emphasise that the CJEU's ruling only provides 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.

Are CJEU rulings binding on national courts?

Once the CJEU gives judgment in a preliminary ruling, it binds the referring national court as well as other national courts before which the same issue is raised.

IV. The preliminary reference request

Practical tips:

The request for a preliminary ruling may be in any form allowed by national law in respect of procedural issues

The request should be drafted simply, clearly and precisely.

The request should be no more than 10 pages long.

The form should be in typewritten form on white, unlined, A4-size paper.

Please number pages and paragraphs of the order consecutively.

Use common font (such as Times New Roman) in 12 point (body of text) and 10 (footnotes) with 1,5 line spacing and horizontal and vertical margins of at least 2.5 cm.

The request for a preliminary ruling must be dated and signed, then sent by **registered post** to the Court Registry at the following address: Rue du Fort Niedergrünewald, 2925 Luxembourg, LUXEMBOURG.

Where a PPU is required, send a signed copy of the request **first** by email at ECJ-Registry@curia.europa.eu and the original by registered post (at the address indicated above).

The request must be accompanied by any relevant documents and include the precise contact details for the parties to the main proceedings and their representatives.

The request must include a copy of the file of the case.

A. Form of the preliminary reference request

In what language must the preliminary reference request be drafted?

The request can be drafted in the language of the national proceedings. It will be translated into French, the working language of the CJEU, by the Court's translation services.

How should an order for reference be drafted?

The request may be in any form allowed by national law in respect of procedural issues.

As it will be translated into all the official languages of the EU, it is vital that the request be drafted simply, clearly and precisely. The Recommendations indicate that about 10 pages are sufficient.

The pages and paragraphs must be numbered.

What formalities must be complied with?

The request must be dated and signed, and then sent by registered post to the CJEU Registry: Rue du Fort Niedergrünewald, 2925, Luxembourg, LUXEMBOURG.

B. Content of the preliminary reference request

What should go into the reference request?

The CJEU is bound by the question(s) formulated by the referring court or tribunal: it cannot take the initiative to answer a question of EU law that has not been asked. 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, and the request may be rejected.[31]
- 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, 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 (i.e. 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 **Part IV** in this toolkit on the PPU.

Practical tip from a judge from a national court:

Think about adding a subsidiary question in the preliminary reference request for the CJEU to address in the event that the CJEU responds negatively to the first question.

Structure of the request

The content of the request is prescribed by Article 94 of the Rules of Procedure of the CJEU, summarised in the Annex to the Recommendations. Please note that in the absence of any of the required information, the CJEU may decline jurisdiction or dismiss the request as inadmissible.

The request must include the following seven sections:

1. The referring court or tribunal

[31] See, for instance, case C-259/17 of 21 November 2017 where the CJEU considered there to be insufficient information regarding the factual and regulatory context of the dispute in the main proceedings and the reasons justifying the need for an answer to the questions referred for a preliminary ruling.

Please specify the referring court or tribunal and the full contact details.

2. The parties to the main proceedings and their representatives

State the names of the parties to the main proceedings and anyone representing them before that court or tribunal.

Please include the exact postal address of the persons concerned, their telephone or fax number and email address.

3. The subject matter of the dispute in the main proceedings and the relevant facts

Please briefly describe the subject matter of the dispute in the main proceedings and the relevant findings of fact as determined by the competent national court or tribunal.

4. The relevant legal provisions

Please include precise references to the national provisions applicable to the facts of the dispute in the main proceedings, including any relevant case-law. The references must include the precise title and citations for the provisions concerned, as well as their publication references.

In this section, please also identify the provisions of EU law whose interpretation is being sought.

5. The grounds for the reference

Please state the reasons which prompted the request and specify the relationship between the EU law provisions and national legislation applicable to the main proceedings.

6. The questions referred for a preliminary ruling

The question(s) referred to the CJEU must be self-standing.

Please also state a view on the answer to be given to the question(s).

7. Possible need for specific treatment

Please indicate if the person(s) concerned must remain anonymous, or if the request has to be dealt with urgently.

V. Urgent procedure

A. Key features

- **The national referring court may make a request for the urgent procedure ("PPU").**
- **The CJEU designates a five-judge chamber to deal with PPU cases on a rotating basis (the** "Chamber"**). The Chamber decides whether to accede to the PPU request.**
- **The PPU procedure is typically accepted where a person is in detention pending the outcome of the proceedings.**
- **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 set 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 (i.e. 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.**

What is the urgent procedure?

The average time for consideration of a preliminary ruling is about 18 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)*.

For criminal practitioners, and frequently used in practice, the urgent preliminary ruling procedure is particularly relevant. Under this procedure, cases are typically judged by the CJEU within a few months of the lodgement of the request by the national court.

PPU cases are provided for by Articles 107-114 of the Rules of Procedure and follow a streamlined procedure. The number of parties authorised to lodge written observations can be limited, the length of written submissions and the time to submit them can be limited, and the written procedure is generally conducted electronically. In extremely urgent cases, the written procedure may be omitted entirely, although this is uncommon.[32] According to a 2012 report of the CJEU, the duration of the written submission period under the urgent procedure ranged from 15 to 21 days.[33]

[32] Article 23a of the Statute of the CJEU.

[33] Table 3, Report on the use of the urgent preliminary ruling procedure by the Court of Justice, Court of Justice of the European Union, Luxembourg, 31 January 2012 (link here).

Who can ask for the urgent procedure?

