Fair Trials

Litigating to advance defence rights in Europe: why EU law remains underused

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I. Introduction

Violations of procedural rights, protected both in national and EU law, are common in criminal proceedings throughout Europe.[1] EU law is rarely invoked in order to determine whether the rights of suspects or accused persons are guaranteed in criminal proceedings. What is more, we observed certain reluctance from lawyers to acquire more knowledge on the scope and practical application of EU law in their cases. EU law is perceived as relatively complex and difficult to invoke in national proceedings, which often do not allow for sufficient time and resources to develop what is perceived as complex legal arguments. Lawyers also believe that EU law arguments are likely to be rejected by courts because of their unfamiliarity with EU law. In addition, they fear that invoking EU law arguments could result in potential delays in proceedings where the courts would need to engage the Court of Justice of the European Union (CJEU) though preliminary reference procedure. This is particularly relevant where their clients are held in pre-trial detention.

When EU law is used in criminal proceedings, it is usually done by a minority of criminal defence lawyers. These lawyers routinely represent clients in cross-border cases and are therefore familiar with EU law and how to incorporate it in their defence strategy. As a result, criminal defence lawyers typically either use EU law arguments frequently in their cases or do not refer to it at all. Lawyers who are already familiar with EU law generally form the majority of the audience in training sessions, webinars, workshops and other educational and training activities on EU law.

This report is based on two years of continuous engagement with lawyers in seven EU Member States and attempts to identify and address, through recommendations, the main reasons why EU law, in particular Procedural Rights Directives[2] remain relatively unused in national criminal proceedings to advance defence rights.

About the project

This report was created as a part of the project "Litigating to Advance Defence Rights in Europe" (LADRE) funded by the European Union. The Project acknowledged the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights abuses. They operate on the front-line of the justice system, deciding

[1] See e.g., Fair Trials, Where's my Lawyer?, 2019, Fair Trials, Innocent until proven guilty?, 2019.
[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).

which legal arguments to make and whether to apply EU law. The project aimed to strengthen the ability of defence lawyers to effectively engage in litigation at domestic and EU levels where rights have been violated and use EU law to tackle abuse of fundamental rights in criminal justice systems across the EU.

Throughout the project Fair Trials offered support to groups of defence lawyers in several EU Member States – Belgium, Bulgaria, Estonia, France, Ireland, Italy, Poland and Portugal – to help them increasingly rely on EU law in domestic criminal proceedings and to seek preliminary references to the CJEU. More specifically the objective of the LADRE project was to work closely with local lawyers to help address the following issues:

- Coordinate and support strategic litigation using EU law. The project intended to build an active and engaged cohort of defence lawyers who are using EU law in their cases in different EU Member States to challenge violations of rule of law and human rights and are eager to share their insights and experience.
- Understand barriers to using EU law in domestic criminal cases and how to overcome them. This project sought to generate and publicise documented examples of the impact EU law can have in criminal cases.
- Educate and train lawyers on the relevance of EU law to criminal defence practice. The project sought to increase awareness amongst a wider community of defence lawyers and judges on the relevance of EU law in criminal justice, how to use EU law, and, crucially, where to turn for guidance.
- Create practical tools for lawyers to use EU law in domestic criminal cases. The project provided practical tools on the application of EU criminal law highlighting practical examples of effective strategic litigation.

Methodology

This report is based on individual interviews and group conversations with the lawyers engaged in the project. These lawyers represent both ones that use EU law routinely in their practice, as well as lawyers who are unfamiliar with EU Procedural Rights Directives. It is also based on our observations while attempting to engage more lawyers from target Member States in training and discussions on procedural rights and EU law. The views presented in this report do not represent the views of the majority of defence lawyers in the target Member States, however, we believe it highlights the main challenges they face when deciding whether to rely on EU law in their clients' cases. It also highlights some of the systemic shortcomings that influence lawyers' choice of defence strategy, which often may lead to the choice not to use EU law to advance their clients' case.

