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Strategic Litigation Pack

Ireland

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STRATEGIC LITIGATION PACK

IRELAND

Table of Contents

1. Introduction

The existence and proper functioning of the European Union (**EU**) in all areas is based on trust between Member States that they share a common set of values. They include the "universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."[1] These values underpin the close cooperation between Member States from opening their borders to citizens of other Member States to transferring persons to another Member State to be tried in front of its courts. Fundamental rights in the EU are first and foremost protected by the Charter of Fundamental Rights of the European Union (**Charter**), which is a source of primary EU law having the same status and legal force as the founding treaties of the EU. However, some specific areas such as cooperation in criminal matters require more detailed rules to ensure that the minimum level of protection of fundamental rights is harmonised across the EU. Therefore, over the past decade the EU has adopted six Directives (**Procedural Rights Directives**) to strengthen the protection of suspects' and accused persons' rights in criminal proceedings.[2] These directives cover some of the most important aspects of defence rights in criminal proceedings – the right to a lawyer and legal aid, the right to interpretation and translation, the right to information and access to case materials, the presumption of innocence, and the protection of children's rights in criminal proceedings. The growing body of EU criminal law also covers a recommendation on the rights of vulnerable suspects and accused persons,[3] cross-border[4] and other instruments.

All EU Member States belong to the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms (**ECHR**) and are bound by the standards set by the convention and jurisprudence of the European Court of Human Rights (**ECtHR**), including on the right

[1] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, 2nd recital of the Preamble and Article 2.

[2] 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); 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); 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); Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings (OJ L 132, 21.5.2016, p.1.); 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 L 65, 11.3.2016, p. 1); Directive 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 L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

[3] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

[4] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

to a fair trial and the right to effective remedy. However, the so-called Roadmap Directives[5] detailing the rights of suspects and accused persons were born out of the EU's recognition that the ECHR alone was insufficient to uphold Member States' trust in each other's justice systems: a more detailed set of standards needed to be laid down in EU law to protect suspects' and accused persons' rights. In adopting the Procedural Rights Directives, the EU created the most detailed existing set of regional standards designed to protect basic fair trial rights of persons accused of a criminal offence. Generally, when it comes to defence rights, EU and ECHR standards overlap and must be interpreted in harmony with each other. However, in some areas including access to a lawyer,[6] the right to information about rights[7] or access to case materials,[8] EU law has a higher standard than that required by the European Court of Human Rights (**ECtHR**). Failures to implement EU law can also be brought before the EU oversight mechanisms – the Court of Justice of the European Union (**CJEU**) on a judicial level and the European Commission on an administrative level – forcing Member States to comply.

Despite these advantages, EU law continues to be underused in domestic litigation even where national law or practice is in clear violation of the Procedural Rights Directives or the Charter.

Defence lawyers have enormous potential to drive the use of EU law to challenge fundamental rights abuses in criminal cases. They operate on the front-line of the justice system, deciding which legal arguments to make and, in particular, whether to draw on fundamental rights protected by EU law. They have the potential to address existing fundamental rights violations and to protect against new threats to fair trial rights where national law falls short of the minimum standards under EU law. Through the preliminary reference procedure, lawyers can also encourage courts to clarify key issues of interpretation in EU law itself, including the notion of effective remedy for violations of directive rights, the scope of the right to access to a case file in pre-trial proceedings, or what are the 'essential documents' in pre-trial detention proceedings. In recent years, lawyers have increasingly demonstrated that their work plays a key role in bridging the gaps in fundamental rights protection under EU law. Their role has been instrumental in proceedings resulting in landmark decisions on the protection of the right to a fair trial[9] and the clarification of important notions, such as the 'issuing judicial authority'[10] in the European Arrest Warrant (**EAW**) proceedings or 'essential documents' in pre-trial detention proceedings.[11] Defence lawyers have also alerted the national courts about other situations liable to result in a violation of the prohibition of inhuman and degrading treatment, such as a serious mental condition of the requested person resulting in a pending preliminary reference request before the CJEU.[12]

Thus, lawyers have the potential to directly contribute to raising the standards of existing EU law for the benefit of defence rights across Europe.

[5] Resolution of the Council 2009/C 295/01 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 30 November 2009, recitals 2 and 8.
[6] Article 3 of the Directive 2013/48/EU on access to a lawyer.
[7] Article 4 of the Directive 2012/13/EU on the right to information.
[8] Article 7(2) of the Directive 2012/13/EU on the right to information.
[9] See e.g., CJEU, *Case C-2016/18 PPU, LM*, 25.07.2018.
[10] See e.g., CJEU, *Joined cases C-566/19 PPU and 626/19 PPU, JR and YC*, 12.12.2019; CJEU, Case C-625/19 PPU, *XD*, 12.12.2019; CJEU, *Case C-627/19 PPU, ZB*, 12.12.2019.
[11] CJEU, *Case C- 242/22 PPU, TL*, 1.08.2022.
[12] CJEU, *Case C-699/21, E.D.L*.

1.1. About this Strategic Litigation Pack

This document is designed to give practical advice, mainly to defence practitioners, on how to use EU law in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the Legal Experts Advisory Panel (**LEAP**) in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

This document is intended to provide a brief and accessible overview of the basic principles of EU law and the Charter and their application in national proceedings (Chapter 2). It will also provide guidance on the main steps of the preliminary reference procedure before the CJEU and how to argue for such reference in domestic cases (Chapter 3). Finally, it includes several practical examples (template arguments) on how to incorporate EU law in defence submissions in criminal proceedings in relation to key defence rights (Chapter 4). The templates are based on key issues defence lawyers face in many Member States – access to case materials in pre-trial detention proceedings, access and quality of interpretation and translation, and access to a lawyer before police questioning.

Use this document together with Fair Trials' other materials on specific EU law instruments, notably:

- The toolkit on the Right to Interpretation and Translation Directive;
- The toolkit on the Right to Information Directive;
- The toolkit on the Legal Aid Directive;
- The toolkit on the Presumption of Innocence Directive;
- The toolkit on the Charter of Fundamental Rights of the European Union;
- The online legal training on pre-trial detention.
- The CJEU Preliminary Reference Toolkit**.**

2. Using EU law in domestic strategic litigation

2.1. Introduction

EU law can play an immensely important role in national proceedings in upholding the basic right of suspects and accused persons at all stages of criminal proceedings. However, the application of EU law can seem complex at first sight due to the differences in the legislative instruments used and how they apply in relation to national law. For example, some EU law instruments such as EU treaties and regulations apply directly without the need to transpose them into national law. Directives, on the other hand, need to be transposed into national law and only become directly applicable when a Member State has failed to do so. In order to understand how to rely on EU law before national courts, it is thus important to first understand the basic principles of interpretation and application of EU law. In the following Chapters, we will briefly explain the basic principles of interpretation and application of EU law and the Charter.

2.2. Basic principles of EU law

In the following Chapters, we will briefly explain the main principles of applying EU law domestically. These principles are important to understand the interplay between national and EU law and to correctly invoke and apply EU law, such as the Procedural Rights Directives. Basic principles of EU law help understanding the place of EU law in the hierarchy of domestic law as well as the main principles of interpretation of both the national law implementing EU law and the provisions of directives, regulations, and framework decisions themselves.

2.2.1. Primacy of EU law

The starting point of using EU law in domestic litigation is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. In EU law, this is called the 'principle of primacy of EU law' and it means that in case of contradiction between national law and EU law, the latter takes precedence[13] and under certain conditions can be directly invoked before national courts to claim rights guaranteed by EU law against the state.[14]

The primacy of EU law applies to all national law, whether it was adopted before or after the EU act in question. The principle of primacy of EU law is primarily aimed at ensuring that EU citizens are uniformly protected by EU law across all EU territories.

2.2.2. Direct effect of EU law

EU law works through a system of 'decentralised' enforcement where the national court is the primary institution charged with ensuring that it is complied with. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,[15] in which the European Court of Justice (now the CJEU) established the principle of 'direct effect'. The idea is that when an EU law instrument provides rights to individuals and requires Member States to guarantee those rights, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was

[13] CJEU, *Case 6-64, Costa v. E.N.E.L.*, 15.07.1964.
[14] CJEU, *Case C-236/92 Difesa*, 23.02.1994, paras. 8-10.
[15] CJEU, *Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 5.02.1963.

originally recognised for primary law (the Treaties) when the right and corresponding obligation in question was 'precise, clear and unconditional' and 'does not call for additional measures' by Member States or the EU. It was then extended to regulations and subsequently to directives.

2.2.3. Direct effect of directives

Although directives are commonly drafted in a detailed and precise language, they are addressed to Member States and set a number of 'objectives' they must implement. This means that generally directives must be transposed into national law, and they work indirectly though national legislation. Member States also have certain discretion to choose how to best implement a directive into their national system, including the choice of the legislative act or where necessary the best practical arrangements. After a directive is adopted by the EU, Member States are usually given a certain time period to transpose it into national law, with a deadline set in the directive itself.

However, certain provisions of directives can have direct effect where the Member States have failed to implement the directive in time or have implemented or applied it incorrectly. This was originally established by the CJEU in the *Van Duyn*[16] and *Ratti*[17] cases and more recently in *Difesa*:

> *"(…)[W]herever the provisions of a directive appear (…) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (…) A[n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (…)."*[18]

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

- the transposition deadline of the directive has passed;
- the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;[19]
- it is invoked against a state;
- it gives rights to an individual; and
- it is unconditional and sufficiently precise, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

'Unconditional and sufficiently precise' does not mean that the provision for it to have direct effect will not need any interpretation or that it cannot include any conditions or limitations. Even if a provision is arguably not 'unconditional and sufficiently precise' because it is drafted in general terms and may require some interpretation, it can still be relied on directly in national courts. The CJEU has clarified some of those instances:

- The fact that a certain provision needs interpretation does not prevent it from having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.[20]

[16] CJEU, *Case 41/74 Van Duyn,* 4.12. 1974.
[17] CJEU, *Case 148/78 Ratti*, 5.04.1979.
[18] CJEU, *Case C-236/92 Difesa,* 23.02.1994, paras. 8-10.
[19] CJEU, *Case C-62/00 Marks & Spencer plc v. Commissioners of Customs & Excise*, 11.07.2002, para. 27.
[20] CJEU, *Case 41/74 Van Duyn,* 4.12.1974, para. 14.

- The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.[21]
- A provision which "limits the discretionary power"[22] of the Member State or imposes an obligation for Member States to "pursue a particular course of conduct"[23] may also be invoked in national courts. An individual may invoke such a provision to argue that the national authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.[24]

In our view, it is possible to argue that the provisions of Procedural Rights Directives are mostly sufficiently clear and precise to produce direct effect. They confer specific rights to suspects and accused persons in criminal proceedings. For example, Article 3(2)(a) of Directive 2013/48/EU on the right to access to a lawyer guarantees the suspect or accused person access to a lawyer before they are questioned by the police or by another law enforcement or judicial authority. Similarly, Article 4(1) of the Directive 2012/13/EU on the right to information gives suspects and accused persons who have been arrested or detained the right to promptly receive a written Letter of Rights. These rights are clearly granted to an individual person and can be invoked against a state in case of failure to implement them in the national law and practice. Even if in some instances some terms used in the Procedural Rights Directive such as 'essential documents'[25] in pre-trial proceedings may require some interpretation, the right to access case materials in order to effectively challenge the lawfulness of arrest and detention is defined sufficiently clearly and precisely to invoke it directly in your litigation before national courts.

2.2.4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of a directive to ensure its full effectiveness. The CJEU has clarified the obligation as follows:

> *"The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it."*[26]

In some cases, the preamble of a directive can be used as an interpretative source. Recitals of directives have no legal binding force and they do not in themselves contain any enforceable rights or obligations and cannot alter the content of substantive provisions.[27] However, they explain the background and the objectives of each directive. Thus, they are important for understanding the directive and can be used as an interpretative source.

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[21] Ibid., para. 7.
[22] Ibid., para. 13.
[23] CJEU, *Case 51/76 Verbond van Nederlandse Ondernemingen*, 1.02.1977, para. 23.
[24] Ibid., para. 24.
[25] Article 7(1) of the Directive 2012/13/EU on the right to information.
[26] CJEU, *Case C-69/10 Samba Diouf*, 28.07.2011, para. 60.
[27] The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, *Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j.*, 2.04.2009, para. 16.

2.3. Basic principles of application of the Charter

The Charter of Fundamental Rights of the European Union is the main EU human rights instrument. It contains a broad catalogue of human rights, including core rights such as the right to life, the right to liberty, the prohibition of torture, inhuman or degrading treatment, and the right to a fair trial. It also covers social and economic rights, such as the right to work, the right to social security and social assistance, freedom to conduct business, and others. In the EU context, it also includes the specific freedom of EU citizens to freely move and reside anywhere within the territory of Member States.