In principle, the PPU is requested by 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.

When can the urgent procedure be used?

The urgent procedure applies *only* in the area of freedom, security and justice, that is, EU laws relating to asylum and immigration and judicial cooperation in civil and criminal matters, and only in urgent matters where it is necessary for the CJEU to rule very quickly. There is no exhaustive set of criteria stating when it is to apply. However, Article 267 TFEU 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".

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.

Generally, a matter is considered urgent where: (1) where subject is in custody or otherwise deprived of liberty and (2) where the continued deprivation of liberty is affected by the outcome of the preliminary ruling.[34]

What is the impact of the urgent procedure in practice?

In practice, the PPU process can run very quickly from the point at which an EU law issue is raised. In our case study, *LM* (or "Celmer"),[35] the High Court of Ireland determined on 12 March 2018 that a preliminary reference was necessary and invited submissions of the parties on the questions to be asked. The CJEU delivered its ruling on the questions on the 25 July 2018, just over four months later, despite hearing the case as the full "Grand Chamber" of fifteen judges.

A word of caution

When a defendant is detained, a preliminary reference procedure may have the impact of prolonging their detention. It is important to keep this in mind and to assess the chances of obtaining the benefit of the PPU before arguing that a preliminary reference be submitted.

[34] See Case C-477/16 PPU, *Kovalkovas,* Judgment of the Court of 10 November 2016, paragraph 21, (EU:C:2016:861); C-237/15 PPU, Lanigan, Judgment of the Court of 16 July 2015, paragraph 24, (EU:C:2015:474).

[35] Case C-216/18 PPU, *LM*, Judgment of the Court (Grand Chamber) of 25 July 2018, (ECLI:EU:C:2018:586).

B. Case Study – an urgent preliminary reference in the "Celmer" case

Using the "Celmer" case (*Minister for Justice and Equality v LM (Deficiencies in the system of justice)*), this section illustrates how the preliminary ruling process works in practice, in terms of timing and process. We follow the timeline of the case from the beginning, and consider the various stages of a case which is referred for a preliminary reference.

Timeline

Phase 1:	
5 May 2017	Mr. Artur Celmer is arrested in Ireland based on EAW issued by Poland (delays due to "legal aid issues")
1-2 Feb 2018	Initial hearing in the High Court of Ireland: defence argues that rule of law issues in Poland prevent Ireland from executing the EAW
12 Mar 2018	High Court invites Parties to make submissions on CJEU reference
23 Mar 2018	Request for preliminary reference sent
Phase 2:	
27 Mar 2018	**Request for preliminary reference lodged (urgent procedure)**
12 Apr 2018	Decision of CJEU to grant request for PPU
1 Jun 2018	Hearing before CJEU (Grand Chamber)
28 Jun 2018	Opinion of Advocate General
25 Jul 2018	**Judgment of CJEU**
Phase 3:	
8 Aug 2018	High Court requests information from Polish authorities
31 Oct 2018	High Court hearing held
19 Nov 2018	**Judgment by the High Court issued**

Background and initial national proceedings

Artur Celmer was arrested in Ireland on 5 May 2017 on the foot of two EAWs issued by Polish authorities seeking to prosecute Mr. Celmer on alleged narcotics related offences. Proceedings were initially delayed due to legal aid issues, as well as Mr. Celmer's arrest on the basis of a third EAW issued on 14 November 2017.

Meanwhile, in view of the changes to the Polish constitution affecting the independence of its judiciary, on 20 December 2017 the European Commission issued a reasoned proposal to the Council "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law".

The initial hearing before the High Court of Ireland was held on 1-2 February 2018. Mr. Celmer argued, relying on the European Commission reasoned proposal, that there was a systemic threat to the entire system of the rule of law in Poland and that the court was bound to respect fundamental rights when applying the FDEAW.

Accordingly, Mr. Celmer argued that the Court must refer to the CJEU to determine the interpretation of the FDEAW, in particular, the role of the court in determining whether surrender could be ordered without violating his fundamental rights.

The Court largely agreed with Mr. Celmer's arguments and the findings of the Commission's reasoned proposal. It considered the systemic impact of the constitutional changes in Poland on fair trial rights raised issues with respect to the interpretation of the FDEAW. As such, in a judgment of 12 March 2018, the High Court invited the parties to make submissions on the questions to be asked of the CJEU.

Determining the questions to be asked

Before inviting the parties to make submissions on the questions to be referred the CJEU, in its judgment of 12 March 2018, the Court suggested the following wording based on (a) the CJEU's two step test in Aranyosi and Caldararu and (b) the ECHR's 'flagrant denial' test:

a. Is the Aranyosi and Caldararu test, which relies upon principles of mutual trust and mutual recognition, the correct test to apply where the High Court, as an executing judicial authority under the Framework Decision, has found that the common value of the rule of law set out in Article 2 TEU has been breached in Poland?

b. If the test to be applied is whether the requested person is at real risk of a flagrant denial of justice, does the High Court, as an executing judicial authority, have to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?

Final questions of the High Court of Ireland

After hearing submissions from the parties, the High Court sent the following questions to the CJEU on 23 March 2018:

a. Notwithstanding the conclusions of the Court of Justice in Aranyosi and Cãldăraru, where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

b. If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?

