

**ROADMAP PRACTITIONER TOOLKITS**

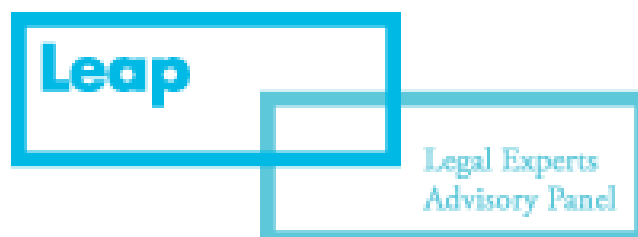
## **USING EU LAW IN CRIMINAL PRACTICE**

**KEY EU LAW PRINCIPLES**

**HOW THE TOOLKITS WORK**

**USING A DIRECTIVE PRIOR TO ITS TRANSPOSITION DEADLINE (WITH  
SPECIFIC FOCUS ON THE ACCESS TO A LAWYER DIRECTIVE)**

**CJEU REFERENCES**



## About Fair Trials and LEAP

Fair Trials Europe (“Fair Trials”) is a public utility foundation based in Brussels which works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Working with the Legal Experts Advisory Panel (“LEAP”) – a network of over 140 criminal justice and human rights experts including defence practitioners, NGOs and academics from 28 EU Member States – Fair Trials has contributed to the negotiations surrounding the adoption of the first three directives under the Roadmap for strengthening procedural rights.

LEAP, supported by Fair Trials, is now working to ensure effective implementation of the Directives, further to its February 2015 strategy [Towards an EU Defence Rights Movement](#), including through practitioner training, litigation before the national courts and Court of Justice of the EU.

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## INTRODUCTION

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### 1. New directives on fair trial rights

Working with Fair Trials, the Legal Experts Advisory Panel ('LEAP')<sup>1</sup> – a network of over 140 criminal justice professionals from all 28 Member States – did a lot of work to support the European Union ('EU') institutions negotiation and eventual adoption of the three directives adopted under the Roadmap for strengthening procedural rights in criminal proceedings. LEAP members saw problems in the protection of fair trial rights, and it was hoped that EU legislation could help solve them.

Three directives have been adopted: Directive 2010/64/EU on the right to interpretation & translation in criminal proceedings<sup>2</sup> (the 'Interpretation & Translation Directive'); Directive 2012/13/EU on the right to information in criminal proceedings<sup>3</sup> (the 'Right to Information Directive'); and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings<sup>4</sup> (the 'Access to a Lawyer Directive') (collectively, the 'Directives').

Their transposition deadlines expire(d) on 27 October 2013, 2 June 2013 and 6 November 2016 respectively. And, though there are already some documented delays, by and large, Member States have or will have adopted legislation in order to implement the Directives.

### 2. Lawyers need to use them

However, to ensure the Directives have full effect, it is necessary to ensure that they are relied upon by the national courts, the key forum for enforcement of EU law. At an October 2014 roundtable meeting, LEAP members agreed a strategy paper, *Strategies for effective implementation of the Roadmap Directives: Towards and EU Defence Rights Movement*,<sup>5</sup> placing particular emphasis on ensuring lawyers invoke the Directives and encourage courts to rely upon them.

This series of Toolkits aims to assist in this process by providing a reminder of essential EU law ideas and structures (this Toolkit), and practical advice for relying on the Interpretation & Translation Directive and the Right to Information Directive. This Toolkit also includes some general comments on the use of Directives prior to their transposition deadlines, relevant to the Access to a Lawyer Directive, the transposition deadline of which was some distance away at the date of publication.

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<sup>1</sup> For more information about LEAP, visit <http://www.fairtrials.org/fair-trials-defenders/>.

<sup>2</sup> 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](#)).

<sup>3</sup> 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](#)).

<sup>4</sup> 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 294, p. 1](#)).

<sup>5</sup> Available at <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

## A. STRUCTURE OF THE TOOLKITS

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These Toolkits are designed to help you understand how the Directives fit into your practice as a criminal practitioner, in particular vis-à-vis the European Convention on Human Rights ('ECHR'). In this Toolkit we will refer to different kinds of law and will distinguish them like this:

*Provisions of the ECHR and citations from case-law of the European Court of Human Rights ('ECtHR') appear in yellow shading, with a single border, to represent their nature as an irreducible minimum. They are presented in italics.*

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union ('CJEU') appear in green shading, with a double border, to represent their nature as complementary, possibly more extensive protection.