Since EU law is mostly implemented and applied on a national level, the Charter plays an essential role in interpreting and applying EU law at a national level. Therefore, it is important that you refer to it in national litigation regarding the rights of suspects and accused persons. The following sections will address the background and principles of application of the Charter, as well as its relationship with the national fundamental rights and the ECHR. For more detailed information on key Articles of the Charter that are likely to be useful in domestic litigation on defence rights, see the toolkit on the Charter of Fundamental Rights of the European Union.

2.3.1. Historical background

The original Treaties of the European Communities did not include human rights provisions since the core objectives of the European Communities were initially purely economic. However, as the European Communities increasingly expanded their activity, the need for protection of human rights gradually surfaced. In the late 1960s, the CJEU recognised that the 'general principles of European Communities' law', which are based on common constitutional traditions of the Member States, included also fundamental rights. However, the EU had no written catalogue of fundamental rights incorporated in its law.

In 1996, when the European Court of Justice (now the CJEU) declared that the European Commission lacked competence under the Treaties to join the ECHR,[28] the EU started working on its own bill of rights. The Charter of Fundamental Rights of the European Union was proclaimed by the European Institutions in December 2000 but remained a non-binding instrument. Almost ten years later, the Lisbon Treaty[29] gave the Charter the same legal value as the EU Treaties, thereby placing it among the primary sources of EU Law.

2.3.2. General purpose of the Charter

The preamble of the Charter expresses the main rationale for introducing human rights[30] into the EU's legal framework:

> *"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."*

[28] Opinion 2/94 on Accession of the Community to the ECHR, 28 March 1996.

[29] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1–271, Art. 6.

[30] Throughout this Toolkit we use the terms "fundamental rights" and "human rights" interchangeably, i.e., where contextually appropriate the term "human rights" may refer to the fundamental rights as set out by the Charter for the EU legal system.

Fundamental rights are one of the shared values on which the EU is based and which stand at the core of mutual trust between Member States. The Charter, as a modern and relatively new human rights instrument in EU history, brings together fundamental rights as they are found in the constitutional traditions and international obligations common to all the Member States and expresses them in modern terms. The Charter thus sets out the fundamental rights of everyone living in the EU, including civil and political rights as well as economic, social and cultural rights, and the specific rights of EU citizens.

The Charter is addressed to the EU institutions, bodies, offices and agencies as well as to the national authorities when they are applying EU law. While it is important that EU law itself complies with the standards of the Charter, it is primarily enforced and applied at national level. Therefore, the Charter is particularly relevant to national actors. In many areas, Member States enjoy a certain margin of appreciation when they transpose and apply EU law. However, in these cases the Charter provides additional guidance on how they must use this room for manoeuvre in a way that is compatible with fundamental rights.[31] Thus, the interpretation and application of national legislation that transposes EU law must be guided by the fundamental rights standards as they are found in the Charter.

The Procedural Rights Directives, the Recommendation on rights of vulnerable suspects and accused persons[32], and cross-border instruments[33] must therefore also be applied and interpreted in accordance with the Charter.

2.3.3. Principle of primacy and the Charter

As explained above, EU law stands higher in the hierarchy of legislative acts than domestic law. The principle of primacy of EU law means that in case of conflict between EU law and national law, EU law prevails and must be applied by national courts above national law.

Regarding the Charter specifically, Article 6 of the Treaty on the European Union ('**TEU**') states that the EU "*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 EU law, which means that it imposes overriding obligations over national law.

The Charter applies to Member States when they implement EU law, and it enjoys primacy in the same way as the other treaty provisions. This makes the Charter an important and powerful tool in bringing

[31] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", January 2016, p. 11.

[32] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

[33] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

national law in line with human rights standards. The principle of primacy in this case essentially means that the national law implementing EU law may not be applied in a given case if it is not fully consistent with the Charter.[34]

2.3.4. Direct applicability of the Charter

Direct applicability of EU law means that a provision of EU law becomes a part of the Member States' national legal systems directly and, as such, does not call for national implementation measures. Generally, primary EU law – the Treaties – and also some categories of secondary EU law, specifically regulations, are directly applicable. They can be directly invoked before national courts by parties to proceedings, including individuals.

Regarding the Charter, Article 6(1) TEU stipulates that the rights, freedoms and principles set out in the Charter have the same legal value as the Treaties. This statement is generally understood as confirming that the Charter has the status of primary law within the EU legal order. The provisions of the Charter are therefore directly applicable in the Member States as long they are precise, clear and unconditional, that is, they have "direct effect".

2.3.5. Direct effect of the Charter

As explained above, EU law works through a system of "decentralised" enforcement where the national court is the primary driver of compliance. Direct effect is an essential principle of EU law, which safeguards the efficiency of EU law by making it possible for individuals to rely directly on EU law in national court where EU law gives rights to individuals which have not been timely or correctly transposed (applied).

A provision has direct effect when it is sufficiently "precise, clear and unconditional" and that it "does not call for additional measures" by Member States or EU institutions. This principle was first recognised by the CJEU for the provisions of the Treaties. The CJEU held:

> *"In accordance with settled case-law, the provisions of primary law which impose precise and unconditional obligations, not requiring, for their application, any further action on the part of the EU or national authorities, create direct rights in respect of the individuals concerned".*[35]

Applied to the Charter, a sufficiently precise and clear Charter provision can be relied upon immediately provided that:

- it has to be invoked against a state authority (not another private person) or an EU institution;
- it must give rights to an individual; and
- the invoked provisions are unconditional and sufficiently precise (the right is set out in unequivocal terms and does not require further implementation measures by the EU or the Member State).

Some rights in the Charter require implementing measures to give them full effect. For example, Article 47 on the right to effective remedy and to a fair trial requires by its nature that states set up independent courts and adopt procedural rules to guarantee the effective exercise of these rights.

[34] EU Agency for Fundamental Rights "Ten years on: unlocking the Charter's full potential", 2020, p.6.
[35] CJEU, C-537/16, *Garlsson Real Estate SA and others v. Commissione Nazionale per le Società e la Borsa (Consob)*, 20.03.2018, para. 65.

Nevertheless, the CJEU has ruled that it can be relied on directly in disputes falling within the scope of EU law. The CJEU ruled in *Egenberger*:

> *"Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such."* [36]

Thus, the Charter rights can be relied upon directly in litigation before national courts even where they require some positive action from Member States to implement certain aspects of the right. Where the case involves EU law or national law or practice implementing EU law, you can rely on the Charter for their interpretation.

2.3.6. Duty of conforming interpretation and the Charter

Regardless of whether a Charter provision has direct effect, national courts must interpret the national law implementing EU law in the light of the Charter. In other words, national courts are under the obligation to guarantee that national legislation is interpreted and applied in so far as possible in conformity with the Charter.

In relation to framework decisions and the duty of conforming interpretation, the CJEU held in *Pupino*:

> *"In the light of all the above considerations, the Court concludes that the principle of confirming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."*[37]

The principle of conforming interpretation was later extended to include conformity with the Charter:

> *"[I]t should also be borne in mind that, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter."*[38]

Thus, national law implementing EU law must be interpreted not only in conformity with the secondary EU law, but also the Charter.

2.3.7. When does the Charter apply?

The Charter is primarily addressed to EU and national institutions. Article 51(1) of the Charter states that it applies to the institutions, bodies and agencies of the EU and to the Member States where they are implementing EU law. The notion of "when implementing EU law" is rather broad and is not always well understood.[39] According to the CJEU:

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[36] CJEU, C-414/16 *Egenberger*, 17.04. 2018, para. 78.
[37] CJEU, C-105/03, *Maria Pupino*, 16.06.2005, para. 43.
[38] CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, 13.09.2018, para. 51.
[39] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", 22 June 2016, p. 11.

> *"The Court has consistently held that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter."*[40]

According to the case law of the CJEU, Member States are bound by the requirement to respect fundamental rights whenever they act within the scope of EU law.[41] Therefore, the notion of "when implementing EU law" covers all execution and application of the EU law:

> *"Since the fundamental rights guaranteed by the Charter must (…) be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."*[42]

The next step is to establish whether a subject matter falls within the scope of EU law. For the Charter to apply, at a minimum, there must be a link to EU law.[43] However, not every link to EU law is sufficient to trigger the application of EU fundamental rights. The link must be sufficiently concrete to qualify the application of national law as implementing EU law:

> *"In accordance with the Court's settled case-law, in order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it."*[44]

Thus, the Charter applies when Member States act as "agents" of the EU. The EU Agency of Fundamental Rights ('**FRA**') has listed the types of situations where the Charter applies:

- Member States transpose EU law into national legislation;
- Member States adopt national measures on the basis of powers conferred to them by EU law (discretionary powers);
- When national acts involve remedies, sanctioning or enforcement that are connected to EU law;
- When national acts involve legal concepts that are mentioned in EU law; or
- When national acts fall within the exact scope of EU law and there is no implementation measure, for instance when a state has failed to implement EU law.[45]

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[40] CJEU, C-358/16, *UBS Europe SE and Alain Hondequin and Others v DV and Others,* 13.09.2018, para. 51.
[41] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, Explanation on Article 51.
[42] CJEU, C-617/10, *Aklagaren v Hans Akerberg Fransson*, 26.02.2013, para. 21.
[43] European Union Agency for Fundamental Rights, "Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level", 23 October 2018, p. 39.
[44] CJEU, Case 198/13, *Hernández v Spain*, 10.07.2014, para. 37.
[45] Ibid. p. 40

2.3.8. Charter rights v. Charter principles

The Charter has two types of binding provisions referred to as Charter "rights" and "principles". They are referred to in Article 52 of the Charter which sets out the scope and interpretation of the "rights" and "principles".

Rights can be invoked directly by individuals before national courts, and they have to be guaranteed by Member States. Charter rights are, for example, the right to a fair trial, the right to private and family life, the right to liberty and security, the right to life, defence rights, etc.

Principles, however, work indirectly and must be respected by Member States when they adopt national rules to implement EU law.[46] Charter principles are most relevant in the context of the review and interpretation of those acts. For example, Charter principles include the principle of proportionality, the principle of equality, and the principle of integration of persons with disabilities. These principles, for example, the principle of proportionality is key to analysis of any restrictions of fundamental rights, therefore Charter principles can be key in your submissions on the interpretation of EU law before national courts.

2.4. Interplay between EU law, the ECHR, and national fundamental rights

Member States of the EU are simultaneously bound by multiple human rights instruments. On the one hand, there is the Charter and detailed provisions of defence rights under the Procedural Rights Directives. On the other hand, Member States are also bound by the ECHR and national constitutions that often contain elaborate human rights catalogues. Many of the fundamental rights directly affected by criminal proceedings, such as the right to a fair trial, the right to liberty and security, the right to an effective remedy, the principle of *nullum crimen, nulla poena sine lege*, the right to privacy, and other rights, overlap in these instruments and can seemingly lead to differing results if invoked before national courts. Therefore, it is important to understand the relationship between the Charter, the ECHR, and fundamental rights under national law.

2.4.1. The Charter and the ECHR

In principle, the Charter and the ECHR are meant to complement each other and corresponding rights under those two instruments should have the same meaning and scope.[47] This means that the same rights under the Charter must generally be given the same scope and meaning as the corresponding rights under the ECHR. Even though the EU did not join the ECHR, fundamental rights as recognised by the ECHR play a significant role in the EU legal order and the CJEU often refers to the case law of the ECtHR. Article 52(3) of the Charter states that "*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 Explanations relating to the Charter state that:

[46] Article 52(5) of the Charter.
[47] Article 52(3) of the Charter.

> *"Paragraph 3 [of Article 52] 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 reference to the ECHR covers both the Convention and the Protocols to it. 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 European Union."*[48]

However, as indicated by the last sentence of Article 52(3) of the Charter, it does not prevent EU law from providing more extensive protection than the ECHR, which only establishes the minimum baseline for interpretation of the Charter rights. In some ways the Charter does indeed provide a more extensive protection of fundamental rights. For example, Article 48 of the Charter elevates the right of defence to a distinct fundamental right whereas certain rights of defence are treated as "aspects" or "fundamental features" of the right to a fair trial under the ECHR.[49] This a key difference in interpreting the provisions of Procedural Rights Directives. Therefore, even though the Charter and the ECHR provide for the same rights and must generally be interpreted harmoniously, the Charter may be argued to provide a higher standard of protection for certain fundamental rights.