CJEU proceedings

The request of the High Court for a preliminary reference was made under the urgent PPU procedure, given that Mr. Celmer was being held in custody, and the outcome of the preliminary reference procedure may have impacted upon his release. The request was lodged before the CJEU

on 27 March 2018 and on 12 April 2018, the CJEU granted the request to be heard under the urgent procedure. The Parties made their submissions and, seven weeks later, they were heard before the Court in an oral hearing of 1 June 2018.

On 28 June 2018, Advocate General Evgeni Tanchev delivered his opinion on the case. He considered limitations on the principal of mutual trust should be interpreted strictly, and that for the EAW to be postponed there must be a real risk not of a breach of a fair trial, but of a "flagrant denial of justice". For this to be the case, he argued, the lack of independence must be so serious that it destroys the fairness of the trial.

Four weeks later, on 25 July 2018, the CJEU delivered its ruling on the case. Importantly, the CJEU did not follow the "flagrant denial of justice" test that AG Tanchev put forward. Instead, the CJEU in effect transposed the two-stage *Aranyosi* test, requiring the Irish court to examine whether:

1. First, there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, systemic; and
2. Secondly, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by Poland, there are substantial grounds for believing that Mr. Celmer himself would be exposed to a "real risk" that there would be a breach of his "fundamental right to an independent tribunal" and therefore his right to a fair trial.

The case then went back to the Irish court to make its determination, based on the test outlined by the CJEU. From the point at which the request for a preliminary reference was lodged, under the urgent procedure, to the point at which the CJEU made its ruling, less than four months passed.

Final national proceedings (post CJEU-ruling)

Following the CJEU ruling, the Parties returned to the Irish High Court to determine how the test devised by the CJEU should be applied in practice, in particular, the second stage of the test.

The Irish judge, Justice Aileen Donnelly, described the post-CJEU proceedings as an "exercise in establishing the nature and extent of the CJEU principles that have been set out". She considered that the stage should not be dismissed as "merely evidentiary" and deserved "intense consideration and application of legal principles".

On its judgment of 8 August 2018, the High Court requested further information from the Polish judicial authorities, as required by the CJEU.

In a later hearing on 2 October, the substance was postponed until 31 October 2018, as the official translation of the further information provided by the Polish authorities was yet to be provided. The court considered that the CJEU judgment allowed the executing judicial authority to communicate "as appropriate" with the issuing judicial authority for the purposes of gathering all the relevant information.

Lawyers for Mr. Celmer submitted an expert report on the fundamental rights issues, and having read that, the court considered that further assistance was necessary from the Polish judicial authority.

On 19 November 2018, the High Court accepted the surrender of Mr. Celmer to Poland. The case is currently pending appeal. For more information, see our comments here.

VI. Strategic litigation

Defence attorneys have a key role in invoking EU law in domestic criminal proceedings, and, where a genuine question of EU law arises, asking the court to make a reference to the CJEU. Success in obtaining a reference request from a national court very much depends on individual judges, the wider political context and of course a specific set of facts in a case. Certain courts may be more willing to make references, but it is difficult to foresee where a specific issue of EU law will arise.

It is also important to actively try to identify cases that are likely to lead to "good" case-law, i.e. that will help advance human rights in criminal justice. Remember that CJEU rulings will be binding on all courts.

Criminal defence lawyers will be faced with two key hurdles:

- Persuading the national judge to make a reference to the CJEU (and even that EU law applies in the case at hand); and
- Persuading the CJEU to accept the reference.

Courts may be positively unwilling to make references, to the extent that they would prefer to agree with the defence's argument as to the correct interpretation of EU law rather than relinquish control of the outcome in favour of the CJEU. The attitude of criminal courts can be driven by efficiency objectives of pushing on with the case to its conclusion in accordance with the standard procedure.

In this last part of the toolkit, we identify ways in which defence attorneys can seek to initiate a reference to the CJEU.

A. Assist the national court in drafting the preliminary reference request

The relevance of EU law in domestic criminal proceedings and the possibility to initiate preliminary references the CJEU is largely new for criminal defence practitioners - lawyers, prosecutors and judges alike, across the EU. It is common practice for courts across the EU, as illustrated in the *Celmer* case above, for courts to invite all parties to make submissions on the need for a preliminary reference request, and formulation of the request. If this is not the case, lawyers should encourage courts to hold such hearings.

As a lawyer in the main proceedings, you will then have the opportunity to help the national court prepare and formulate the preliminary reference request. It is of vital importance to consider carefully the drafting of the question to the CJEU. The CJEU is in principle bound to give an answer to a **question in relation to the interpretation of EU law**, but is not obliged to answer:

- hypothetical questions;
- questions which do not disclose an issue of EU law;
- questions on the Charter alone; or
- direct questions on the compatibility of national law with EU law, which is a matter for national courts.

Moreover, the CJEU is bound by the question(s) as formulated by the referring court: it cannot take the initiative to answer a question of EU law that has not been asked. Although regarded as being a little artificial, the standard way to phrase the question is to ask the CJEU: '*whether the provision of EU law is to be interpreted as precluding a rule of national law, such as that at issue in the main proceedings, which…*'. In the **Annex** below, we have included by way of illustration a draft template reference request in relation to the interpretation of the EU Directive on the Right to Information.

The CJEU is competent to respond to questions of interpretation of EU criminal law, including the EU Procedural Rights Directives and the cross-border judicial cooperation instruments such as the EAW Framework Decision. Moreover, EU criminal law, like any EU law, must be interpreted in accordance with the **EU Charter of Fundamental Rights**.

It is important to expressly refer to the relevant provisions of the EU Charter in the question.