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directives in the local legal context. We have indicated when we are making a suggestion with the symbol '→'.

In general, the Toolkits are constructed by reviewing the existing ECHR principles (with reference to cases of the ECtHR), presenting the provisions of the relevant Directive with some initial views as to their meaning, and then providing advice on how to use the Directives in practice.

The last point – effectively, 'using' EU law in court – depends upon certain assumptions about the legal effects of the Directives and how they can be invoked in national courts. The purpose of this Toolkit is to propose our approach to this question of how the Directives take effect in national law.

## B. INVOKING EU LAW: GENERAL PRINCIPLES

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It is not possible to give a complete overview of EU law in this Toolkit. However, since criminal lawyers may have had very little reason to study any of these principles since law school, we propose to run through the essential principles as a starting point for further research.

### 3. Direct effect – in general

EU law works through a system of 'decentralised' enforcement where the national court is the primary driver of compliance. This system has been the modus operandi of EU law ever since the seminal judgment *Van Gend en Loos*,<sup>6</sup> in which the European Court of Justice (now the CJEU) established the principle of 'direct effect'. The philosophy is that when obligations upon Member States are there to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. The principle was originally recognised for primary law (Treaties) when the obligation in question was 'precise, clear and unconditional' and 'do not call for additional measures' by Member States or the EU. It was then extended to regulations (not relevant here), and then to directives.

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<sup>6</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [ECLI:EU:C:1963:1](#).

#### 4. Direct effect – Directives

Directives need to be transposed into national law by Member States. However, provisions of directives can have direct effect too, as was originally established in the *Van Duyn*<sup>7</sup> and *Ratti*<sup>8</sup> cases. A recent restatement of the principle is the following:

'(...) [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 (...)'.<sup>9</sup>

Clearly, in criminal proceedings your opponent is the state so – fortunately – there is not going to be an issue in terms of the vertical nature of direct effect. However, on the question of the requirement for the provision to be 'unconditional and sufficiently precise', there are some points to make:

- The fact that a provision may be unclear – in the sense that it needs interpreting – does not prevent it having direct effect: the meaning and exact scope may be clarified by the CJEU.<sup>10</sup>
- An EU law provision including derogations can have direct effect: such a provision 'limits the discretionary power' available under national law and the individual is able to rely on this;<sup>11</sup> 'This is especially so when the individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits as to their discretion set out in the directive'.<sup>12</sup>

Further to the above we would make these observations:

- The provisions of the Directives – entitled 'Right to...' – impose unequivocal obligations in favour of suspected or accused persons and appear intended to give rise to rights for such persons.
- Provisions establishing derogations to the rights so established (e.g. Article 7(4) of the Right to Information Directive allowing exceptions to the right of access to case materials) appear simply to limit national discretion, and do not detract from the precision of the whole obligation.
- Unclear provisions in the Directives may still be directly effective (it may need to be clarified what an 'essential document' within the meaning of Article 3 the Interpretation & Translation Directive is, but that provision nevertheless creates a right to translations of such documents).

<sup>7</sup> Case 41/74 *Van Duyn* [ECLI:EU:C:1974:133](#).

<sup>8</sup> Case 148/78 *Ratti* [ECLI:EU:C:1979:110](#).

<sup>9</sup> Case C-236/92 *Difesa* [ECLI:EU:C:1994:60](#), paragraphs 8-10.

<sup>10</sup> Case 41/74 *Van Duyn* [ECLI:EU:C:1974:133](#), paragraph 14.

<sup>11</sup> *Van Duyn*, cited above note 7, paragraph. 13.

<sup>12</sup> Case 51/76 *Verbond van Nederlandse Ondernemingen* [ECLI:EU:C:1977:12](#), para. 24.

- The Directives are all entitled 'right to' as are many of their provisions, and as instruments designed to make certain aspects of the human right to a fair trial more effective, it would seem logical that they should be capable of being invoked by individuals.

→ Start from the basis that provisions of the Directives entitled 'right to' and which unequivocally oblige Member States to ensure that suspected or accused persons have a certain right do in fact create such rights and have direct effect in favour of your client. Let the prosecution argue the contrary.