II. Main obstacles to using EU law in criminal proceedings

2.1. Directives leave too wide discretion to Member States

Procedural Rights Directives contain a detailed set of rights for suspects or accused persons in criminal proceedings, including access to a lawyer and legal aid, access to information, access to interpretation and translation services and other essential rights. In many areas, for example, the right to a written Letter of Rights for detainees or access to a lawyer in police custody, EU law provides a higher standard of protection than the European Convention on Human Rights and Fundamental Freedoms (ECHR). However, the effectiveness of EU law is undermined by the broad discretion afforded to Member States in implementing key aspects of Procedural Rights Directives. In practice this discretion often goes unchecked and leaves EU law on key aspects of procedural rights largely ineffective. This leads to some rights being systematically unimplemented in practice. Striking examples of such implementation gaps include mechanisms to ensure the quality of interpretation services,[3] access to legal aid, access to case materials in the pre-trial stage of criminal proceedings, including detention proceedings,[4] or access to a lawyer in the issuing state in EAW proceedings[5] and others. As an example, we will highlight the right to interpretation under the Directive 2010/64/EU.

Quality of interpretation services. Article 2(1) of the Directive 2010/64/EU on the right to interpretation and translation[6] guarantees every suspect or accused person who does not speak or understand the language of criminal proceedings a right to receive interpretation services. Interpretation is an essential right that enables the suspect or accused person to understand and exercise most other rights protected by EU law, including the right to information about rights, and the right to access and communicate with a lawyer.

Interpretation services must be provided without delay in criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings. Article 2(8) of that Directive specifies that "interpretation (…) shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence."

[3] Fair Trials, Where's my lawyer?, 2019, p.23.
[4] Fair Trials, Where's my lawyer?, 2019, p. 21.
[5] 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, Section 3.10.2., Fair Trials, Where's my lawyer?, 2019, p.17, Fair Trials, "Protecting fundamental rights in cross-border proceedings: are alternatives to the European Arrest Warrant a solution?" 2021, p.46.
[6] 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).

Article 5(1) specifies that Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9). In order to do so Member States should "endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified."[7]

In practice, however, interpretation is often of poor quality.[8] Although encouraged by the Directive 2010/64/EU[9] national law often does not require creation of a register of certified interpreters or that interpreters qualify with a specific degree or test. As a result, Member States may use interpreters that have received no accreditation or training in legal terminology or objectivity and confidentiality requirements for interpreters.[10] Interpretation services provided by poorly trained interpreters may not only deny the suspect or accused person of their right to fully understand and exercise their essential rights in criminal proceedings, but also result in violations of the right to a fair trial.[11]

In addition, no quality control mechanisms to assess the work of interpreters in police stations or in court exist. In its 2019 report the European Union Agency for Fundamental Rights observed that "across all of the Member States researched, there appears to be no mechanism to check the quality of interpretation."[12] Lawyers are also usually unable to identify any issues relating to interpretation, unless they happen to speak the language. Remedies for poor quality interpretation, especially if it has resulted in the suspect or accused person providing self-incriminating evidence, under EU law are limited and are largely left to the Member States to create.[13] Sometimes concerns about the quality of interpretation 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. The lack of objective evidence, such as audio-visual recordings, make it difficult to challenge poor quality interpretation.

Therefore, even though there is a right to receive qualitative interpretation services for all suspects or accused person who need it under EU law, the broad discretion left to Member States in creating quality control systems, coupled with a lack of concrete and effective remedies in case of failure to guarantee these rights, severely undermines the usefulness of EU law in such cases. Even though there is a right to receive qualitative interpretation services, the manner in which this obligation is fulfilled by Member States is subject to a political (financial, institutional, organisational) choice which cannot be challenged before national or even regional courts. Therefore, EU law is sometimes not seen as effective in challenging violations of the right to qualitative interpretation (and fair trial) in individual cases or ensuring systemic implementation of the right.