A word of caution

It is important to keep in mind that a badly worded question or set of facts by a national court may lead to unhelpful or sometimes damaging decisions by the CJEU. It is crucial for the defendant to help national courts draft the question appropriately and precisely, and to be engaged in every step of the process nationally and before the CJEU.

B. Raise fundamental rights arguments

Article 6(1) of the Treaty on European Union recognises the Charter of Fundamental Rights of the European Union as having the same legal value as the Treaties.

The CJEU has jurisdiction over human rights and interprets all EU law in light of the Charter. As the CJEU now has jurisdiction the field of police and judicial cooperation, it increasingly hears criminal cases where the defendant is asserting fundamental rights under the Charter. This has been particularly relevant in the execution of European Arrest Warrants, with several high-profile fundamental rights cases emerging.

Practitioners' tip

The CJEU is particularly receptive to arguments relating to prison conditions (raising concerns in relation to inhumane and degrading treatment) as well as issues relating to judicial independence. The CJEU has recognised the duty of national courts to take into account these fundamental rights when assessing whether to execute European Arrest Warrants.

There is an opportunity to raise before the CJEU other fundamental rights in this context – such as the right to privacy, family life – but only a good set of facts will result in good case-law!

The Charter is similar in many ways to the European Convention on Human Rights (**"ECHR"**). Indeed, Article 52(3) of the Charter states that meaning and scope of corresponding rights shall be the same as the ECHR, whilst not precluding a higher level of protection under the Charter: "the CJEU takes

account of the Convention as the minimum threshold for protection, meaning that the EU system of fundamental rights protection may go above and beyond that threshold".[36]

However, unlike the system set out by the ECHR, the Charter's fundamental rights are not self-standing for the EU Member States. Not all national measures may be examined in the light of the Charter, but only those that fall within the scope of EU law. So, where a national measure falls outside the scope of that law, it also falls outside the scope of the Charter.

Practitioners report the reluctance of national courts across the EU to make references to the CJEU, which may not traditionally be recognised as a "human rights" court or a court competent on criminal matters. It may need time for the criminal courts to start turning to the CJEU. As a lawyer, you have a role to support that process.

There is a fundamental difference in the procedural impact of asserting fundamental rights before the CJEU, compared to the ECtHR. Cases are referred to the CJEU during the trial stage of national proceedings, whereas cases brought before the ECtHR are often heard years after the violation has occurred once all national remedies have been exhausted. Moreover, the CJEU route offers the PPU option where a person is in detention, which is the quickest route to a ruling.

However, to some extent, the "threat" of a potential ECHR infringement may incentivise courts to make references, or at least to provide satisfactory reasons for not referring (which may be difficult if the interpretation is genuinely needed). The decision whether to refer and the possibility of bringing the Member States before the ECtHR arguing an infringement of Article 6 of the European Convention on Human Rights ('ECHR') for the failure by a court of final instance to respond adequately to a request for a reference to be made. In the case of *Dhahbi v. Italy,*[37] the ECtHR established, for the first time, a violation of Article 6 owing to the failure to provide any reasons for such a refusal. However, in the recent case of *Repcevirag Szovetkezet v Hungary*,[38] the ECtHR indicated that if reasons are provided, the ECtHR is not competent to assess the **merits** of the reasons.

How to raise an argument based upon the Charter of Fundamental Rights

The starting point for a methodical argument invoking the Charter should be **Article 6(1) TEU**: "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". 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. In this respect, you can also rely on **Article 6(1) TEU** which states that: "... 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

[36] Koen Lenaerts, President of the Court of Justice of the European Union, "The ECHR and the CJEU: creating synergies in the field of fundamental rights protection", Dialogue between judges – Proceedings of the Seminar 26 January 2018, Strasbourg, January 2018 (link here).
[37] App. No 17120/09, Judgment of 8 April 2014.
[38] App. No 70750/14, Judgment of 30 April 2019.

explanations referred to in the Charter, that set out the sources of those provisions." Title VII of the Charter includes 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". 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.

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.

That said, it is important to keep in mind that the ECHR sets out the minimum standard and that the content of the Charter may be more protective. 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.

For further information about Charter rights, please consult:

- the Charterpedia online tool developed by the Fundamental Rights Agency (link here): Case law database of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) as well as a selection of national case law with direct references to the EU Charter of Fundamental Rights.

- Fair Trial's Toolkit on Using the Charter of Fundamental Rights of the European Union in Practice (link here).

C. Raise general principles of EU law

Article 6(3) TEU explicitly recognises as general principles of EU law 'fundamental rights, as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States'.

Developed by the case-law of the CJEU, general principles have allowed the CJEU to implement rules in different domains of which the treaties make no mention. They supplement the legal gaps and give legitimacy to the EU legal order, as the embodiment of common values. General principles of EU law may be common to all the national legal systems of the EU countries and compatible with EU objectives, or specific to the EU, even if inspired from principles enshrined in certain national legal systems only.

In the context of litigation relating to criminal proceedings, the following general principles are key to invoke (where possible):

- Protection of fundamental rights: see above.
- Proportionality: this principle requires that measures implemented through EU law provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.[39] The Court developed the principle of proportionality as involving a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method.

[39] For instance, Case 137/85, *Maizena*, paragraph 15.