## 5. The duty of conforming interpretation

Regardless of whether a provision has direct effect, national law must be read in light of the wording and purpose of a directive in order to achieve the objectives pursued by the latter, in accordance with the conception of national courts as part of the Member State subject to the result obligations of a directive. Though this 'duty of conforming interpretation' applied originally to domestic legislation specifically implementing the directive, the duty is broader. The CJEU has explained that:

'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 (...), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.'<sup>13</sup>

The principle provides you with a solid basis to argue for certain interpretations of national law in line with the Directives. So, again:

→ Be prepared to argue in relation to any question relating to the Directives that national law must be interpreted in such a way as to give effect to the Directive in question. This applies irrespective of whether the provision is determined as having direct effect.

It is worth noting, since the topic is criminal procedure, that the *Pupino*<sup>14</sup> judgment famously applied the duty of conforming interpretation to framework decisions adopted under the Treaty on European Union prior to 2009. The ruling effectively gave these measures, more loosely binding by virtue of their legal basis which fell outside the main Community law structure, a status proximate to Directives adopted under the Community basis.

Though much is written about this judgment in criminal law publications, (a) it is arguably now redundant since framework decisions are, following the expiry of transitional provisions in the Treaty on the Functioning of the European Union ('TFEU'), in any case part of the main EU law structure, and (b) the measures we are presently concerned with are directives, adopted under the TFEU; accordingly, you need not concern yourself with the *Pupino* principle.

<sup>13</sup> Case C-69/10 *Samba Diouf* [ECLI:EU:C:2011:54](#), paragraph 60.

<sup>14</sup> Case C-105/03 *Pupino* [ECLI:EU:C:2005:386](#).

## 6. The Charter

Again, a review of the discussion surrounding the application of the Charter in national contexts is beyond the scope of this Toolkit. We would point out the essential provisions which provide the legal basis for the application of the Charter in criminal proceedings.

- Article 51(1) This Charter is addressed to ... the Member States *only when they are implementing EU law* (emphasis added).
- The CJEU has stated in relation to this provision that ‘the application of EU law entails the applicability of the fundamental rights guaranteed by the Charter’.<sup>15</sup>
- Under Article 6 of the Treaty on European Union, the Charter ‘has the same legal value as the Treaties’; as such it can be invoked directly, and enjoy supremacy in the same way as treaty provisions on free movement (see *Van Gend* above). Parts of the Charter (such as Article 27) do not have direct effect without implementing measures, but the rights relevant here (Article 6 (right to liberty), Article 47 (right to a fair trial / effective remedy) and Article 48 (defence rights)) are categorical rights and may be invoked in disputes falling within the scope of the Directives.

Based on the above there is no doubt about the following piece of advice:

- ➔ You can invoke the Charter together with the Directives. Even if a provision of the Directives does not itself have direct effect, the provisions of the Charter can be relied upon directly by individuals in relation to any issue falling within the scope of the Directives. Conflicting rules of national law must be set aside.

## C. INVOKING THE DIRECTIVES

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### 1. Brandish the Directive

In the Toolkits on the Interpretation & Translation Directive and Right to Information Directive, we several times recommend taking action at the pre-trial stage, mostly in the context of initial police questioning. In this context, we specifically say that you should refer to the Directive.

Of course, the police station is not the place for a legal argument in the same way as a court. However, we advise action based on the Directive in order to create a record, within police protocols / minutes, which you will be able to refer back to in the context of invoking a remedy later on before the courts. In addition, the fact of referring explicitly to the Directive is an important part of the process of establishing the Directive as a normative framework in practice.

In this regard we would cite the initiative of some lawyers in Spain. Challenging the apparently limited role of the lawyer in police interrogations as specified in the criminal procedure law, several lawyers decided to take a more active role in police interrogations in order to protect their clients’ right to silence. This resulted in a complaint<sup>16</sup> to the Madrid Bar by the local police force, in which it

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<sup>15</sup> Case C-617/10 *Åklagaren v Åkerberg Fransson* [ECLI:EU:C:2013:105](#), paragraph 21.