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[7] Article 5(2) Article 5(2) of the 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.
[8] See Fair Trials video testimonies on the right to interpretation and translation in cross-border proceedings: https://www.youtube.com/watch?v=0XIRw9EbKiw&list=PLFOit5MKd80WV_AqtpNHCnrrWudJbN7yC&index=1
[9] Article 5(2) Article 5(2) of the 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.
[10] See Fair Trials video testimonies on the right to interpretation and translation in cross-border proceedings: https://www.youtube.com/watch?v=0XIRw9EbKiw&list=PLFOit5MKd80WV_AqtpNHCnrrWudJbN7yC&index=1
[11] ECtHR, Knox v. Italy, No. 76577/13, 24 January 2019, paras. 82.-88.
[12] European Union Agency for Fundamental Rights, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 2019, p.68.
[13] Fair Trials, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, see also ECtHR, Baytar v. Turkey, App. No. 45440/04, 14 October 2014, para. 54.

2.2. Courts are not receptive to EU law arguments

Lawyers who do not regularly use EU law in their practice are more difficult to engage as they do not believe familiarity with EU law will advance their criminal defence practice. Defence lawyers often choose to rely instead on constitutional law or the jurisprudence of the European Court of Human Rights (ECtHR) to challenge violations of defence rights due to courts' familiarity with these sources of law. Even in areas where EU law presents a higher standard of protection, such as access to case materials in pre-trial stage or access to a lawyer in police custody, lawyers do not believe that relying on EU law will provide a better outcome.

One of the reasons for general unfamiliarity with EU law is that it is still perceived as relatively new and complex legislation. Invoking EU law before domestic courts requires familiarity not only with substantive provisions on procedural rights, but also with the general principles of its direct applicability. Therefore, the preparation required to invoke EU law generally requires more time and resources. If lawyers are not sure that courts will be receptive to EU law, they are reluctant to spend this additional time and resources. They doubt that spending their already scarce resources will yield enough benefit to justify their use in comparison with constitutional law or ECHR standards or even comparative criminal (procedural) law. This is especially where the financial resources available to defence lawyers to prepare their client's case are limited by either the financial situation of their client or limited legal aid funding (see chapter 2.3 below).

Interviewed lawyers consider that the reason why courts are not receptive of EU law is that they are unfamiliar with Procedural Rights Directives and the principles of their application in national criminal proceedings. Thus, they prefer to focus on constitutional law and on the ECHR which are applied routinely and are more likely to get the desired engagement from judges.

2.3. The right to legal aid and inadequate resources

Limited resources available to defence lawyers and the number of people in need of state provided legal assistance mean that lawyers have very limited time and resources to prepare their clients' cases. Most individually practicing lawyers do not have additional research staff to help prepare complex legal arguments in their cases. This forces them to settle for a defence strategy that allows them to be effective in their role while also spending the limited resources as efficiently as possible. This choice may often not include exploring new sources of law, such as EU law.

Legal aid services across the EU are systemically under resourced. A clear focus towards providing more resources, including, legislative, administrative, and financial, to law-enforcement authorities and courts is felt not only on a national level, but also on EU level. This includes among others increasing regional policing and evidence gathering powers

through expansion of EUROPOL's mandate[14] and the creation of the European Public Prosecutor's Office. At the same time insufficient resources, both in terms of time and resources, are afforded to defence. This includes not only financial resources, but also legislative resources such as access to procedures to guarantee effective judicial protection (remedy). The imbalance in attention afforded to the defence as an essential part of a fair criminal process is felt even in cross-border digitalisation policies, which do not envisage digital tools to address systemic shortcomings such as access to a lawyer or essential case materials in the issuing state.[15]

Under the Directive 2016/1919 on legal aid, EU Member States are permitted to make receiving legal aid conditional to the satisfaction of a means test,[16] a merits test,[17] or both.[18] However in many European countries that apply a means test, it is applied in an inflexible manner essentially excluding people whose means are slightly above the eligibility threshold, but also not sufficient to afford to pay for a private lawyer. Moreover, legal aid budgets are typically underfunded. The European Commission for the Efficiency of Justice (CEPEJ) reported that 17 Council of Europe (CoE) Member States had reduced their implemented budget for legal aid between 2014 and 2016.[19] According to the CEPEJ, only seven CoE countries have legal aid budgets reaching over 10% of the total budget of the judicial system. In most countries legal aid budgets represent from 2% to a little over 6% of the total budget of justice system.[20] In five countries the legal aid budget is below 1% of the total budget of the judicial system.[21]