- Effectiveness: although it is for the domestic legal system of each Member State to establish detailed rules in criminal proceedings, national rules cannot make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.[40]
- Effective judicial protection: a specific aspect of the general principle of effectiveness is the obligation of domestic Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.[41] The CJEU has recognised that this is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.[42]
- Equality of arms: the principle of equality of arms is an aspect of the right to a fair trial enshrined in Article 47 of the Charter, which has the purpose of aiming to find a balance between the parties in the proceedings.[43]
- Equivalence: it is for the domestic legal system of each Member State to establish detailed rules in criminal proceedings, provided however that the national rules are not less favourable than those governing similar domestic situations.[44]
- Non-discrimination: Article 2 of the TEU specifies that the non-discrimination principle is one of the fundamental values of the EU. The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties. Under the title "Equality" (Articles 20 to 26), the EU Charter of Fundamental Rights emphasises the importance of the principle of equal treatment in the EU legal order.[45]

In addition to general EU law principles, it is useful to have regards to the protection of vulnerable individuals when applying and interpreting EU law. Most procedural rights instruments require member states to implement EU law taking into account the **needs of vulnerable suspects and accused persons**.

D. Coordinated litigation

[40] *Ibid.*

[41] See in particular the strong statements in this respect in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, paragraph 34: "Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields."

[42] Ibid, paragraphs 35 - 36.

[43] Case C-199/11, *Otis and others*, 6 November 2012, paragraphs 71 - 72: http://curia.europa.eu/juris/liste.jsf?num=C-199/11.

[44] See, for instance, the judgment of the CJEU in Case C-704/18, *Nikolay Kolev and Others*, 12 February 2020, paragraph 49: http://curia.europa.eu/juris/document/document.jsf?text=&docid=223305&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3216542.

[45] Council of Europe, European Court of Human Rights, European Union Agency for Fundamental Rights, Handbook on European non-discrimination law, 2018 Edition.

As a practitioner, you may face reluctance by national prosecutors or judges to apply a specific right under the EU directives, and instead continue the practice prior to the coming into force of EU law on a certain issue (e.g. access to file) even if you believe it is in direct violation of EU law.

In this respect, it may be helpful to develop a **template pleading** in relation to the specific issue that keeps arising in your jurisdiction, and that lawyers can use on each time the issue arises and put forward to the local courts. The need for a reference on a specific issue could be made clear through the **repeat invocation** of similar arguments. Eventually, a judge may be willing to use the template to formulate a preliminary question on the applicability of EU law to the CJEU in order to resolve the dispute.

Example - France[46]

In March 2013, the *Conference* of the Paris Bar (a yearly cohort of young lawyers) issued a template pleading relying on Article 7(1) of the Right to Information Directive, which it argued required the provision of the police file to an arrested person's lawyer, prior to its transposition deadline. Although this did not result in a reference, the initiative had the effect of placing the legislator under scrutiny.

Example - The Netherlands

The Court of Amsterdam, where all EAW requests are centralised, was criticised for refusing to refer to the CJEU a number of preliminary questions posed by the defence about the correct interpretation of the law and the EAW Framework Decision. A group of Dutch lawyers wanted to file a complaint with the European Commission about the refusals by the Court of Amsterdam and this seems to have let to the Court starting to ask more preliminary questions of the CJEU.

By way of guidance, in the **Annex**, we have drafted a template question of interpretation of EU law where we consider that guidance from the CJEU would be useful and suggest below relevant wording which you may be able to use and adapt in the event that one of the questions arises in any of your cases. We are continuing to work on such templates so please do not hesitate to contact us for further input.[47]

To the extent possible, a concerted effort at the national level may be helpful in supporting the need for a reference.

This may involve the following activities around a specific EU law issue:

- Circulation of EU law arguments/template amongst criminal practitioners;
- Publication of articles in the legal press or general media;
- Raising the issue in training sessions; or
- Engaging academics to raise the issue at conferences.

[46] For further information, see: https://eutopialaw.com/2014/06/03/access-to-the-criminal-case-file-french-example-shows-potential-impact-of-roadmap-directives/.

[47] For example, Fair Trials developed a series of template pleadings in the context of COVID-19 related restrictions, raising issues of access to a lawyer, access to information, access to interpretation services and remedies. These templates develop EU law arguments that can be used beyond the COVID-19 pandemic. For more information, please see the templates here.

Practitioners' tips

EU law helps! Good knowledge and awareness of the relevance EU law in criminal proceedings is key to obtaining references – trainings can be very helpful in this respect.

Don't be discouraged! Keep trying to get a reference on an issue – courts may be persuaded over time to refer an issue that keeps being raised. Implementation of EU law is a long-term process.

Civil or administrative courts dealing with compensation or other issues in criminal cases may also make references.

Think about asking for references on cases where you have a favourable set of facts to do so – a sympathetic judge may be more inclined to accept.

E. Domestic advocacy

There may be tension between different levels of judges within your country, for instance, lower court(s) disagreeing with a Supreme Court. The lower courts may be willing to exercise their discretion to make a preliminary reference request to the CJEU in order to seek to have a Supreme Court judgment with which the referring court disagrees overruled. This was the case in *Nikolova,* concerning the interpretation of Directive 2000/43/EC (the "Race Equality Directive") and the practice in Bulgaria of placing electricity meters atop 7m-high posts in areas of with concentrations of Roma population, widely considered to be discriminatory against that group. It was explained that this reference was made with the aim – openly recognised in the order for reference – of overruling a Supreme Court judgment with which the referring court disagreed.