2.4.2. The Charter and fundamental rights under national law

The Charter is also not meant to contradict fundamental rights and constitutional traditions as defined under national law. Article 52(4) of the Charter specifies:

> *"In so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."*

This means that generally when it comes to national criminal proceedings national authorities and courts remain free to apply higher national standards than those found the Charter, provided they respect the provisions of the Charter as the minimum level of protection. Explanations relating to Article 52 of the Charter stipulate that:

> *"(…) The rule of interpretation contained in paragraph 4 [of Article 52] has been based on the wording of Article 6(3) of the Treaty on the European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g. judgment of 13 December 1979, Case 44/79 Hauer (1979) ECR 3727; judgment of 18 May 1982, Case 155/79, AM&S (1982) ECR 1575). Under that rule, rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions."*[50]

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[48] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, Explanation on Article 52.

[49] ECtHR, *Pishchalnikov v. Russia*, No 7025/04, 24.09.2009, para 64; ECtHR, *Beuze v. Belgium*, No 71409/10, 24.09.2009, para. 150.

[50] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 52.

The situation is different with regard to cross-border cooperation. In the *Melloni* case, the CJEU established that the freedom to apply a higher standard of protection applies only insofar as the difference in standards does not compromise the primacy, unity and effectiveness of EU law.[51] In other words, where application of higher standards can impede the smooth working of cross-border cooperation, Member States must refrain from enforcing its own national standards. This makes the protection of fundamental rights difficult especially in the EAW proceedings as this judgment caps the level of protection Member States are free to afford to persons within their jurisdiction. In addition to creating potential contradictions between national constitutions and EU law, this approach is also somewhat inconsistent with the position adopted under later cross-border cooperation instruments. For example, the European Investigation Order (**EIO**) which was adopted after the Lisbon Treaty and incorporation of the Charter into the primary EU law, allows the executing Member State to apply its own safeguards in choosing an alternative investigative measure to the one requested by the issuing Member State.[52]

2.4.3. Invoking the Charter before national courts

Where the provisions of the Charter produce direct effect, i.e., they are sufficiently precise and unconditional, you may rely upon them directly before national courts as far as the case raises a question relating to the implementation of EU law.

Where national law or practice is incompatible with EU law, EU law may be invoked together with the Charter before national courts to ensure compliance. Firstly, a practice based on national law or interpretation of national law can be challenged if it is incompatible with a provision of an EU directive interpreted in the light of the Charter. National measures, both law and practice, which come within the scope of EU law can thus be reviewed in the light of the Charter.

Secondly, national courts are under the obligation to interpret any implementing measures (including practice) in line with the Charter. Where national legal provisions conflict with the Charter, courts must apply the relevant provision of EU law instead [53] even without undergoing the formal process of setting aside the national law. The CJEU confirmed this with regard to Article 50 of the Charter:

> *"[I]t should be noted that the Court has already recognised the direct effect of Article 50 of the Charter (..) in the course of the assessment of the compatibility of provisions of domestic law with the rights guaranteed by the Charter, the national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means..*
>
> *[I]n the course of the assessment of the compatibility of provisions of domestic law with the rights guaranteed by the Charter, the national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to*

[51] CJEU, C-399/11, *Stefano Melloni v Ministerio Fiscal*, 26.02.2013, para. 60.
[52] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Article 10.
[53] European Union Agency for Fundamental Rights, "Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level", 2018, p. 31.

apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[54]

The CJEU has reached the same conclusion with regard to the prohibition of discrimination in Article 21 of the Charter.[55] Thus, where the defence argues that national law or practice is incompatible with any of the rights contained in the Procedural Rights Directives or the Charter, national courts are under an obligation to engage and properly examine these arguments. In case national law or practice is found to be contrary to EU law, the national courts must apply EU law to guarantee full and effective protection of suspects' or accused persons' rights.

2.5. Domestic Template

This section contains a practical example in the form of a "template" argument showing how you can incorporate EU law in domestic litigation on the rights of suspects and accused persons. The template concerns the right of access to quality interpretation and relies on EU law as the basis for suspects' or accused persons' rights. In corporation with local defence lawyers, namely Aimee McCumiskey and Elise Martin-Vignerte, we have linked the general EU law to the existing provisions under national criminal procedure law and case-law of national courts. Feel free to use any of the arguments or references contained in this template in your practice before national authorities and share your feedback with us!

Access to interpretation of sufficient quality

If a suspect needs interpretation during criminal proceedings, and the interpretation does not enable effective communication, a risk of unfairness arises. The suspect may misunderstand questions from police or the judge and answer incorrectly. His/her own answers may be misinterpreted. Statements may be made which appear incriminatory due to bad interpretation, and factual inconsistencies may arise vis-à-vis later statements, damaging the person's credibility and their defence.

Lawyers across Europe have described a number of recurrent problems with the quality of interpretation, in particular at the police station:

- **Non-existent or lack of clear requirements for certification or specific qualification** in order to act as a legal interpreter. As a result, interpreters are sometimes selected on the basis of fluency in the relevant language and, thus, often lack training and the specific skills for legal interpretation and translation. Some interpreters routinely volunteer their services for languages in which they are not expert.[56]

- **Outdated and non-mandatory registers of interpreters can cause problems** at the police station where the urgency to find an interpreter 'without delay' leads police officers and courts to use unregistered or uncertified interpreters or translators, at the expense of quality

[54] CJEU, C-537/16, *Garlsson Real Estate and Others*, 20.03.2018, para. 62 and 67; CJEU C-234/17, XC and Others v Generalprokuratur, 24.1.0.2018, § 38.
[55] CJEU, C-482/16, *Georg Stollwitzer v. ÖBB Personenverkehr AG*, 14.03.2018, paras. 30 and 45.
[56] For an overview of the required qualifications for legal interpreters or translators to be included in national registers in EU Member States, see FRA Report, n11, November 2016, p. 48.

safeguards. In some Member States, police and courts may simply call any person who is believed to speak the required foreign language – be it another police officer, just a relative of the person interrogated or a local shop keeper.[57] This is particularly seen when rare languages are needed or for cost efficiency reasons.[58]

- **Inability of lawyers to identify issues relating to the quality of interpretation services**, unless they happen to speak the language.[59]

- **Lack of means to control the quality of interpretation services *ex post***, such as audio-visual recordings, make it virtually impossible to challenge the quality interpretation.[60]

- **Limited remedies for poor quality interpretation**. Sometimes such challenges, when they are possible, only lead to the replacement of the current interpreter without assessing properly the impact the substandard interpretation has had on the fairness of the proceedings. [61]

Situation covered by the template

The argument provided in this template applies to the situation where the interpretation services provided for police or other law enforcement interrogation during the course of the investigation at pre-trial stage is of insufficient quality to safeguard the fairness of the proceedings.

The template aims to serve as a tool for the defence that seeks to challenge either during the trial or at a pre-trial hearing the admission of statements made under such circumstances into evidence.

It is important to keep in mind that this model argument does not constitute legal advice and needs to be adapted to the specific circumstances of each case, factually and legally.

Practical steps

If you have doubts as to the quality of interpretation services during police interrogation:

- Ask the interpreter to provide their credentials and ensure their answer is recorded.
- Pay attention to whether the interpreter takes notes when the interviewer/defendant speaks for a long period of time.
- Pay attention to whether the interpreter provides simple answers when your client has provided a longer answer or spoken for a longer period of time.
- Pay attention to whether the interpreter asks to see documents shown or commented on.
- Pay attention to whether the interpreter keeps speaking in third person (him/her) instead of saying “me”, when referring to your client.
- Raise your concerns to the Member-in-Charge– if needs be, interrupt the interrogation.
- Ask that your complaint is noted in the Custody Record

[57] OBSERVADOR, *Intérprete recrutada em loja chinesa para processo judicial,* 29 December 2020.
[58] For an overview of the required qualifications for legal interpreters or translators to be included in national registers in EU Member States, see FRA Report, n11, November 2016, p. 48.
[59] For an overview of the required qualifications for legal interpreters or translators to be included in national registers in EU Member States, see FRA Report, n11, November 2016, p. 48.
[60] Interviews with domestic criminal defence lawyers.
[61] For an overview of the required qualifications for legal interpreters or translators to be included in national registers in EU Member States, see FRA Report, n11, November 2016, p. 48.

- Ask that your complaint regarding the quality of interpretation services is on the record of the interrogation – outline your concerns when the DVD is recording. Request a copy of the transcripts / audio-visual recording of the interrogation. Request a copy of the Custody Record

There is no specific or autonomous mechanism in Irish law providing a judicial challenge of the quality of interpretation provided at the Garda Station. Careful notes of the issues of interpretation arsing at the Garda Station and any objections raised with the members of An Garda Síochána, should be taken for future challenge before the Court once the suspect has been charged with the offence.

Template arguments to challenge interpretation services of insufficient quality and support a request for exclusion of statements

[*The arguments below must be adapted to incorporate relevant national legal provisions and procedure and to the facts of the case.*]

Scope of the EU Directive 2010/64

National courts must interpret national law as far as possible in light of the wording and the purpose of a EU law directive in order to ensure its full effectiveness. The principle of conforming interpretation under EU law requires "national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (…), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it."[62] Here, Ireland's legal and institutional frameworks do not appropriately/fully implement the directive insofar as they do not sufficiently ensure and control the quality of interpretation services in criminal proceedings. It is key to turn to the Directive itself to guide the Court in its implementation of national law.

Article 2 of EU Directive 2010/64 of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings ("**the Directive**")[63] provides, in paragraph 1, that that directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. Therefore, the Directive 2010/64 applies to all stages of criminal proceedings, including the pre-trial stage. The period for its transposition ended on the 27th of October 2014 therefore it can be relied on directly by suspects and accused persons seeking to protect their right to receive interpretation services of sufficient quality.

Ireland purported to transpose the Directive through the following:

- Bunreacht na hEireann (CONSTITUTION OF IRELAND) Articles 34, 38 + 40
- Prison Rules 2007
- A Guide for Members of An Garda Síochána (Irish Police Force) using Interpreters and Translation during Criminal Investigations
- Quality assurance in Interpretation in Court Proceedings
- Criminal Legal Aid: Interpretation/Translation Claims
- Quality assurance in Interpretation in Police interviews

[62] CJEU, *Case 41/74, Van Duyn*, 4.12.1974, § 14. 26 Ibid., § 7. 27 Ibid., § 13. 28 CJEU, *Case 51/76 Verbond van Nederlandse Ondernemingen*, 1.02.1977, § 23. 29 Ibid., §24. 14

[63] 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 L 280, 26.10.2010, p. 1–7*).*

- European Communities Act 1972 (Interpretation and Translation in Criminal Proceedings) Regulations, 2013.
- European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013.[64]

The right to quality interpretation under EU law

The Directive lays down minimum rules for suspects and accused persons access to interpretation and translation in criminal proceedings. Article 2(1) of the Directive requires Member States to provide interpretation services without delay during the criminal proceedings, including during police questioning: "suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings."

According to Article 2(8) of the Directive interpretation must be of sufficient quality to safeguard the fairness of the proceedings and to ensure that suspected or accused persons have knowledge of the case against them and are able to exercise the right of defence". Thus, right to interpretation is a prerequisite for the suspect or accused person to understand and fully exercise their key fair trial rights such as right to silence and protection against self-incrimination and right to legal assistance.

The obligation to ensure that the suspect or accused person has access to interpretation of sufficient quality rests with the state. Article 5(1) of the Directive requires Member States to adopt concrete measures to ensure interpretation services meet the quality required under Article 2(8). Recital 26 of the Directive further specifies that competent authorities should be able to replace the appointed interpreter where the quality of the interpretation is not sufficient to ensure the right to a fair trial.[65]

Recital 33 of the Directive specifies that the provisions of the Directive that correspond to rights guaranteed by the European Court of Human Rights ("**ECHR**") or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights (**"ECtHR"**) and the Court of Justice of the European Union.[66] Article 51 of the EU Charter of Fundamental Rights (**"Charter"**)[67] requires Member States to apply European Union law in light of the principles set out in the Charter. To that end, the Directive must be interpreted in light of Articles 47 and 48(2) of the Charter which enshrine the right to a fair trial and defence rights. Article 6(3)(e) of the ECHR in particular guarantees everyone charged with a criminal offence the right to have free assistance of an

[64] https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32010L0064

[65] The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, *Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j*., 2.04.2019, §16.

[66] Article 52(3) of the Charter 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: "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 ..." (Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, Explanation on Article 52).

[67] Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, (OJ C 326, 26.10.2012, p. 391–407).

interpreter if he cannot understand or speak the language used in court. In *DPP (Garda Patrick Fahy) v Savickis*[68], the High Court held that there is no doubt that the right to an interpreter is 'an integral part of the right to a fair trial' and that Article 38 of the Constitution is engaged.