Even where legal aid is available, it often is subject to limitations and restrictions. For example, legal aid does not cover the cost of proceedings under EU law and in many European jurisdictions. The Directive 2016/1919 on legal aid failed include court costs and other costs associated with criminal proceedings as part of legal aid. As a result, a person may qualify for legal aid that would cover their lawyer's fees, but not other costs.[22] In addition, the very low level of legal aid fees generally do not allow lawyers to prepare their clients' defence adequately, let alone explore new avenues of defence or spend time familiarising with new sources of law that are not guaranteed to benefit their clients' cases. The lack of resources available to defence lawyers forces them to make strategic choices on how to spend limited time and resources, which also limits their ability to rely on sources of law that are perceived to be less familiar to judges.

[14] New Europol rules massively expand police powers and reduce rights protections, Statewatch, 10 November 2022.
[15] Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, 1.12.2021.
[16] When applying a means test, Member States must consider factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that State (Article 4(3) of the Directive on legal aid).
[17] When applying a merits test, Member States shall take into account the seriousness of the offence, the complexity of the case and the severity of the sanction at stake (Article 4(4) of the Directive on legal aid).
[18] Article 4(2) of the Directive 2016/1919 on legal aid.
[19] CEPEJ, European judicial systems – Efficiency and quality of justice - 2018 Edition, p. 84.
[20] CEPEJ, European judicial systems – Efficiency and quality of justice - 2018 Edition, p.77.
[21] Ibid.
[22] Fair Trials, Efficiency over justice: insights into trial waiver systems in Europe, 2021, p.58.

III. Lack of effective remedy for violations of EU law

Another reason why EU law remains underused is the absence of an effective remedy for violations of EU law. Effectiveness of legal provisions is determined to a large extent by the ability to challenge, reverse or compensate violations of those provisions. The right to an effective remedy or effective judicial protection for fundamental rights violations is protected by various EU instruments,[23] notably Article 47 of the Charter of Fundamental Rights of European Union (the Charter). There is also a general obligation to guarantee effective judicial protection for violations of rights under EU law, which is considered to be a general principle of EU law.[24] Directive 2013/48/EU on the right to a lawyer and Directive 2016/343 on the presumption of innocence provide for a right to an effective remedy, however they are loosely defined and no not envisage concrete binding measures. Other Procedural Rights Directives do not specifically refer to an effective remedy.

Procedural Rights Directives and the Charter do not define what an effective remedy should entail and what form they should take in national proceedings or with regard to specific rights violations. For example, Article 12 of the Directive 2013/48/EU states that: "Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected." Right to an effective evidentiary remedy is particularly important not only to restore suspects' or accused persons' rights in criminal proceedings, but also to disincentivise officials from breaching rights protected under EU law.[25] The effectiveness of EU law and thus its utility in defence on a national level is largely dependent on whether the suspect or accused person can invoke a breach of those rights and obtain an effective remedy.

In reality, as shown by a recent Fair Trials' report, evidentiary rules increasingly tolerate evidence obtained in violation of procedural law or even EU law and fundamental rights.[26] Instead of creating concrete and enforceable rules on effective judicial protection, Procedural Rights Directives refer to the ECHR which itself relies on the principle of subsidiarity as a justification for refusing to set clear red lines when it comes to the admission and use of illegally obtained evidence.[27] This includes evidence obtained in violation of procedural rights protected by the Directives, such as evidence obtained in breach of right to a lawyer, right to silence or privilege against self-incrimination or right

[23] Articles 6 and 13 of the ECHR; Article 47(1) of the Charter; Article 12 of the Directive on the right of access to a lawyer; Article 10 of the Directive on the presumption of innocence. For more on the right to an effective remedy and evidentiary remedies in particular, *see* Fair Trials, Unlawful evidence in Europe's Courts: principles, practice and remedies, 2021.
[24] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, para. 35, available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=D7A97289BD68A4F7E3E7D31D578AA5BE?text=&docid=199682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11583977
[25] Fair Trials, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, p. 48.
[26] Fair Trials, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, from p. 31.
[27] Fair Trials, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, from p. 15.