Getting an NGO involved in the domestic proceedings by way of third-party intervention or through the submission of an amicus brief which in the specific context could make arguments in support of making a reference to the CJEU. NGOs have a role in creating discussions within the bar associations, in particular by cooperating with judges, academics and other stakeholders – something not to be undervalued in view of the greater role of doctrine in some jurisdictions (e.g. Germany). NGOs could play a key role in facilitating this, for instance organising roundtables to help develop consensus around the need for references on key points. NGO-led activities could also involve case-based litigation training where participants bring with them issues from their own jurisdictions to discuss litigation solutions

Third party interventions in CJEU proceedings

Please be aware that there is no possibility for third parties such as NGOs to intervene at the CJEU in a case to which they are not party at the national level.

If third parties wish to make formal observations before the CJEU, they must be formally joined to the national proceedings **before** the reference is made to the CJEU.

F. Regional advocacy

The European Commission will always intervene in preliminary ruling proceedings and it has an authoritative voice. It will often take a pro-citizen line and may be the individual's only ally against the views of the Member States. It is worth therefore worth trying to influence beforehand.

The European Commission will often take a **pro-citizen line** and may be the individual's only ally against the views of the Member States, and it may be worth trying to contact relevant policy officers beforehand.

It is also possible to make a complaint to the Commission about a court's refusal to make a reference to the CJEU. The European Commission also has a significant role to play in the implementation of the Roadmap Directives. As the 'Guardian of the Treaties', it has responsibility for ensuring accurate and effective implementation of the Treaties. Member States are obliged to notify implementing measures to the Commission. If they fail to, or if the Commission considers that the national law does not comply with EU law, the Commission can issue a reasoned opinion and thereafter put the matter before the CJEU; subsequent to a finding of the CJEU that a Member State has failed to fulfil its obligations, the Commission can take the Member State to the CJEU again if no or insufficient action is taken, and fines may be imposed at that stage.10 However, there is little indication to date that it will be able to do a lot in this regard, not least because the relevant team is under-resourced and has limited capacity to monitor the situation in detail. For political reasons, too, the Commission might not be keen to be confrontational and there is a role for NGOs in pushing the Commission, through putting information at its disposal and mobilising lawyers to take individual complaints to the Commission, accompanied by pressure for it to take these forward into formal letters of notice and infringement actions. In any event, the threat of **infringement proceedings** may prompt the national court to make a reference.

VII. Resources

- EU Treaties, Regulations and Directives
- CJEU Judgments, Opinions, Orders and Pending Cases
- CJEU Rules of Procedure and Information Notes
- CJEU Registry
- Charterpedia, European Union Agency for Fundamental Rights (FRA), Regularly updated.
  Case law database of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) as well as a selection of national case law with direct references to the EU Charter of Fundamental Rights.
- Factsheet on ECtHR case law concerning the European Union, European Court of Human Rights, Regularly updated.
  Including case law on preliminary ruling to CJEU and European Arrest Warrant.
- Mapping CJEU Case Law on EU Criminal Justice Measures, Fair Trials, March 2021.
  Summary of decisions of the CJEU by reference to the underlying provisions of EU legislation, including the Framework Decision on the EAW.
- How to initiate a preliminary reference request to the European Court of Justice in criminal proceedings?, Fair Trials, May 2019.
- Practical Guidance for Advocates before the Court of Justice in Preliminary Reference cases, Council of Bars and Law Societies of Europe (CCBE), 2015.
- Toolkit on Using the EU Law in Practice, Fair Trials, 2015.

Annex – Template Reference Request on the right to information

Background

There appears to be a common problem across Member States regarding access to the case file during the pre-trial proceedings. The reasons for withholding access seems to vary between Member States. National courts and authorities on the one hand took the view that access was not needed in principle, as this was the investigative phase and the lawyer did not need access to defend the suspect effectively. Other Member States "justify" this restriction on the basis of the need to protect the investigation, and take the view that there was a reasonable 'balance' between the investigation and the rights of the defence.

Defence lawyers are routinely denied access to the case file during the pre-trial stages, including those elements that are essential in order to challenge the lawfulness of the arrest of detention.[48] In a survey conducted in 2018, Fair Trials found that:

- In **Italy**, **Spain**, **Finland**, **Bulgaria** and the **Netherlands**, lawyers are not given access to the casefile in order to challenge the initial arrest.
- In **Spain**, the only information that was accessible to arrested persons and their lawyers to challenge an arrest within the first 72 hours of detention was a document with "very generic" summaries of information contained in the case file. Very recently the Spanish Constitutional court has overruled the practice related to the first 72 hours, instructing the Spanish authorities that, during this period, they must provide access to documents and information relating to incriminating evidence (i.e. the basis for the reasonable suspicion). The court's decision makes no reference to providing exculpatory evidence, nor does it fully instruct who should be making the decision on what evidence to provide which implies that it is the police officer in charge of the case.
- The authority competent to decide what elements are essential varies throughout. Whilst in **Italy**, **Romania**, **Lithuania** and **Greece** the prosecutor decides what evidence to disclose at this stage and to what extent are lawyers able to ask for more, in **Spain**, **Finland** and **Denmark** the decision lies with the police.

In this respect, Article 7(1) of Directive 2012/13/EU on the Right to Information (**"Right to Information Directive"**) gives a detained person the right of access to case materials which are "essential" to challenging effectively the lawfulness of the arrest or detention. In the case of an initial arrest, this must, in Fair Trials' view, include evidence deemed to constitute lawful grounds for interference with the person's liberty (i.e. reasonable suspicion of an offence).