The Directive does not spell out the standards of quality that states are under an obligation to ensure, but emphasizes the objective of that requirement, namely, to safeguard the fairness of the proceedings. As already pointed out above, the Directive specifies that as a minimum that means that the suspect or accused persons must be able to have knowledge of the case against them and be able to exercise their right of defence.[69] This clearly applies to the exercise of defence right in the crucial stages of pre-trial proceedings. In *Hacioglu v. Romania,* the ECtHR confirmed that the right to interpretation extends to the pre-trial phase: "every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings […]".[70] Lack of or insufficient interpretation services in police custody can create repercussions for other rights and may undermine the fairness of the proceedings as a whole.[71] The ECtHR has noted in that regard that an individual held in police custody enjoys a certain number of rights, such as the right to remain silent or to be assisted by a lawyer.[72] The decision to exercise or waive such rights can only be taken if the individual concerned clearly understands the charges, so that he or she can consider what is at stake in the proceedings and assess the advisability of such a waiver.[73] Interpretation of sufficient quality is crucial for such understanding.

In *Knox v. Italy*, the ECtHR clarified that the right thus guaranteed must be 'concrete and effective'.[74] In this respect, the ECtHR recently found a violation of Article 6 ECHR where: "it has not been established in the present case that the applicant received language assistance which would have allowed him to actively participate in the trial against him. This, in the Court's view, is sufficient to render the trial as a whole unfair."[75] Therefore, the right to interpretation requires a quality of interpretation which enables the accused not simply to partially understand but to "actively participate" in the proceedings, starting from the pre-trial stage.

[With reference to the facts of your specific case indicate how the poor quality of information affected the exercise of suspect or accused person's rights.]

The right to challenge the quality of interpretation services and obtain an effective remedy

Article 2(5) of the Directive sets out the right for suspects or accused persons to complain about the lack of quality of the interpretation services: "suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.".

The Directive does not specify the type of remedy the court must offer in cases where the quality of the interpretation is insufficient to safeguard the fairness of the proceedings. In recital 24, the Directive

[68] High Court, DPP (Garda Patrick Fahy) v Savickis, [2019] IEHC 557
[69] Article 2(8) of the Directive.
70 ECtHR, *Hacioglu v. Romania,* Application no. 2573/03, Judgement of 11 January 2011, para. 88.
[71] ECtHR, *Baytar v. Turkey*, App. no. 45440/04, Judgment of 14 January 2015, paras 54-55.
[72] ECtHR, *Salduz v. Turkey* [GC], App. no. 36391/02, Judgment of 27 November 2008, para 63.
[73] ECtHR, *Baytar v. Turkey*, App. no. 45440/04, Judgment of 14 January 2015, paras 53.
[74] ECtHR, *Knox v. Italy*, App. no 76577/13, Judgment of 24 January 2019, para. 182.
[75] ECtHR, *Vizgirda v. Slovenia*, App. no. 59868/08, (Judgment of 28 November 2018), paragraph 102.

clarifies that Member States should ensure that control can be exercised over the adequacy of interpretation when competent authorities have been put on notice – i.e. when a challenge is brought.

The general principle of effectiveness of EU law requires national courts to interpret domestic law, to the extent possible, in light of the wording and the purpose of a directive in order to ensure its full effectiveness: "[…] national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (…), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it."[76]

Article 2(5) must therefore be interpreted in light of Article 47 of the Charter which 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". Article 47 of the Charter is based on Article 13 of the ECHR, which specifies that anyone whose rights under the Convention have been violated shall have an effective remedy before a national authority.

On the right to interpretation services specifically, the ECtHR stressed that the right must be "concrete and effective", and that the obligation of the competent authorities (including courts) is therefore not limited to appointing an interpreter but to exercise subsequent control over the quality of the interpretation provided.[77] These cases imply that States must put in place ways to guarantee qualitative services, but also to control the quality of interpretation services through, *inter alia*, national standards, proper training for interpreters, certification etc. Suspects and accused persons must also have means to challenge and prove the inadequate quality of interpretation services.

In *Savickis,* the High Court found that it is not only part of a Trial Judge's constitutional duty to ensure there is no unfairness 'arising from the lack, or quality, of interpretation' but it is an obligation placed in Member States under the 2010 Directive to enquire into the adequacy of interpretation.

Appropriate Remedy

What constitutes proper redress is assessed on a case-by-case basis. The ECtHR has indicated that the appropriate remedy for statements made without the presence of an interpreter would be exclusion of such evidence from the evidence, even if these statements constitute only one of the factors that formed the basis of a conviction.[78] Also in case of similar violations of other defence rights, such as the right to a lawyer, the ECtHR has considered exclusion of evidence an effective way to remedy such violation.[79]

The Courts here have taken this approach. In *DPP v Malai*[80], the Court of Appeal held that general Irish legal principles as to admissibility of evidence apply where there had been a breach of the European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013. The Court stated that while 'the question of language interpretation is a matter which can be seen as a matter falling within the embrace of the constitutional right to a fair trial… it does not follow that every breach of the 2013 Regulations necessarily amount to a breach of a constitutional right'. The Court noted that some aspects of the Regulations are administrative in nature and would therefore fall to be considered under the principles set out in *People (AG) v O'Brien* (illegally obtained evidence) as

[76] CJEU, *Case C-69/10 Samba Diouf,* 28.07.2011, §60.
[77] ECtHR, *Knox v. Italy,* App. No. 76577/13, Judgment of 24 January 2019, para. 182 (free translation); *Kamasinski v. Austria*, App. No. 9783/82, 19 December 1989, para. 74; *Protopapa v. Turkey*, App. No. 16084/90, 6 July 2009, para. 80; *Hermi v. Italy,* App. No. 18114/02, 18 October 2006, para. 70.
[78] ECtHR, *Baytar v. Turkey*, App. no. 45440/04, Judgment of 14 January 2015, para. 58.
[79] ECtHR, *Titarenko v. Ukraine,* App. No. 31720/02, (Judgment of 20 September 2012, para. 87.; See also ECtHR, *Mehmet Zeki Çelebi v. Turkey,* App. No. 27582/07, Judgment of 28 January 2020), para. 66.
[80] Court of Appeal, *DPP v Malai*, [2020] IECA 304

opposed to the principles outlined in *The People (DPP) v JC* (breach of constitutional rights). In either scenario, the Court stated that the Trial Court, in exercising its discretion to admit the evidence, needs to consider whether there is a causal link between the breach in question and the evidence obtained. If such a link is established the Court has overall discretion as to whether the evidence ought to be excluded.

In *Savickis*, the Court stated 'the remedies available to the court will depend upon the nature and extent of the breach, the circumstances in which it occurred, its effect on any evidence having regard to the complexities of the case and an overall assessment of the effect of any lack of quality interpretation on the ability of a defendant to defend themselves'. Counsel for Mr Savickis sought a dismissal on the basis that the accused could not receive a fair trial considering the inadequate interpretation provided in the Garda interview. The Court noted that the question of what amounts to an appropriate remedy is a matter for the Trial Judge in the exercise of their duty to uphold the constitutional rights of the accused. The Court stated that 'in certain cases, even where there is evidence that could satisfy a firelcourt beyond reasonable doubt of the guilt of the accused, the requirements of fair trial might require a court to refuse to permit the trial to proceed'.

[With reference to the facts of your specific case indicate what remedy you seek.]

3. Advancing EU law through preliminary references before the CJEU

3.1 Introduction

The preliminary reference procedure is set out in Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). It allows (and sometimes obliges) courts and tribunals of Member States to bring questions of interpretation of EU law before the CJEU, when such interpretation is necessary to enable them to render their judgments.

When questions of interpretation of EU law arise in domestic proceedings, it is not for criminal courts alone to resolve them. It is for the CJEU to decide on the interpretation of the directives, the Charter, and other relevant principles through the preliminary reference procedure. After the CJEU has issued a preliminary ruling, not only will the referring Court have to apply the given interpretation to the facts of the case but all Member States will also be bound by the CJEU's interpretation on that specific question. The preliminary reference procedure therefore allows for a uniform interpretation and application of EU law across all Member States.

This section is designed to help criminal practitioners advancing EU law through preliminary references before the CJEU. After explaining why it is useful to convince judges to refer interpretation questions to the CJEU (section 3.2), it gives an overview of the procedure (section 3.3) and explains the role that lawyers can play in it (section 3.4).

For more information on preliminary references, you can consult the following resources:

- Fair Trial's CJEU Preliminary Reference Toolkit**;**
- Official CJEU case-law research page;
- Statute of the CJEU;
- CJEU Rules of Procedure;
- Recommendations to national courts in relation to the initiation of preliminary ruling proceedings.

3.2 Why is it useful for lawyers to initiate preliminary reference proceedings?

National courts have an obligation to apply EU law provisions that have direct effect and to set aside national laws and practices that do not comply with it. The provisions of Procedural Rights Directives, for example, are mostly sufficiently clear and precise to produce direct effect and can be invoked against a state in case of failure to implement them in the national law and practice (see Section 2.2.3).

When national law and/or practice appears to be incompatible with EU law from the point of view of defence rights and is detrimental to your client's case, the relevant provisions can be invoked directly before national courts (if needed, in combination with the Charter). Your first objective as a lawyer will thus be to argue that EU law instruments are directly applicable before the national court so that it disregards national provisions and applies EU law instead. In that respect, you will need to show that EU law is clear and that it applies to your case.

However, where the national court is not ready to interpret EU law in a way that will strengthen your client's defence rights, your role will be to argue that EU law is not clear yet and to suggest referring an interpretation question to the CJEU. Whether or not a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of EU law

instruments to ensure their full effectiveness (see section 2.2.4).[81] Because the CJEU's interpretation will bind all courts and tribunals in the EU, it has the potential not only to initiate change in the criminal law and practice of your jurisdiction but also to strengthen fundamental rights in all Member States. This also means that it is important to carefully choose the case in which to initiate preliminary reference proceedings, to avoid damaging decisions by the CJEU. Moreover, as the CJEU is not itself a criminal court, your role as a criminal defence lawyer will be to ensure the request is drafted as appropriately and precisely as possible and to be engaged in every step of the procedure.

When violations of the right to a fair trial arise, it is more frequent for criminal defence practitioners to submit the case to the ECtHR based on Article 6 of the ECHR than to initiate preliminary reference proceedings before the CJEU. However, such procedure has comparative advantages:

- Contrary to individual applications before the ECtHR, it is not required that domestic remedies are exhausted before national courts can submit a request for a preliminary reference to the CJEU. Requests can be made at any stage of national proceedings and therefore offer a rather quick solution to ensure the fundamental rights of your client are better protected. In 2021, preliminary reference proceedings lasted on average 16,6 months.[82] In urgent cases that need quicker resolution (for example, if your client is detained), you can argue that the urgent preliminary ruling procedure (PPU) should be used (see section 3.3.4). In 2021, such procedure lasted 3,7 months on average.[83]
- Moreover, while the Charter contains rights that are similar to those protected by the ECHR, Article 52(3) of the Charter provides that it does not prevent EU law from ensuring a more extensive protection than the ECHR, which merely establishes the minimum basis for the interpretation of Charter rights. There are indeed cases where the Charter does provide a more extensive protection. For example, Article 48 of the Charter elevates the rights of the defence to a separate fundamental right, whereas certain rights are treated as "aspects" or "fundamental features" of the right to a fair trial under the ECHR.

3.3 Overview of the procedure

3.3.1 Who can initiate a preliminary reference procedure? [84]

Parties in domestic proceedings cannot submit a preliminary reference request to the CJEU themselves. Only national courts and tribunals can do so at their discretion. It is only for the judge before which the dispute is brought and who will assume responsibility for the subsequent judicial decision to determine the need for a preliminary ruling request and the relevance of the questions asked. There is no requirement that the parties accept the reference request before it is submitted. However, as a lawyer, you have a role to play in convincing national courts to refer questions to the CJEU and in assisting them in drafting the request and the questions (see section 3.4). In practice, courts will very often rely on the parties' lawyers in that regard.

All national courts and tribunals have the discretionary power to refer questions of interpretation to the CJEU. They have no obligation to do so, with one exception: courts of last instance must ask the CJEU for a preliminary ruling where a genuine question of interpretation exists. They can only refuse if: (i) the interpretation of EU law is obvious such that there is no reasonable doubt concerning the

[81] CJEU, *Case C-69/10 Samba Diouf*, 28.07.2011, para. 60.
[82] CJEU "The year in review, annual report 2021", p.73.
[83] *Ibid.*
[84] For more detailed information, see Fair Trial's CJEU Preliminary Reference Toolkit, pp.9-11.

manner in which the provision should be interpreted (the "acte clair" doctrine), or; (ii) the same question has already been answered by the CJEU in another case (the "acte éclairé" doctrine).[85]

3.3.2 What are the steps of the procedure?[86]

Request for a preliminary reference

When a national court accepts to make a preliminary reference request to the CJEU, it makes an order to stay the proceedings, drafts the request (most often with the help of the parties' lawyers) and sends it to the CJEU Registry. National proceedings will then be stayed until the CJEU issues its judgment.