to information about rights.[28] The ECtHR sets a high threshold to find a violation of the right to a fair trial when procedural rights are breached.[29] In recent years the "overall fairness" employed by the ECtHR to determine whether a violation is sufficiently problematic has eroded the effectiveness of procedural rights and limits States' incentives to respect them. In addition, EU law, as opposed to the ECtHR, views defence rights as a separate set of fundamental rights both under Article 48 of the Charter and Procedural Rights Directives. Therefore, the failure to respect them should entail an effective remedy under EU law, which is currently left entirely to Member States' discretion.

Thus, even where it is recognized that evidence has been obtained in violation of EU law, it is unclear that national evidentiary rules will prevent the negative effect on defence. Lack of clear and enforceable rules on effective remedy in cases of violations of EU law render the provisions of the Procedural Rights Directives ineffective and reduce their added value in comparison with constitutional law or ECHR standards on effective remedy. Therefore, given the relatively complex set of principles for their direct application, lawyers are reluctant to base their arguments on EU law. The same problem is increasingly present in cases where evidence is gathered and exchanged between Member States.[30]

IV. Limited scope of EU law in key areas of criminal procedure

Although the Procedural Rights Directives provide a relatively detailed set of defence rights in criminal proceedings, key areas of criminal proceedings remain outside of the scope of their protection. This relates not only to areas such as pre-trial detention or admissibility of evidence (and evidentiary remedies), but also to trial waiver systems or minor crimes, that are explicitly exempt from the scope of the Directives.[31] In those situations, which increasingly cover the majority of punitive processes (criminal and in some states administrative offences) lawyers have to rely on constitutional or ECHR standards to defend their client's rights.

4.1. The presumption of innocence and pre-trial detention

Despite deteriorating conditions in European prisons, pre-trial detention continues to be overused, with rates of pre-trial detention increasing across Europe. In 2021, almost 100.000 persons were in prison waiting for a final conviction. This equates to some 22 of every 100,000 inhabitants in the EU being deprived of their liberty before final

[28] Ibid.
[29] ECtHR, Beuze v. Belgium, No. 71409/10, 9.11.2018, para. 150.
[30] Fair Trials, German courts refer the legality of EncroChat evidence to the CJEU, 8 November 2022.
[31] See e.g., 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, recitals 13,16, and 17.

conviction.[32] This means that more than one in five people in European prisons were, at the beginning of 2021, in pre-trial detention. This is despite elaborate regional standards under the ECHR and national legislation, that should limit recourse to pre-trial detention to a measure of last resort after proper assessment of necessity and proportionality.

Although often seen as a separate process, pre-trial detention, where applied, is inextricably linked with criminal proceedings and affects effective exercise of virtually all defence rights. It has a huge impact on its progress and outcome. From a legal perspective criminal proceeding involving pre-trial detention of a suspect have to be carried out with special diligence to avoid prolonged unnecessary deprivation of liberty of a person who is not convinced by an independent court. In practice pre-trial detention is often used as a pressure point to incentivise the suspect or accused person to cooperate with the investigation. It may also be more difficult for the suspects or accused persons to prepare their defence, including meeting their lawyer as often as necessary, from pre-trial detention facilities.[33] Pre-trial detention and its impact on the conditions in European detention facilities also directly affects cross-border cooperation.[34] Yet proper application of pre-trial detention as well as detention conditions remain largely unaddressed by EU law.