This right applies notwithstanding national procedure and practice, by virtue of the principle of supremacy of EU law. For reference, national authorities and courts are obliged to apply the provisions of EU law even if national law conflicts with it as EU law has primacy.[49] The effectiveness

[48] https://www.fairtrials.org/wp-content/uploads/Access-to-file-report-FINAL.pdf.

[49] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Official Journal of the European Union, C 115, 09 May 2008: "the Treaties and the law adopted by the Union on the basis of the Treaties shall prevail over the law of the Member States".

principle and the *bona fide* principle stipulate that EU law should be implemented as quickly and effectively as possible. When a country does not transpose a directive or when the transposition is not consistent, directives are also directly applicable under certain conditions – which means that they can be invoked and relied upon directly and prevail over any conflicting national legislation.[50]

In view of the great disparity amongst EU Member States, guidance from the CJEU would help ensure an even level of protection afforded to EU citizens, it would be helpful to seek guidance from the CJEU on the meaning of "essential", in view of framing the discretion of national authorities in respect of the case materials that are disclosed. The need for a reference on the point could be made clear through the repeat invocation of similar arguments.

Hypothetical factual scenario

- Your client is arrested and held in pre-trial detention.
- You seek access to the case file which contains material evidence uncovered by the investigating authorities, and which you consider necessary to be in a position to assess whether the arrest/pre-trial detention order is lawful.
- The relevant authority discloses some evidence to you, but refuses to give you access to other case materials on the basis of national procedural rules (e.g. a possibility to restrict access for "overriding reasons" for instance) which you consider may be relevant to assess the lawfulness of your client's detention.
- As a result, you are not in a position to assess (and possibly challenge) the lawfulness of the arrest or detention of your client (e.g. whether there is a sufficient ground for suspicion that your client committed the offence).
- You challenge the decision to refuse access to these documents before a judicial authority during the pre-trial proceedings (e.g. to seek the invalidity of the detention order).
- Even though the relevant authority had the competence to refuse to give you access to the case materials under the relevant applicable domestic rules, you seek to rely upon the right in Article 7(1) of the Right to Information Directive to access "essential" case materials to argue that the domestic rules should be precluded from applying as a result of EU law obligations.
- You show the court information about the discussion of Article 7(1) in different jurisdictions, demonstrating that it is an issue in need of clarification and suggest that the court should seek a reference for a preliminary ruling to the CJEU.

Template reference request

Section 1 - The referring court or tribunal

1. The following is the substantive text of the request for a preliminary ruling pursuant to Article 267 TFEU made by [NAME OF REFERRING COURT] on [INSERT DATE].

Section 2 - The parties to the main proceedings and their representatives

[50] For further information, see Fair Trials – Roadmap Practitioner Toolkit on using EU law in criminal practice available at: https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-.pdf.

2. [STATE THE NAMES OF THE PARTIES TO THE MAIN PROCEEDINGS AND ANYONE REPRESENTING THEM BEFORE THAT COURT OR TRIBUNAL. PLEASE INCLUDE THE EXACT POSTAL ADDRESS OF THE PERSONS CONCERNED, THEIR TELEPHONE OR FAX NUMBER AND EMAIL ADDRESS.]

Section 3 - The subject matter of the dispute in the main proceedings and the relevant facts

3. [DESCRIBE THE SUBJECT MATTER OF THE DISPUTE IN THE MAIN PROCEEDINGS AND THE RELEVANT FINDINGS OF FACT AS DETERMINED BY THE COMPETENT NATIONAL COURT OR TRIBUNAL.]

Section 4 - The relevant legal provisions

4. [INCLUDE PRECISE REFERENCES TO THE RELEVANT PROVISIONS OF NATIONAL LAW APPLICABLE TO THE FACTS OF THE DISPUTE IN THE MAIN PROCEEDINGS, INCLUDING ANY RELEVANT CASE-LAW. THE REFERENCES MUST BE COMPREHENSIVE AND INCLUDE THE PRECISE TITLE OF AND CITATIONS FOR THE PROVISIONS CONCERNED, AS WELL AS THEIR PUBLICATION REFERENCES.]

5. Article 6(3) of the European Convention of Human Rights (**"ECHR"**) provides that:

   "Everyone charged with a criminal offence has the following minimum rights:

   (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) To have adequate time and the facilities for the preparation of his defence;
   (c) To defend himself in person or through legal assistance (…)"

6. Article 5(4) of the ECHR provides that:

   "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*"

7. Article 47 of the Charter of Fundamental Rights of the European Union (the **"EU Charter"**) provides that:

   "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

8. Article 48 of the Charter states that:

   "1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

   2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

9. Article 6 of the EU Charter further provides that:

   "Everyone has the right to liberty and security of person."

10. Article 19(1) of the Treaty on European Union states that:

> *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*"

11. Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (the **"Right to Information Directive"**):

> *"1. 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.*
>
> *2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.*
>
> *3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.*
>
> *4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.*
>
> *5. Access, as referred to in this Article, shall be provided free of charge."*

12. Recital 30 of the Right to Information Directive specifies that:

> *"Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention."*

Section 5 – The grounds for reference

13. [PLEASE DESCRIBE NATIONAL LAW AND PRACTICE ON ACCESS TO CASE FILE MATERIALS TO CHALLENGE THE ARREST/DETENTION].