The CJEU Registry then notifies the reference to all Member States, the European Commission, and the EU Institution which adopted the act whose interpretation is in question. The parties in the national proceedings all take part in the CJEU procedure (including any third parties).

It is important to note that preliminary ruling proceedings before the CJEU are free of charge[87] and that the CJEU may itself grant legal aid for legal representation fees and other costs linked to the procedure.[88]

Written submissions

From the moment the case is notified by the Registry, the written procedure begins. All parties will have two months to submit their written observations, which the CJEU heavily relies on, as they can be translated and examined more closely.

Oral hearing

When the written procedure is closed, the CJEU may decide to grant an oral hearing. However, it is not automatic, and the Court may decide not to. In such case, written pleadings may be your only opportunity to influence the outcome of the case.

Advocate General Opinion

In some cases (generally cases related to fundamental rights), the opinion of the Advocate-General will be sought. It is a non-binding advisory document recommending the Court to decide in a particular way. The Advocate-General assists the court in an impartial and independent manner and does not take part in the deliberations. Its opinion represents an opportunity for dissent in a system which does not currently allow for dissenting judgments.

After the Advocate-General has delivered their opinion, the Court will start its deliberations and issue a judgment.

Decision of the CJEU and return to the referring Court

Once the judgment is issued, the referring court still must apply the CJEU's interpretation to the facts of the case at hand and decide on the merits. The CJEU's interpretation on a specific issue binds the referring national court but also all national courts before which the same issue is raised.

3.3.4 The urgent procedure for preliminary rulings (PPU)[89]

The urgent preliminary ruling procedure can be particularly relevant to use as the CJEU will typically close the case within a few months of the submission of the national court's request. The procedure

[85] CJEU, Case C-416/17, *European Commission v French Republic*, 4.10.2018, para. 110.
[86] For more detailed information, see Fair Trial's CJEU Preliminary Reference Toolkit, pp.12-16.
[87] CJEU Rules of Procedure, Article 102.
[88] CJEU Rules of Procedure, Articles 115-118.
[89] For more detailed information, see Fair Trial's CJEU Preliminary Reference Toolkit, pp.20-25.

described above will be accelerated: the number of parties authorised to lodge written observations can be limited as well as the length of written submissions and the time to submit them.

This is very useful in urgent cases, especially if your client is detained. However, as a preliminary ruling procedure may have the effect of prolonging your client's detention, it is advisable to thoroughly assess the chances of obtaining the benefit of a PPU before trying to convince the national judge to submit a preliminary reference request to the CJEU.

Two criteria must be fulfilled for the urgent procedure to apply:

- Contrary to regular preliminary ruling proceedings, the PPU applies only in the area of freedom, security and justice, meaning EU laws relating to asylum and immigration, and to judicial cooperation in civil and criminal matters. It therefore applies to questions relating to the EU Procedural Rights Directives or to cross-border judicial cooperation instruments.
- It must be established that the case is an urgent matter. There is no exhaustive set of criteria to establish urgency, but a matter will generally be considered urgent (i) when your client is in custody or otherwise deprived of liberty and (ii) where the continued deprivation of liberty is affected by the outcome of the preliminary ruling.[90]

The use of the PPU must be requested by the referring court alongside its initial preliminary ruling request. As a lawyer, your role will then be to convince the national judge to make a request for the application of the PPU procedure and help them to set out the matters of fact and law which establish the urgency of the situation.

3.4 Your role as a lawyer

Although it is for national courts and tribunals to submit preliminary ruling requests to the CJEU, you have an important role to play as a lawyer in convincing the national judge that:

- EU law is not clear on the specific issue at hand;
- there is a need to refer an interpretation question to the CJEU;
- this question has not yet been solved by the CJEU;
- if necessary, there is a need to request a PPU.

To convince the CJEU to accept the preliminary reference, you will also have to assist the judge in drafting the questions and the preliminary reference request (see sections 3.4.1 and 3.4.2, 3.4.3).

If national judges are reluctant to use the preliminary reference procedure, you can engage in coordinated efforts with other practitioners at the national level (see section 3.4.4) or make a complaint at the ECHR or European Commission level (see section 3.4.5).

3.4.1 Assist the national court in drafting the preliminary reference request

Lawyers should keep in mind that CJEU preliminary rulings are not only binding for the referring national court but also for all other national courts before which the same issue will be raised. As 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 important to ensure that national courts draft the question appropriately and precisely, and to be engaged in every step of the process.

3.4.2 What type of questions should you suggest national courts to ask the CJEU?[91]

The CJEU is competent to answer questions of interpretation of EU law, including the EU Procedural Rights Directives and the cross-border judicial cooperation instruments such as the EAW Framework

[90] See Case C-477/16 PPU, *Kovalkovas*, 10.11.2016, para. 21 and C-237/15 PPU, Lanigan, 16.07.2015, para. 24.
[91] For more detailed information, see Fair Trial's CJEU Preliminary Reference Toolkit, pp.26-31.

Decision. The CJEU also has jurisdiction over human rights and interprets all EU law in light of the Charter. However, it is important to note that national courts cannot formulate questions based only on the Charter. Indeed, Article 51(1) of the Charter establishes that the latter only applies to Member States when they are implementing EU law (see section 2.3.7) and as a result, the CJEU cannot interpret the Charter itself: it interprets EU law (for example, the EU Procedural Rights Directives) in light of the Charter in a combined manner.

The Court will however not answer:

- hypothetical questions (meaning it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the case);
- questions which do not disclose an issue of EU law;
- questions on the interpretation of the Charter alone;
- direct questions on the compatibility of national law with EU law, which is a matter for national courts only;
- questions that have already been answered in previous case-law.

As a lawyer in the main proceedings, you can help to ensure that the CJEU accepts the request by guiding the national judge as to how the questions should be formulated. The standard way to phrase a preliminary question is to ask the CJEU whether a specific 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 section 3.5, we have included a template reference request by way of illustration.

It is moreover advisable to verify that the questions have not already been answered by the Court before, by conducting a thorough research of its existing case-law. You can also use previous judgments of the CJEU to show how the questions you want to ask now are in fact different. The Curia website's research page can be used to research cases by case number, date, name of the parties, subject matter. You will also find key cases on the EU Procedural Rights Directives and the EAW Framework Decision in Fair Trials' Mapping CJEU Case Law on EU Criminal Justice Measures, a document designed to help criminal practitioners to find case law on the interpretation of a certain right, provision or term.

3.4.3 What should the preliminary reference request contain?[92]

At the risk of being deemed inadmissible, a request for a preliminary ruling must contain:

- a summary of the main proceedings subject matter and relevant facts;
- national provisions applicable in the main proceedings and, where appropriate, the relevant national case-law;

a statement of the reasons why the referring court is asking the CJEU to interpret the relevant provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings;[93]the questions referred to the CJEU.

By way of illustration, we have included a template reference in section 3.5.

3.4.4 Take part in coordinated litigation at the national level

As a practitioner, you may face reluctance by national courts to apply EU law provisions and instead continue to follow unsatisfactory practices on a certain issue. The need for a preliminary ruling on a specific issue could be made clear through the repeated invocation of similar arguments before

[92] For more detailed information, see Recommendations to national courts in relation to the initiation of preliminary ruling proceedings, pp. 4-5.
[93] CJEU Rules of Procedure, Article 94.

national courts. Eventually, a judge may be willing to use the template to formulate a preliminary reference to the CJEU. In this respect, template pleadings like those developed in this strategic litigation pack are very useful for lawyers to use before local courts each time a specific issue arises.[94]

3.4.5 Act as an advocate at the regional level

When a national court refuses to make a reference to the CJEU, lawyers can:

- Take the case to the ECtHR:

It has been ruled several times by the ECtHR that when a last instance national court refuses to refer a question to the CJEU and provides no reasoning for its refusal, it infringes Article 6 of the ECHR.[95]

- Make a complaint directly to the European Commission:

As the 'guardian of the Treaties', the Commission is responsible for ensuring accurate and effective implementation of the EU Directive by Member States. In that respect, Member States are obliged to notify implementing measures to the Commission and if the latter considers that national law or practice does not comply with EU law, it can launch infringement proceedings that can result in an action for failure to fulfil UE law obligations before the CJEU.

When a Court refuses to refer questions to the CJEU, it is thus interesting for lawyers to complain directly to the Commission. For example, complaints from the affected parties in a case before the French Conseil d'État led the European Commission to start infringement proceedings against France for, *inter alia,* the failure of its court of last instance to make a reference to the CJEU. This led to a judgment stating that the French Conseil d'État, a court against whose decisions there is no judicial remedy under national law, violated EU law (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.[96]

[94] For example, in April 2018, the Syndicate of French lawyers (Syndicats des Avocats de France) has published a template argument on the incompatibility of the use of glass cages in courts with the Directive 2016/343 of 9 March 2016 on the presumption of innocence.

[95] ECtHR, *Dhahbi v. Italy*, No. 17120/09, 8.04.2014; ECtHR, *Schipani and others v. Italy*, No. 38369/09, 21.07.2015. See, most recently, ECtHR, *Repcevirag Szövetkezet v. Hungary*, No. 70750/14, 30.04.2019, 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.

[96] CJEU, Case C-416/17, *European Commission v French Republic*, 4.10.2018, paras. 105-114. In the same vein, the Syndicate of French lawyers (*Syndicats des Avocats de France*) wrote a letter to the European Commission of May 2018 to alert them of the persistent use of glass cages in French courts. The Commission replied, affirming it was verifying the compliance of the provisions taken by the Member States, including France, to ensure the transposition of the Directive on the presumption of innocence and would take all appropriate measures to ensure the effective application of the Directive and would take all appropriate measures to ensure the effective application of the Directive, if necessary, by initiating infringement proceedings.

3.5 Template on preliminary reference procedure access to interpretation and translation

3.5.1 Hypothetical factual scenario

These EU law questions could be relevant in the context of the following set of facts:[97]

- Your client, who does not speak the language of the proceedings, is sentenced to a suspended sentence of imprisonment on probation. When he was charged, your client was subjected to the coercive measure provided for in the Code of Criminal Procedure (CCP), which consists of a declaration of identity and residence (DIR) and is accompanied by a series of obligations, including the obligation to inform the authorities of any change of residence. These obligations stay in force throughout the period of probation.
- Your client did not have the assistance of an interpreter when the DIR was drawn up, and he was also not informed of the right to interpretation and translation at that time. He subsequently also did not receive a translation of the DIR into a language he speaks or understands. Unaware of the obligation to inform the authorities of change of residence he moved to another address.
- In order to enforce the probation regime, the competent authorities tried in vain to contact your client at the address indicated in the DIR. They turned to the court that sentenced your client, which issued an order (in national language) inviting him to appear at a hearing on the non-compliance with the obligations of the probation regime. The order was sent to the same address indicated in the DIR, therefore your client did not receive it and failed to appear. The suspension of the sentence was therefore revoked.
- Your client was subsequently arrested at the current residence and imprisoned to serve his sentence. He lodged and appeal to declare that the DIR was invalid because in the absence of an interpreter he was unaware of the obligation to inform the authorities about the change of residence. The DIR was also not translated for him. As a consequence, the revocation of the sentence was also invalid.
- The court of first instance dismissed the appeal on the grounds that, although these procedural defects concerning translation and interpretation had been established, they had been rectified, since your client had not invoked them within the prescribed time limits, which according to the nation law was until the revocation of the suspension of sentence became final. You appeal that decision and ask the court of appeal to file a preliminary reference to the CJEU asking to clarify the content of applicable articles in Directives 2010/64 on the right to interpretation and translation[98] and 2012/13 on the right to information.[99]

[97] The facts used in this template are based on case before the Court of Justice of the European Union C-242/22 PPU *TL* (01.08.2022), but can be applied in any similar case where the suspect or accused person has not had access to interpretation or translation of documents (information) that directly relate to their rights and obligations throughout the criminal proceedings, in this case including also the obligations under suspended sentence.

[98] 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 L 280, 26.10.2010, p. 1–7.

[99] 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 L 142, 1.6.2012, p. 1–10.