For decades there has been a recognition that pre-trial detention is severely overused in the EU,[35] however essential aspects of defence rights in pre-trial detention proceedings are not covered by the Procedural Rights Directives. For example, Directive 2016/343 on the presumption of innocence does not apply to basic aspects of pre-trial detention proceedings such as burden of proof.[36] According to the CJEU in *DK*, Article 6 of the directive, which regulates the burden of proof, and accordingly Articles 6 and 47 of the Charter, do not apply to a national law that makes the release of a person held in detention on remand conditional on that person establishing the existence of new circumstances justifying their release.[37] Thus it does not apply in situations where the detainee is faced with the burden to prove why he/she should be released from pre-trial detention. Despite glaring incompatibility with basic principles of the right to liberty under the ECHR[38] and the Charter, the CJEU ruled that presumption of innocence, which also determines the burden of proof, does not apply in such case. This decision has been criticised by commentators as over-restricting the applicability of the Directive 2016/343.[39] Accordingly, and although the Directives and Charter should be at least as protective as the ECHR, resorting to ECtHR case law might therefore be more successful on key issues related to pre-trial detention, including the burden of proof.

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[32] Civio, One in five people in EU prisons are in pretrial detention, 10 May 2022.
[33] Reference to Measure of Last Resort and Where is my Lawyer
[34] See e.g., Court of Justice of the European Union (CJEU), Joined Cases C-404/15 and C-659/15, Judgement of 5 April 2016.
[35] Ref to PTD green paper, COE docs.. etc.
[36] CJEU, Case C-653/19 PPU – DK, Judgment of 28 November 2019.
[37] CJEU, Case C-653/19 PPU – DK, Judgment of 28 November 2019, para. 42.
[38] Although not under the right to presumption of innocence (article 6(2) ECHR) but the right to liberty (article 5 ECHR). *See* ECtHR, Pastukhov and Yelagin v. Russia, App. no. 55299/07, Judgment of 19 December 2013, para. 49; ECtHR, Magnitskiy and Others v. Russia, App. nos. 32631/09 and 53799/12, Judgment of 27 August 2019, para. 222; ECtHR, Zherebin v. Russia, App. no. 51445/09, Judgment of 24 December 2013, para. 60; ECtHR, Ilijkov v. Bulgaria, App. no. 33977/96, Judgment of 26 July 2001, paras. 84-85; ECtHR, Rokhlina v. Russia, App. no. 54071/00, Judgment of 7 April 2005, para. 67.
[39] See notably Adriano Martufi and Christina Peristeridou, CJEU, Case C 653/19 PPU, DK, November 2019.

4.2. Procedural rights and trial waiver systems and fast track processes

EU procedural rights are conceptualised to work in a trial setting. Despite the substantive gaps in EU law in providing effective remedies, challenges to the fairness of criminal investigations and violations of procedural rights in the process of evidence gathering can only be brought by the accused person in a trial setting. However, increased reliance on criminal punishment for the past 30 years across Europe has gradually overburdened criminal justice systems which are forced to find new ways to be more efficient. As a result, we witness the rise of trial waiver systems and other fast track mechanisms to settle criminal cases without full criminal trial.[40] These mechanisms cut the normal criminal proceedings short by skipping a full investigation or examination of evidence before an independent court, increasingly relying on evidence such as confessions or police testimony. In France, for example, the European Commission of the Efficiency of Justice (CEPEJ) highlighted in 2016 that: "75% of cases, compared with 45% ten years ago, are subject to rapid referral to the criminal court, either by the investigating judge or by direct summons, without a preliminary investigation. These developments have helped to expedite proceedings, with 75% of persons concerned now appearing before the courts within a period of two days to four months".[41]

In the context of trial waiver systems and other fast track processes, courts have limited power (sometimes no power at all) to review the fairness of the proceedings on their own motion. In addition, suspects or accused persons are not incentivised to challenge rights violations, as this may lead the court to reject the request to approve a trial waiver agreement.[42] These mechanisms often do not envisage an examination of the legality of the manner in which the evidence was collected and an independent verification as to whether the accused person's procedural rights were fully complied with throughout the proceedings.[43] Therefore EU law may not be ineffective or even not applicable in proceedings which do not involve a full criminal trial or at least independent verification of the evidence and procedural rights of accused persons.