14. Article 7(1) of the Right to Information Directive requires Member States' authorities to provide access the 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." Recital 30 of that same Directive provides some further guidance on the meaning of "documents" in this context. In the absence of further details on what is to be considered as "essential" for the purposes of the application of the Right to Information Directive, the referring court seeks guidance from the Court on the meaning of "essential" in this context.

15. This provision reflects Article 48 of the Charter and is consistent with previous case law developed by the CJEU regarding the rights of defence in administrative manners, according to which an entity must be informed of the evidence adduced against it to justify the measure adopted by the administration and adversely affecting it (Case T-496/19, *Bank Mellat v Council)*. When a person is deprived of their liberty, such right to be informed of the reasons for the arrest and the evidence substantiating those reasons is critical to enable the person, through their lawyer, to form a view as to the legality of the arrest and decide whether to exercise their right to challenge the arrest.

16. The referring court also notes that Article 7(1) of the Right to Information Directive reflects the jurisprudence of the European Court of Human Rights in relation to Article 5(4) of the ECHR, which that court has interpreted as requiring access to those materials which are necessary for challenging detention: "*The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions of the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer.*"[51]

17. In order to enable an arrested person to challenge the lawfulness of the detention, the ECtHR case law requires that "*the detainee must be given an opportunity effectively to challenge the basis of the allegations against him [...] This may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention [...] It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him[...]*" (Judgment of 19 February 2009, *A. and others v. the UK*, App. no. 3455/05, paragraph 204). In this context, access to the case materials provides the arrested person with information about the evidence underlying the reasonable suspicion that the person

[51] Case of *Chruściński v. Poland*, App. no. 22755/04 (Judgment of 6 November 2007), paragraph 56.

has committed an offence, and (if applicable) of the additional ground(s) for continued detention, which forms the basis of the arrest warrant/pre-trial detention order. The ECtHR has recognised that even if evidence is confidential for national security reasons, the protection of that material cannot come at the expense of substantial restrictions on the rights of defence and the relevant evidence will have to be disclosed, perhaps with allowances made for its confidential nature (Case of *Dochnal v. Poland*, App. No 31622/07, Judgment of 18 September 2012, paragraph 87).

18. The same reasoning must, therefore, apply in the context of Article 6 of the Charter, which reflects Article 5(4) of the ECHR.

19. Moreover, the referring court notes that Article 7(1) of the Right to Information Directive does not contain any explicit derogation. Article 7(4) of that same directive sets out grounds for restricting access to material evidence, but states specifically that these grounds apply only as a derogation to Articles 7(2) and (3). Those provisions relate to the disclosure of material evidence beyond that which is necessary for challenging detention and are themselves expressed as being "without prejudice to Article 7(1)". It follows that Article 7(1) is not subject to any derogation. There does not, therefore, appear to be any possibility for national authorities to restrict access to the key documents which are material to the detention decision.

20. The referring court further notes that any restriction to access the evidence relating to the grounds of the arrest/detention order may compromise the right of the suspect to exercise his right to challenge the lawfulness of such detention and seek a remedy before a judicial authority. Such right is enshrined in Article 48 of the Charter, and in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (Judgment of 27 February 2018 in Case C-64/16), which relates to questions of judicial independence in Portugal, the Court emphasised that the principle of "effective judicial protection of individual rights under EU law" referred to in Article 19(1) TEU is an obligation that applies to all Member State courts, including therefore this referring court. Moreover, the Court expressly stated in that judgment that this principle is enshrined in Article 47 of the Charter (the right to an effective remedy and fair trial).

21. It follows that the referring court must ensure that the person concerned by the arrest warrant/pre-trial detention order is placed in a position to exercise his defence rights and challenge the grounds of his detention, in accordance with Article 7(1) of the Right to Information Directive, as interpreted in the light of Article 5(4) and 6(3) ECHR, as well as Articles 6, 47 and 48 of the Charter. Therefore, this court seeks guidance from the CJEU on how to ensure effective judicial protection of the person's right to exercise his defence rights and challenge the lawfulness of his arrest or detention.

Section 6 – The questions referred for a preliminary ruling

22. Is the concept of "essential" in Article 7(1) of the Right to Information Directive to be interpreted as requiring that investigating authorities grant the defendant access to all the evidence contained in the case material that relates to the grounds for the arrest

warrant/pre-trial detention order, in so far as access to such evidence is necessary to enable the arrested person to effectively exercise his rights of defence and in particular right to challenge the lawfulness of the arrest warrant/pre-trial detention order before a judicial body?

23. Does Article 7(1) preclude the [prosecuting] authority from relying upon powers available under national law which enable him to refuse access to the essential materials relating to the grounds for the arrest, in so far as such a restriction prevents the exercise by the arrested person of his right to challenge the lawfulness of the arrest warrant/pre-trial detention order before a judicial body?

24. If the answer to the above question is negative, on what grounds does Article 7(1) of the Right to Information Directive allow the [prosecuting] authority lawfully to restrict access to the evidence contained in the case materials which constitute the grounds for the arrest warrant/pre-trial detention order?

Section 7 – Possible need for specific treatment

1. [INDICATE HERE IF THERE IS A NEED TO PRESERVE ANONYMITY OF THE PERSONS CONCERNED OR WHERE URGENCY. THE REASONS FOR SUCH TREATMENT MUST BE SET OUT IN DETAIL IN THE REQUEST FOR THE PRELIMINARY RULING AND IN THE COVERING LETTER.]