At the hearing before the court of appeal, your **defence strategy** is structured as follows:

- The right to information, which is accompanied by the right to interpretation and translation (when the person does not speak the national language), is provided by Directive 2010/64 and 2012/13/EU. The rights to an effective remedy and rights of defence are protected under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (Charter).
- The obligation to inform the authorities about the change of address was an important obligation that applied not only to pre-trial proceedings but remained in force also after the sentencing and throughout the period of suspension of prison sentence. Thus, it was an 'essential document' and had to be translated in accordance with Article 3(3) of the Directive 2012/13/EU.
- Your client did not have access to interpretation, and he was not informed of such right at the drafting of the DIR. A translation of the DIR was also not subsequently provided to your client.
- The failure to provide interpretation and subsequently translation of the DIR resulted in your client's failure to comply with the obligation to inform the authorities of his change of address. This resulted in the application to revoke of the suspension of prison sentence and a hearing to which he was summoned by sending the summons in a language he does not speak and to an address he does not live in. As a result, the suspension of prison sentence has revoked.
- When your client was finally informed of the revocation of the suspension of his prison sentence he was effectively prevented from raising an infringement of his right to interpretation and translation which lead to the decision to revoke the suspension. The provision of CCP as interpreted by the court of first instance applied a time-bar to raising an infringement of the right to interpretation and translation under the EU law thus depriving him of an effective remedy and rights of defence under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (Charter). This is incompatible with Directive 2010/64 on the interpretation and translation and Directive 2012/13/EU on the right to information.

The following template is made bearing in mind the above facts of the case and defence strategy. Although the defence cannot pose questions to the CJEU directly, preparing a template preliminary reference can be hugely helpful in swaying national courts in favour of making such a reference. This template is an example of a draft reference you could submit to the court examining your client's case.

3.5.2 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

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 AND FACTS OF THE CASE IN THE MAIN PROCEEDINGS AND THE RELEVANT FINDINGS OF FACT AS DETERMINED BY THE COMPETENT NATIONAL COURT OR TRIBUNAL.]

Section 4 – The questions referred for a preliminary ruling

4. Must Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13, read in the light of Article 47 and Article 48(2) of the Charter, be interpreted as precluding national legislation under which the infringement of the rights laid down in those provisions of those directives may be effectively invoked only by the beneficiary of those rights and, that infringement must be pleaded within a prescribed period, failing which the challenge will be time-barred?

Section 5 - Legal provisions relied on

5. [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.]

Charter of Fundamental Rights of the European Union

6. Article 47 of the Charter of Fundamental Rights of the European Union (the "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."
7. Article 48(2) of the Charter provides:
   "*2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."*

Directive 2010/64

8. Recitals 5 to 7, 9, 14, 17, 22 and 33 of Directive 2010/64 state:
   '(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950, ("the ECHR")] and Article 47 of the Charter of Fundamental Rights of the European Union [("the Charter")] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence. This Directive respects those rights and should be implemented accordingly.

   (6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

   …

   (7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.

   …

   (9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial

cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.

…

(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.

…

(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their rights of defence and safeguarding the fairness of the proceedings.

…

(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings."

9. Article 1 of Directive 2010/64, entitled 'Subject matter and scope', provides, in paragraphs 1 and 2 thereof:

"1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.'

10. Article 2 of that directive, entitled 'Right to interpretation', provides:

"1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

…

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings."

11. Article 3 of that directive, entitled 'Right to translation of essential documents', provides:

'1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

…

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings."

Directive 2012/13

12. Recitals 5, 19, 25 and 40 of Directive 2012/13 state:

"(5) Article 47 of the [Charter] and Article 6 of the [ECHR] enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence.

…

(19) The competent authorities should inform suspects or accused persons promptly of [their] rights … In order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person …

…

(25) Member States should ensure that, when providing information in accordance with this Directive, suspects or accused persons are provided, where necessary, with translations or interpretation into a language that they understand, in accordance with the standards set out in Directive [2010/64].

…

(40) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the [ECHR] as interpreted in the case-law of the European Court of Human Rights."

13. Article 1 of Directive 2012/13, entitled 'Subject matter', is worded as follows:

'This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. …'

14. Article 2 of that directive, entitled 'Scope', provides, in paragraph 1:

'This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.'

15. Article 3 of that directive, entitled 'Right to information about rights', provides:

"1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:
(d) the right to interpretation and translation;
…
2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons."

Section 6 – The grounds for reference

16. Considering the circumstances of the main proceedings as laid out above, the referring court asks whether the interpretation the provision of the [INCLUDE PRECISE REFERENCE] CPP proposed by the lower court is compatible with the application of those directives; according to that interpretation, the nullity flowing from the failure to provide translations and the failure to appoint an interpreter for the purposes of provision of the DIR, issuing the summons to the convicted person to appear before the court for the revocation of suspended sentence under [INCLUDE PRECISE REFERENCE] CCP is rectified because it was not pleaded within the periods stipulated by that article.

17. Articles Article 2(1) and Article 3(1) of the Directive 2010/64 and Article 3(1)(d) 2012/13 have a direct effect because the periods for transposition of the directives have expired; those periods ended on 27 November 2013 and 2 June 2014, respectively. They have not been correctly transposed into national law.

18. The measures and minimum rules laid down in the European Convention for the protection of Human Rights and Fundamental Freedoms (**ECHR**), which are applied by European Union courts, were the basis for Directives 2010/64 and 2012/13. Thus, Directive 2010/64, which was published in the Official Journal of the European Union on 26 October 2010 and in respect of which the period for transposition expired on 27 October 2013, has been directly applicable

since 28 October 2013, and therefore, in the light of the material date, it is applicable to this case.

19. Article 2(1) of Directive 2010/64 requires Member States to ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with the assistance of an interpreter during criminal proceedings before investigative services and judicial authorities, while Article 3(1) of that directive requests them to ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. As regards Article 3(1)(d) of Directive 2012/13, it requires Member States to ensure that suspects or accused persons are provided promptly with information on their right to interpretation and translation, in order to allow for that right to be exercised effectively.

20. In the present case it is essential to clearly define the applicability and the guarantee of the right to an interpreter throughout the criminal proceedings, since in the main proceedings that right was available to the accused only at the trial. In accordance with Article 1(2) of Directive 2010/64 and Article 2(1) of Directive 2012/13, the rights contained in the directives apply to persons from the time they are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

21. Accordingly, under Article 2(1) and Article 3(1) of Directive 2010/64, [THE CONVICTED PERSON] was entitled to a written translation the essential documents and to an interpreter in pre-trial stage of the criminal proceedings. In addition, in accordance with Article 3(1)(d) of Directive 2012/13, he had the right to be informed of both the right to interpretation and right to have "essential documents" translated. In that regard, it is apparent from recital 19 of Directive 2012/13 that the information referred to in that directive should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority, in order to allow the practical and effective exercise of his or her procedural rights.

22. Therefore there rights also apply at the pre-trial stage of criminal proceedings and [THE CONVICTED PERSON] had the right to interpretation and translation at the time of the drafting of the DIR.

23. As regards the translation of procedural documents, Directive 2010/64 sets out a list of documents which must be translated. According to Article 3(2) these documents include "*any decision depriving a person of his liberty, any charge or indictment, and any judgment*". However, the documents listed in Article 3(2) are defined as 'minimum rights' and only list those documents in the absence of which it would be impossible to exercise the rights of

defence. This list is not exhaustive as indicated by the use of the word "include" and recital 30 of the Directive 2010/64.

24. National [CODE OF CRIMINAL PROCEDURE/LAW] contains no provision laying down a similar list of minimum rights or documents that must be translated; nor does it stipulate the documents which must be translated as a minimum. However, the national courts are directly required to respect that right to the translation of essential documents, and have the obligation to order, as a general rule, the translation of "*any decision depriving a person of his liberty, any charge or indictment, and any judgment*", together with the additional documents determined to be "essential" in accordance with Article 3(3) of the Directive 2010/64.

25. In order to be held responsible for the failure to comply with the obligation a person should be aware of those obligations. This was not the case in the situation under consideration in the main proceedings. Since interpretation was not provided at the time of drawing up the DIR nor a translation of the DIR itself was subsequently available, [THE CONVICTED PERSON] was not aware of the obligation to inform the authorities of the change of residence. In addition, this obligation applied not only until the end of pre-trial or court proceedings, but also throughout the period us suspension of the sentence. Failure to comply with this obligation could become, and in this case, became a reason for revoking the suspension of the prison sentence.

26. Accordingly, the DIR should be considered an 'essential document' and [THE CONVICTED PERSON] should have had access to interpretation at the drafting of it. The DIR containing the obligation to inform the authorities about any change of residence should also have been translated. Therefore [THE CONVICTED PERSON'S] right to interpretation and translation was infringed.

27. Article 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter) provide persons with the right to an effective remedy and to a fair trial and defence rights. The applicability of the Directive 2010/64 and the Directive 2012/13 must therefore be interpreted in accordance with these provisions. In this regard the application of Directives 2010/64 and 2012/13 to procedural acts relating to a potential revocation of the suspension of the prison sentence imposed on the person concerned, who was not enabled to understand the essential documents drawn up in the course of the criminal proceedings, should be necessary in the light of the objective of those directives of ensuring respect for the right to a fair trial, as enshrined in Article 47 of the Charter, and respect for the rights of the defence, as guaranteed in Article 48(2) of the Charter. Those fundamental rights would be infringed if a person, who has been sentenced for a criminal offence to a term of imprisonment suspended with probation, were deprived – because of the failure to translate the summons or the absence of an interpreter at the hearing relating to the possible revocation of that suspension – of the opportunity to be heard, inter alia, on the reasons for which he or she had failed to comply with the probation conditions.

28. The CJEU has previously held in *Sleutjes* that where a procedural act is addressed to an individual only in the language of the proceedings in question even though the individual has

no command of that language, that individual is unable to understand what is alleged against him or her, and cannot therefore exercise his or her rights of defence effectively if he or she is not provided with a translation of that act in a language which he or she understand.[100]

29. In the case at hand being unaware of the hearing on revocation of suspension of sentence [THE CONVICTED PERSON] was also not in a position to argue an infringement of his right to interpretation and translation and defend himself against revocation of suspension of the prison sentence based on a failure to comply with an obligation he was not informed of. Furthermore, there was effectively no possibility to raise such challenge as [THE CONVICTED PERSON] was also not informed of and present in the court hearing on the revocation of the suspension of prison sentence.

30. Article [INCLUDE PRECISE REFERENCE] of the CCP in the interpretation of the court of first instance, namely that the infringement of the right to interpretation and translation is remedied by failure to raise a complaint before the order to revoke the suspension of prison sentence was adopted. This, especially in the absence of the sentenced person in the proceedings and taken into account that they were not properly informed of their rights at the time of drafting of DIR and also about the hearing on the revocation of suspension, effectively removed the possibility to access an effective remedy for an infringement of his right to information and right to interpretation and translation. Thus it raises doubts as to whether such provision may is compatible with Article 2(1) and Article 3(1) of Directive 2010/64 and Article 3(1)(d) of Directive 2012/13, read in the light of Article 47 and Article 48(2) of the Charter.

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.]

[100] CJEU, Case C-278/16, *Sleutjes*, 12.20.2017, para. 33.

4. Using EU law in specific areas of criminal procedure

4.1 EU law resources

Fair Trials has also produced toolkits on the six specific areas of criminal procedure covered by EU law directives, notably:

- The toolkit on the Right of access to a lawyer Directive
- The toolkit on the Right to Interpretation and Translation Directive;
- The toolkit on the Right to Information Directive;
- The toolkit on the Legal Aid Directive;
- The toolkit on the Presumption of Innocence Directive;
- The toolkit on the Charter of Fundamental Rights of the European Union;

These toolkits are designed to give practical advice, mainly to defence practitioners, on how to use the Procedural Rights Directives and the Charter in criminal proceedings. They also serve as a source of references on the interpretation and application of the key provisions of the Procedural Rights Directives and the Charter and compiles the latest relevant developments in the jurisprudence of CJEU and ECtHR. These Toolkits take a deeper look at each directive and the provisions of the Charter most relevant to defending suspects' and accused persons' rights in criminal proceedings. In addition, the toolkits identify key problems of implementation of each directive across the EU Member States.

The toolkits also suggest practical approaches and legal arguments you can use in your practice before national authorities where national law or practice falls short of the standards set by EU law.

For more EU law resources, see also Fair Trials' EU Law Resources Document which compiles freely accessible EU law resources produced by regional courts, EU agencies, academics and non-governmental organisations. These sources contain summaries of case-law, a comparative overview of Member States' practice, as well as in-dept analysis on specific rights of suspects and accused persons guaranteed by EU law.

4.2 Template arguments on EU law

This chapter includes several practical examples (template arguments) you can apply to incorporate EU law in defence submissions in criminal proceedings in relation to key defence rights. These templates provide EU law arguments based on the Charter and the Procedural Rights Directives on key defence rights in pre-trial proceedings that remain inadequately protected throughout the EU. They include:

- Access to a lawyer during police questioning
- Access to case file in pre-trial detention proceedings
- Access to case file in pre-trial proceedings
- Access to interpretation services of adequate quality.

You can freely use the arguments contained in the templates in your practice by incorporating them fully or partially or adapting them to your submissions.