4.3. Minor Offences

Procedural Rights Directives explicitly exempt minor offences from their scope[44] because it was considered that it would be unreasonable for Member States to provide

[40] Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", Journal of Criminal Justice and Security,(5-6)2008, p.10.
[41] CEPEJ, Length of court proceedings in the Member States of the Council of Europe, 2016, p.59.
[42] Fair Trials, Efficiency over justice: insights into trial waiver systems in Europe, 2021, Section 6.2., p.33.
[43] Ibid.
[44] Article 1(3) Directive 2010/64/EU on the right to interpretation and translation; Article 2(2) Directive 2012/13/EU on the right to information; Article 2(4) Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings; Article 2(4) Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings; Article 7(6) Directive (EU) 2016/343 on the strengthening of certain aspects of

rights comparable to those of criminal proceedings for large number of relatively minor offences, notably those that do not involve deprivation of liberty as a sanction.[45] However, sanctions such as fines that may be perceived as relatively minor from the legal point of view, may have a huge impact on an individual accused and severely and in the long-term disrupt their ability to provide for themselves or their family.

What constitutes a 'minor offence' is not defined and this lack of clarity leaves an extremely wide margin of appreciation to Member States to limit the implementation of the directives for a large proportion of criminal procedures, if not the majority of them.[46] In practice, punishment for minor offenses is generally imposed without a full trial and is administered directly by the police, prosecutors and/or administrative officers[47] sometimes by issuing a fine on the spot. In the same vein, classifying certain offences and punitive processes as administrative offenses allows governments to bypass essential procedural rights and judicial oversight, which ensure that any punitive procedure however seemingly small is fair. This creates an environment conducive to unchecked police powers, encouraging unchallenged abuses of power, discrimination, ethnic profiling, and miscarriages of justice. This also applies to cases, which may be characterised as "administrative" under national law, but must be deemed "criminal" under the ECHR either due to the punitive nature of the process or gravity of the sanction.[48] Administrative sanctions likely constitute the majority of sanctions in the EU.[49]

As a result, EU law is not used as it is not effective in challenging violations of procedural rights in minor or administrative offences. This means that where there is a cause for challenging the process of application of an administrative sanction or the accused person's procedural rights in that process, lawyers will likely resort to constitutional law

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the presumption of innocence and of the right to be present at the trial in criminal proceedings; and Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings provides a similar provision to article 2(4) of Directive (EU) 2016/1919.

[45] For example, at the time of drafting the Directive 2013/48/EU, the European Economic and Social Committee (EESC) recommended the exclusion of MOs as it feared that obliging EUMS to guarantee procedural rights in this context would jeopardise efficiency and could lead cumbersome, expensive procedure disproportionate to the potential sanctions. It suggested that EUMS should be able to deviate from the principles of the Directive when 'relatively minor acts, relating to commonly committed offences, are neither questioned nor questionable'. Art. 3.7.4.1 of the Opinion (EESC) on the Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest, 15 February 2012, COM (2011) 326 final – 2011/0154 (COD), 51-55.

[46] *E.g* in Spain, they make up over 50% of criminal prosecutions (see below); in Germany, fines make up over 80 % of all criminal sanctions (*The Limits of Fairer Fines: Lessons from Germany*, Mitali Nagrecha, 2020); in France about 50% of persons in prisons are there for theft, degradation of property or a drug related offense (https://oip.org/en-bref/pour-quels-types-de-delits-et-quelles-peines-les-personnes-detenues-sont-elles-incarcerees/) and 25% are in prison for short sentences of less than 6 months (https://oip.org/decrypter/thematiques/courtes-peines/); in Belgium, a majority of offenses concern theft, degradation of property and drug related offenses (http://www.stat.policefederale.be/assets/pdf/crimestat/nationaal/rapport_2020_trim4_nat_belgique_fr.pdf).

[47] Jörg Martin Jehle, Marianne Wade, Coping With Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe, Springer, 2006, p.19.

[48] ECtHR, Engel and Others v the Netherlands, No. 5100/70, 1806.1976, para. 810-12., see also, European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights*, 2021, pp.10-11.

[49] In 2008, administrative offences made up the majority of offences (criminal and administrative) dealt by the justice system in some EU Member States. *See,* Jörg Martin Jehle, Marianne Wade, Coping With Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe, Springer, 2006., p.38.

or the ECHR standards, which may still apply to offences classified as "administrative" or "minor".