4.2.1 Access to a lawyer during police questioning

Access to a lawyer during police questioning

The right to a lawyer is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights. The lawyer's presence at the initial stages of the criminal process serves as a 'gateway' to other rights and helps prevent prejudice to the suspect's defence. More generally, a lawyer's presence at the early stages of criminal proceedings helps a suspect to understand the legal situation and the consequences of choices made at this crucial stage.[101] The Directive establishes the right to access a lawyer as early as police custody, recognising that this right is key to ensure the fairness of the entire proceedings.

However, there are still many outstanding issues that undermine the effectiveness of the rights guaranteed by the Directive. Some of these issues relate to the very core of the right to access to a lawyer, such as: providing persons without a formal status as a suspect or accused person with a lawyer, maintaining confidentiality during lawyer-client consultations, the opportunity of the lawyer to actively intervene in questioning, and the validity of a waiver in the absence of sufficient information.[102]

Situations covered in the template

In this section, we set out the relevant European Union and European Convention of Human Rights standards that may be invoked to apply to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking the exclusion of statements made during police questioning without the presence of a lawyer. You can use the arguments provided in several situations:

1) Your client has been subjected to informal questioning by the police without the presence of a lawyer, e.g., in the police car on the way to the station and has made self-incriminating statements.
2) Your client has been formally questioned at the police station while in custody without having had a lawyer present and has made self-incriminating statements.

Practical steps

If access to a lawyer has been denied your client before or during questioning in the police station, you can take some practical steps before raising the arguments contained in this template:

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[101] *A.T. v. Luxembourg,* App. No 30460/13, (Judgment of 09 April 2015), paragraph 64: "[A]n accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself."

[102] FRA, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest Warrant proceedings*, 2019; Fair Trials, *Where's my lawyer? Making legal assistance in pre-trial detention effective*, October 2019; Report from the Commission to the European Parliament and the Council on the implementation of 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 person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 26 September 2019, COM(2019) 560 final.

- If you were not present during the questioning, make sure that this is recorded as an issue under the Directive as soon as the circumstances allow for it.
- Get your clients version of events and organise the information in light of the requirements of the Directive and underlying case-law. Consider, inter alia, whether your client was presented with the Letter of Rights.
- Establish how the questioning was incompatible with the Directive. Identify, inter alia, the extent to which the questioning proceeded unnecessarily in the absence of a lawyer.

Template arguments to support a request to exclude statements made during police questioning without the presence of a lawyer

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to a client is based.]*

The subject matter of 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 ("Directive 2013/48")[103], according to Article 1 thereof, is to lay down minimum rules concerning the rights of suspects and accused persons in criminal proceedings including, *inter alia,* to have access to a lawyer.

The scope of Directive 2013/48 is defined in Article 2(1), which states that the directive is to apply to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Article 3(1) of Directive 2013/48 requires Member States to ensure that suspects and accused persons "have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively." Further, Article 3(2) specifies the moment from which this right must be granted. Member States must ensure that suspects or accused persons have a right to consult with a lawyer without undue delay *prior* to questioning by the police or another law enforcement or judicial authority.

Directive 2013/48 refers to Article 47 and 48 of the EU Charter of Fundamental Rights ("the Charter") and Article 6 of the European Convention on Human Rights ("ECHR"), which enshrine the right to a fair trial and guarantee respect for the rights of the defence. According to Recital 12, Directive 2013/48 builds upon, inter alia, Article 6 of the ECHR, as interpreted by the European Court of Human Rights, which provides that "the lawyers of suspects or accused persons should be able to secure without restriction, the fundamental aspects of the defence."

Article 6 (3)(c) of the ECHR sets out that everyone charged with a criminal offence has the minimum right to defend themselves through legal assistance. The right of everyone charged with

[103] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048.

a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[104]

The European Court of Human Rights in *Dayanan v. Turkey,* found that "an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned."[105] In *Beuze v. Belgium*, it was confirmed that there is no doubt as to the starting point of the right of access to a lawyer and that suspects must be able to enter into contact with a lawyer from the time when they are taken into custody, irrespective of whether or not that person is interviewed.[106] It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview.[107]

Although Directive 2013/48 does allow for derogations of the right to access a lawyer in the pre-trial phase, it may only occur temporarily and in exceptional circumstances. Article 3(6) clarifies that access may be denied "where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person" or "where immediate action by investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings". The Court of Justice of the European Union has established that Article 3 provides an exhaustive list of circumstances where derogations might occur.[108] No such derogations envisaged apply in the present circumstances. [List circumstances indicating that derogations are not applicable]

Article 3(3) of Directive 2013/48 provides a detailed description of the content of the right to a lawyer, which entails, inter alia, private meetings and communication with the lawyer prior to questioning and the right for the lawyer to be present and participate effectively when the suspect or accused person is being questioned. The European Court of Human Rights has underlined the importance of the investigation stage for the preparation of the criminal proceedings, "as the evidence obtained during this stage determines the framework in which the offence charged will be considered at trial."[109] It has further explained that the fairness of proceedings requires that an accused is able to obtain services specifically associated with legal assistance, "which includes the ability of the counsel to secure without restriction to the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, […]."[110]

The role of the lawyer in the pre-trial phase includes ensuring respect for the right of the suspect or accused person not to incriminate themselves.[111] As Directive 2013/48 does not cover incriminating statements, it must be read in conjunction with Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. In Article 7(1)(2), it requires Member States to respect the right to silence in relation to the criminal offence that they are suspected or accused of having

[104] *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), paragraph 51; *Ibrahim and Others v. the United Kingdom* [GC], App. Nos. 50541/08 50571/08 50573/08 40351/09, (Judgment of 13 September 2016) 255; *Simeonovi v. Bulgaria* [GC], App. No. 21980/04, (Judgment of 12 May 2017) paragraph 112; *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), paragraph 123.
[105] *Dayanan v. Turkey*, App. no. 7377/03, (Judgment of 13 October 2009), paragraph 32.
[106] *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), para. 124.
[107] Ibid., para. 133.
[108] Ibid, paragraph 45.
[109] *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), para. 54.
[110] *Dayanan v. Turkey*, App. no. 7377/03, (Judgment of 13 October 2009), paragraph 32.
[111] *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), para. 54; *Beuze v. Belgium* [GC], App. No. 71409, (Judgment of 9 November 2018), para. 128.

committed, and the privilege against self-incrimination. The European Court of Human Rights has found that these rights are generally recognised international standards that lie at the heart of the notion of a fair procedure under Article 6 of the ECHR.[112]

The European Court of Human Rights has found that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[113] It has also found that statements not directly incriminatory per se may be adverse to a person's defence if they are used for incriminatory purposes.[114]
Article 12(1) of Directive 2013/48 establishes the obligation of Member States to ensure the right to a remedy in the event of a breach of the right to a lawyer. In paragraph 2, it is specified that Member States must ensure the rights of the defence and the fairness of the proceedings are respected when assessing statements made by a suspect or accused in breach of their right to a lawyer.

Directive 2013/48 does not specify the type of remedy that the court must offer. However, Recital 50 refers to the principle in the case-law of the European Court of Human Rights mentioned above[115], which established that the use of incriminating statements made during police interrogation in the absence of a lawyer will irretrievably prejudice the right of the defence. Further, European Court of Human Rights has reiterated that the most appropriate form of redress for a violation of Article 6 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded.[116] The European Court of Human Rights has in several cases found when assessing the overall fairness of the proceedings that statements made without having a lawyer present should be excluded, even if such statements are confirmed at a later stage in the proceedings in the presence of a lawyer.[117] The same reasoning must apply in the present case.

The obligation of excluding incriminating statements made in violation of the right to access to a lawyer during questioning in police custody devolves on [this court]. Article 47 of the EU Charter of Fundamental Rights ("the 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". The Court of Justice of the European Union has also recognized the importance of effective judicial protection of rights established by the EU law stating that the "principle of the effective judicial protection of individuals' rights under EU law […] 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 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter".[118] Accordingly, there can be no doubt that there is an obligation on national courts to

[112] ECtHR, *Pishchalnikov v. Russia*, App. no. 7025/04, Judgment of 24 September 2009, para. 71.
[113] *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), para. 55.
[114] ECtHR, *Saunders v. United Kingdom,* App. No 19187/91, Judgment of 17 December 1996), para. 71.
[115] See footnote 10 above.
[116] ECtHR, *Teteriny v. Russia,* App. No. 11931/03*,* (Judgement of 30 June 2005), para. 56*; Jeličić v. Bosnia and Herzegovina*, App. No. 41183/02, (Judgement of 31 October 2006), para. 53*; Mehmet and Suna Yiğit v. Turkey*, App. No. 52658/99, (Judgement of 17 July 2007), para. 47; *Salduz v. Turkey* [GC], App. No. 36391/01 (Judgment of 27 November 2008), para. 72.
[117] ECtHR, *Titarenko v. Ukraine*, App. No. 31720/02, (Judgement of 20 September 2012, para. 87.; See also ECtHR, *Mehmet Zeki Çelebi v. Turkey*, App. No. 27582/07, Judgement of 28 January 2020), para. 66.
[118] CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses*, 28 February 2018, ECLI:EU:C:2018:117, para 35.

provide an effective remedy for the use of incriminating statements made during police questioning in the absence of a lawyer and, thus, in violation of Directive 2013/48.

In conclusion, the applicant requests that [this court] excludes the statements made in violation of the right to have access to a lawyer during police questioning.

4.2.2 Access to case file in pre-trial detention proceedings

Access to case file in pre-trial detention proceedings

When a client is arrested and detained, beyond information about charges, lawyers will need access to the case file as quickly as possible to review what inculpatory evidence is on file and start developing a defence strategy and getting the person released. Depending on the level of access, the case file will usually include at least the reasons and the circumstances of the arrest, sometimes also the criminal record of the person.

The European Commission has reported that in several Member States the existing restrictions regarding access to the materials of the case also extend to documents which are essential to challenging the lawfulness of the arrest or detention.[119] This will inevitably impact on equality of arms as the time and facilities to prepare the file may not be adequate for instance there is no secure manner for online access to the file.[120]

Situations covered in the template

In this section, we set out the relevant European Union and European Convention of Human Rights standards that may be invoked to apply to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking access to the case file or challenging a refusal to provide access to the case file in three sets of circumstances:

(1) where a person has been arrested and faces pre-trial detention (or an extension of a pre-trial detention order) and is seeking access to the case file to challenge such detention; and
(2) an application to access the case file other than to seek to challenge detention.
(3) some materials which would constitute 'essential documents' necessary to challenge the lawfulness of arrest or detention are disclosed, but there may be other information that you consider relevant and that the court may take into consideration, but the prosecutor has not deemed it 'essential' and has kept it undisclosed.

Practical steps

Before raising the arguments contained in this template in a complaint or appeal against the decision to deny access to case materials make sure that Your request and decision to deny access to case file

[119] Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with the third persons and with consular authorities while deprived of liberty, COM(2019) 560 final, 26 September 2019, section 3.7.1.
[120] See: https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-covid-19-april-2020_en.pdf.

is properly recorder either in the protocol or of the interview (any other procedural activity) or in audio recording.

Template arguments to request access to case file ('essential documents') to challenge detention

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to the case file is based.]*

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

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ("Directive 2012/13")[121] sets out uniform standards on access to information in criminal proceedings, including access to case file in detention proceedings, across the European Union ("EU"). The period for its transposition ended on the 2nd of June 2014 therefore it can be relied on directly by suspects and accused persons seeking to exercise their right to access the case file in detention proceedings.

The scope the Directive 2012/13 is defined in Article 2(1), which states that the directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

Article 7(1) of Directive 2012/13 thus applies at any stage of the criminal proceedings and requires Member States to: "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." This essentially means that the arrested or detained person and their lawyer is entitled to have timely and full access to all documents that are essential for effective challenge of that arrest or detention. This right applies also to any documents essential for effective challenge of deprivation of liberty beyond the initial arrest, that is, to any subsequent detention review proceedings.

Directive 2012/13 refers to the European Convention on Human Rights ("ECHR") stating that "provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights".[122] Recitals 6 and 30 in particular refer to Article 5 ECHR which

[121] 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).
[122] *Ibid*., Recital 42.

guarantees the right to liberty and security and sets out a number of substantive and procedural requirements for deprivation of liberty to be lawful. In criminal context, these include first and foremost a 'reasonable suspicion that a person has committed a criminal offence', individually identified risk at the basis of need for restrictive measures (sufficient and relevant grounds for detention), as well as assessment of proportionality of deprivation of liberty as opposed to other less restrictive non-custodial measures.[123]
Articles 5 and 6 ECHR are also relevant with regard to general principles applicable to detention proceedings. Basic principles of fair trial, such as equality of arms and adversarial trial, apply also to detention proceedings[124] and must be taken into account in all decisions relating to rights of defence. Equality of arms is at the basis of the requirement to grant timely and full access to information (evidence) on which a detention request is based. The European Court of Human Rights has recognised that equality of arms in detention proceedings is not ensured if the detained person, or their counsel, are denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention.[125]

The main guiding principle for interpreting the obligation under Directive 2012/13 to disclose 'essential documents' before the judicial review of arrest or detention should, therefore, be equality of arms in the review process. Lawyers should have access to information on the case file as early as possible to prepare effective defence. In detention proceedings this means, for example, being in a position to show that detention is not justified because the necessary evidence has already been gathered and there is no possibility to tamper with it, or more generally, to question the reasonableness of suspicion. In a well-established line of case-law, the European Court of Human Rights has repeatedly stated:

> "*Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness, in the sense of the Convention, of his client's detention. The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention*."[126]

Access to 'essential documents' in detention proceedings therefore requires [investigative authorities/prosecutor] to provide full access to information in the case file that is needed in order to challenge the lawfulness of detention effectively. This should include all documents (evidence) relied on to prove that requirements for lawful deprivation of liberty in accordance with Article 5 ECHR are fulfilled. This includes information showing the existence of 'reasonable suspicion', individually identified risk (relevant and sufficient grounds for detention) and assessment of proportionality, including effectiveness of non-custodial alternatives.[127]

Access to 'essential documents' means not only access to the list of documents (evidence) at the basis of detention request, but guarantees access to the content of those documents. Recital 30 of the Directive 2013/12 elaborates as to what 'essential documents' may contain. It states that

[123] ECtHR *Idalov v. Russia* [GC], App. No. 5826/03, (Judgment of 22 May 2012), paragraph 140; ECtHR *Buzadji v. the Republic of Moldova* [GC], App. No. 23755/07, (Judgment of 5 July 2016), paragraphs 87-89
[124] ECtHR *Rowe and Davis v. the United Kingdom* [GC], App. No. 28901/95, (Judgment of 16 February 2000), paragraph 59; ECtHR *Leas v. Estonia*, App. No. 59577/08, (Judgment of 6 March 2012), paragraph 76.
[125] ECtHR *Korneykova v. Romania,* App. No. 39884/05 (Judgment of 19 January 2012), paragraph 68.
[126] ECtHR *Turcan and Turcan v. Moldova*, App. No. 39835/05 (Judgment of 23 October 2007).
[127] See e.g., ECtHR *Schops v. Germany*, App. No. 25116/94 (Judgment of 13 February 2001), paragraph 44; ECtHR *Lamy v. Belgium*, App. No. 10444/83 (Judgment of 30 March 1989), paragraph 29;

"[d]ocuments 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." Recital 30 clearly indicates that access must be given to the contents of such material as recordings, photographs and other types of evidence, so that they can be properly examined by defence and if need be their legality, accuracy, relevance or probative value challenged.

It is clear from the wording of the Directive 2012/13 that right to access 'essential documents' in detention proceedings under Article 7(1) is not subject to restrictions or derogations. Article 7(4) contains and exhaustive list of grounds for restricting access to material evidence, but states specifically that this applies only as a derogation to the disclosure of material evidence under Articles 7(2) and 7(3). Derogations under Article 7(4) therefore relate only to the scope and timing of disclosure of evidence beyond that which is essential for challenging detention and Directive 2012/13 does not allow to restrict the scope or timing of access to 'essential documents' in detention proceedings.

This interpretation of Directive 2012/13 is consistent with the case law of the European Court of Human Rights on detention proceedings under Article 5(4) ECHR. The European Court of Human Rights has recognised that even if evidence is recognized as confidential for reasons such as national security, the protection of that material cannot come at the expense of substantial restrictions on the rights of defence. The relevant evidence will have to be disclosed, perhaps with allowances made for its confidential nature:

> *'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'.* [128]

The powers available under national law for [investigative authorities/prosecutors/the court] to restrict access to the case file must be interpreted in light of this obligation under both Directive 2012/13 and the ECHR. The failure to provide these documents undermines the exercise of rights of defence in accordance with the EU law and the ECHR and the ability of the applicant to challenge effectively his arrest/detention.

The obligation to ensure access to the case file rests on this court. Article 47 of the EU Charter of Fundamental Rights ("the 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". The Court of Justice of the European Union has also recognized the importance of effective judicial protection of rights established by the EU law stating that the "principle of the effective judicial protection of individuals' rights under EU law […] is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6

[128] ECtHR *Chruściński v. Poland*, App. no. 22755/04 (Judgment of 6 November 2007), paragraph 56; see also ECtHR *Dochnal v. Poland*, App. no. 31622/07 (Judgment of 18 September 2012), paragraph 87.

and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter".[129] Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to the case file in violation of Article 7(1) of Directive 2012/13.
In conclusion, the applicant requests that the court order immediate access to the following documents/materials: [identify and enumerate].

4.2.3 Access to case file in pre-trial proceedings

Access to case file in pre-trial proceedings

When a client is arrested and detained in addition to information about charges, lawyers will need access to the case file as quickly as possible to review what inculpatory evidence is on file and start developing a defence strategy. Depending on the level of access, the case file will usually include at least information the initial charges are based upon, sometimes also the criminal record of the person. However, access to case file during crucial stages of pre-trial proceedings, such as first suspect interview, is routinely denied citing generic public interests. Member States apply broad derogations and grounds for refusal in some Member States, in addition to threat to life and physical integrity, include 'freedom of a person', 'right to privacy', 'risks of pressure on or threat to victims, witnesses, investigators, experts or any other persons involved in the proceedings'. Only a few Member States mention the necessity to safeguard 'important' public interests, generally referring to 'public interest' or 'interests of society'. Many Member States deny access to material evidence, invoking general prejudice, danger or damage to the investigation itself as the justification for the derogation, with some allowing derogations for undefined 'serious reasons'.[130]

Situations covered in the template

In this section, we set out the relevant European Union and European Convention of Human Rights standards that may be invoked to apply to the court having jurisdiction over the pre-trial phase (e.g. investigating judge, court having jurisdiction over the prosecution) seeking access to the case file or challenging a refusal to provide access to the case file in two sets of circumstances:

- The prosecutor (investigator in charge of the pre-trial proceedings) has restricted access to the evidence during the pre-trial stage based on broadly the determined grounds such as 'threat to investigation' and domestic case law supports this as a valid ground for denial of access;
- The prosecutor (investigator in charge of the pre-trial proceedings) has denied access to some of the evidence in the case file based on general reference to 'public interests' or 'freedom of another person' without providing more detailed reasons.

Practical steps

[129] CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses*, 28 February 2018, ECLI:EU:C:2018:117, § 35.
[130] Report from the European Commission to the European Parliament and the Council on the implementation of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, 18 December 2018, section 3.7.4.

Before raising the arguments contained in this template in a complaint or appeal against the decision to deny access to case materials take some practical steps.

Take action at the pre-trial stage, if you are there:

- insist upon being given access to the case file prior to questioning by the police, prosecutor or investigating judge, mentioning that you rely on the Directive;
- explain that this access is necessary in order to enable you to prepare for the questioning or other procedural activity as part of the defence. It is also necessary for your client to make his views known on the substance of the allegation, subject to his right to silence;
- ensure your request is recorded in any police protocols, mentioning the Directive. If access is not provided, consider advising silence until the contents of the file have been supplied, and ensure the reasons for the refusal of access are recorded. Explain how this refusal is undermining your ability to advise the client usefully and is forcing the client to make decisions without sufficient knowledge as to their potential consequences.

Template arguments to request access to case file in pre-trial proceedings

[*The arguments below can be incorporated into an application that sets out the factual background and the applicable national provisions, including on which the decision to refuse access to the case file is based.]*

[PLEASE DESCRIBE NATIONAL LAW AND PRACTICE ON ACCESS TO CASE FILE MATERIALS IN PRE-TRIAL STAGE].

Article 7(2) of Directive 2012/13 requires Member States to: "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." Article 7(3) in turn clarifies that "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." Therefore as a general rule suspect or accused person and their lawyer are entitled to have access to material evidence throughout the proceedings in order to be able to prepare defence, including preparing for [questioning/confrontation/examination of witnesses] during pre-trial stage.

Article 7(3) of the Directive 2012/13 states that 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. However, this paragraph refers only to the latest possible point of disclosure of evidence, and in the absence of individual decision laying out case-specific reasons for denying such access at earlier stage of proceedings, does not grant permission to deny access to material evidence during pre-trial stage by default. Such interpretation is supported by the case-law of the European Court of Human Rights.

Directive 2012/13 refers to the EU Charter of Fundamental Rights ("the Charter") European Convention on Human Rights ("ECHR") stating that "provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those

rights, as interpreted in the case-law of the European Court of Human Rights".[131] Recital 5 in particular refers to Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights ("ECHR") which enshrine the right to a fair trial and guarantee rights of defence.

European Court of Human Rights has repeatedly confirmed that rights of defence apply throughout the criminal proceedings, including pre-trial stage. This includes also the ability to prepare defence for procedural activities during pre-trial stage, including police interviews, for which access to case file is essential. In *Sapan v. Turkey* the European Court of Human Rights found a violation of the right of access to a lawyer at the pre-trial stage stating that "the applicant's lawyer had not been allowed to examine the investigation file at that point (…), which would seriously hamper her ability to provide any sort of meaningful legal advice to the applicant."[132] Similarly in *Beuze v. Belgium*, the European Court of Human Rights recognised that the lack of access to the file may affect the overall fairness of the proceedings: "depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation (…)."[133] Therefore Article 7(2) of the Directive 2012/13 provides the suspect or accused person and their lawyer with the right to access the material evidence gathered by the competent authorities during pre-trial stage of the criminal proceedings.

Article 7(4) of Directive 2012/13 allows to deny access to 'certain materials' 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. This means that competent authorities can refuse access to specific materials only when such granting access to those materials to the specific suspect or accused person could endanger an important public interest and it is strictly necessary to protect that interest. The reasons for denying access to 'certain materials', and not to all case file, are listed in Article 7(4) exhaustively. The interpretation given by the CJEU on restrictions listed in Article 3 of Directive 2013/48 on Access to a Lawyer supports exhaustive and strict interpretation of any restrictions and derogations set out in the EU Procedural Rights Directives. In *VW case* on derogations from the right to access a lawyer the CJEU stated:

> *"[T]he directive seeks, inter alia, to implement the principle of mutual recognition of decisions in criminal matters, which presupposes that Member States trust in each other's criminal justice systems. The aims of that directive include the promotion of the right to be advised, defended and represented laid down in the second paragraph of Article 47 of the Charter and of the rights of the defence guaranteed by Article 48(2) of the Charter (..) To interpret Article 3 of Directive 2013/48 as allowing Member States to provide for derogations from the right of access to a lawyer other than those which are exhaustively set out in that article would run counter to those objectives and the scheme of that directive and to the very wording of that provision and, as the Advocate General observed in point 51 of his Opinion, would render that right redundant."*[134]

[131] *Ibid*., Recital 42.
[132] ECtHR, *Sapan v. Turkey*, App. no. 17252/09, Judgment of 20 September 2011, paragraph 21.
[133] ECtHR, *Beuze v. Belgium* [GC], App. No. 71409/10, (Judgment of 9 November 2018), paragraph 135.
[134] CJEU, Case 659/18 *VW,* (Judgment of 12 March 2020), paragraphs 44-45.

The same reasoning applies to rights protected by Directive 2012/13 and restrictions set to therein. Therefore, access to certain case materials can only be denied when the competent authorities can convincingly demonstrate that access to certain specific materials in the case file may 'lead to threat of life and fundamental rights of another person' or is strictly necessary to safeguard a strictly and narrowly defined[135] public interest. This would require case-specific reasoning as to why and how access to [list specific materials or all case file] will endanger [interests of investigation/national security]. No such reasoning is given in this case.

Article 7(4) of the Directive 2013/12 requires Member States to 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. Thus, the obligation to ensure access to the case file rests on [this court]. Article 47 of the EU Charter of Fundamental Rights ("the 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". The Court of Justice of the European Union has also recognized the importance of effective judicial protection of rights established by the EU law stating that the "principle of the effective judicial protection of individuals' rights under EU law […] 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 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter".[136] Accordingly, there can be no doubt that there is an obligation on national courts to provide an effective remedy for lack of access to the case file in violation of Article 7(1) of Directive 2012/13.

In conclusion, the applicant requests that the court order immediate access to the following documents/materials: [identify and enumerate].

4.2.4 Access to interpretation services of adequate quality

See 2.5 Domestic template.

[135] See by comparison CJEU, Case 659/18 *VW,* (Judgment of 12 March 2020), paragraphs 43 on strict interpretation of derogations from the right to access a lawyer.
[136] CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses*, 28.02.2018, § 35.