V. Inapplicability of procedural rights in cross-border proceedings

Even where lawyers are familiar with EU law and use it on daily basis, they may sometimes be incentivised to push for resolution of cross-border issues between national competent authorities rather than seeking clarification from the CJEU. This is connected to the fact that EU law and the interpretation given by the CJEU gives an extremely restrictive approach to the application of Procedural Rights Directives to cross-border proceedings, further limiting their scope and effectiveness.

In a recent line of case law concerning the Criminal proceedings against IR,[50] the CJEU approved a system whereby no adversarial judicial review of the merits of issuing either a European Arrest Warrant (EAW) or a national arrest warrant is required until the requested person is transferred to the issuing state. The CJEU stated that Article 47 of the Charter, which encompasses the right to effective judicial protection, does not require that the right to challenge the decision to issue an EAW for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State. Thus, the Court has taken the view that the mere fact that the person who is the subject of an EAW issued for the purposes of criminal prosecution is not informed about the remedies available in the issuing Member State, and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of the issuing Member State, cannot result in any infringement of the right to effective judicial protection.

Thus, the requested person or their lawyer in the issuing state do not appear to have the right to access essential documents in the case file in accordance with Article 7(1) of the Directive 2012/13/EU and other rights typically guaranteed to detained or accused persons under EU law until after their transfer to the issuing state. In IR, the CJEU stated that requested persons acquire the status of an "accused person" within the meaning of Directive 2012/13/EU and therefore enjoys all the rights associated with that status under Articles 4, 6 and 7 of that directive "from the moment of his or her surrender to the authorities of the Member State that issued that warrant". This means that even where there is a possibility to challenge the national arrest warrant, procedural rights enjoyed by all suspects in the EU may not apply due to the absence of the requested person from the territory of the issuing state.

Therefore, the Procedural Rights Directives, which were adopted with the express goal to promote mutual trust in cross-border proceedings, may be inapplicable and thus ineffective in bridging the existing gaps in earlier legislation and procedures.[51] This decreases the confidence of lawyers in effectiveness and utility of not only the EU law

[50] CJEU, Case C-105/21, *IR*, 30.06.2022; CJEU, Case C-649/19, *IR*, 28.01.2021.
[51] See also Fair Trials, The right to judicial review in cross-border proceedings, Video Testimonies, 2021, available: https://www.youtube.com/watch?v=z_SRh_OkLAY.

itself but also in the ability of CJEU to promote the protection of fundamental rights through the interpretation of existing procedural safeguards. For this reason lawyers sometimes prefer to push national courts to resolve the issues faced in cross-border proceedings on a national level through application of higher national standards rather than to involve the CJEU, which they believe may reduce the standard of protection for procedural rights and present more challenges to fulfilment of their tasks in EAW proceedings.

VI. Conclusion

Fair Trials' work on the Project and ongoing interaction with defence lawyers across Europe shows that despite more than ten years since the adoption of the first Procedural Rights Directive, EU law remains underused in criminal proceedings across Europe. The main reasons for its limited use remain lawyers' unfamiliarity with EU law and its complex application in national proceedings. There is also a distinct possibility that national judges will not be receptive to EU law arguments thus rendering the time and resources invested in preparing EU-law based defence ineffective.

In order to improve the effectiveness of existing EU law and broaden its use in domestic proceedings training activities alone will not be sufficient. Given the enormous inequality in resources between defence and prosecution, in particular the restraints put on defence lawyers by extremely limited legal aid budgets across the EU, lawyers are unlikely to devote time and resources to include EU law arguments in their pleadings without systemic changes that afford them such possibility. This means ensuring that legal aid budgets are adequately financed and offer lawyers the opportunity to prepare comprehensive defence in each case.

On an EU level, defence rights and equality of arms in criminal proceedings must be mainstreamed into all EU policies concerning criminal law and procedure, including digitalisation policies, the expansion of policing and prosecutorial powers, and any review of cross-border cooperation instruments.