<sup>16</sup> Available here: <https://docs.google.com/file/d/0ByaSopTTggsPQOdNNE1oWk11X2M/edit>.



is recorded that the lawyers had been explicitly invoking the Access to a Lawyer Directive, well over two years before its implementation date. The Madrid Bar politely dismissed this complaint, pointing out that it was not for the police to determine what effects the Directive might have.<sup>17</sup> This shows the conduct of police station proceedings can be cast in a new light, and possibly influenced for the better, just by making the Directive part of the conversation.

## 2. The remedial principle

Ultimately though, the Directives establish rights and the way these are enforced is by invoking the Directive in court when those rights are not respected. This may, in particular, be because national law has not correctly implemented the Directive and so, when applied to your case, produces a violation of EU law. In this situation, you need to claim a remedy.

### a. The access to a lawyer model

The ‘model’ we will take as a reference point is that established by the ECtHR in its *Salduz v. Turkey*<sup>18</sup> judgment of 2008:

*‘Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (...) 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.’<sup>19</sup>*

The ECtHR is not, of course, capable of specifying to Contracting States how they should organise their justice systems. But it arises fairly clearly from this provision that if the right to a lawyer at the pre-trial stage is infringed, remedial action must be taken by the courts to ensure that the resulting evidence is not ‘used for a conviction’ (e.g. through exclusion of evidence).

The strength of this indication is what enabled the EU Member States to agree the clearest provision on remedies of any of the Directive: Article 12(2) of the Access to a Lawyer Directive, which includes a specific ‘remedies’ provision apparently designed to secure compliance with the *Salduz* principle:

*‘Without prejudice to national rules and systems on the admissibility of evidence, 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 (...) the rights of the defence and the fairness of the proceedings are respected.’*

This provision displays the ‘constructive ambiguity’ that characterises the Roadmap – in other words, Member States could not agree and so used broad wording, leaving the CJEU to find the right interpretation when concrete cases arise. But it does express the basic idea that a violation of the right guaranteed by the Directive should meet a response from the competent courts, so as to guarantee that the earlier breach does not contaminate the fairness of the proceedings as a whole.

<sup>17</sup> The response is available here: [http://web.icam.es/bucket/ACUERDO%20I\\_P\\_%20277-14%281%29.pdf](http://web.icam.es/bucket/ACUERDO%20I_P_%20277-14%281%29.pdf).

<sup>18</sup> Case of *Salduz v. Turkey*, App. no. 36391/02 (Judgment of 27 November 2008).

<sup>19</sup> Paragraph 55.

## b. The other Directives

The situation in relation to the other Directives is less clear. Article 8(2) of Directive 2012/13/EU provides a general right obligation concerning remedies, providing:

'Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.'

In relation to Directive 2010/64/EU, very little is provided other than that there should be a 'right to challenge' a decision that there is no need for linguistic assistance or a 'possibility to complain' regarding the quality of linguistic assistance provided. Both these Directives therefore leave a great deal to Member States' discretion. However, this is still subject to general requirements of EU law.

## c. The right to an effective remedy

However, it should be borne in mind that even when something is left to Member State competence, general principles of EU law still apply, including the right to an effective remedy. This right, which has existed for a long time in the CJEU case-law, is contained in Article 47 of the Charter:

'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.'

## d. General approach in the Toolkits

Fair Trials relies on the following two assumptions in these Toolkits:

- Whilst the provisions in the specific Directives differ in the extent of approximation they bring about, all reflect the general assumption that EU law rights must be effectively protected through judicial remedies.
- In order to be legally effective, a judicial remedy offered in respect of a violation of one of the Directives needs to be such as to achieve the purpose pursued, which with all the Directives is to ensure the fairness of the proceedings.
- Accordingly, the remedy which you should be seeking is one within the context of the criminal proceedings, which has the ability to recognise a given act (e.g. a police questioning conducted in violation of obligations in the Directives) as inconsistent with a right under the Directives and take action to redress any prejudice this has caused to the fairness of the proceedings.

→ Start from the basis that you have a general right to an effective judicial remedy in accordance with Article 47 of the Charter, of which there may in addition be a specific articulation in the Directive. You must be able to call upon a court to ensure the fairness of the proceedings and ensure the objective pursued by the relevant Directive is achieved.

### 3. The Directives do not create new systems

EU law tends to leave procedures to the Member States to organise, under a principle known as 'national procedural autonomy'. Traditionally, EU law will only impose very basic requirements of access to remedies, e.g. requiring legal aid provision, excluding time limits which limit access to the courts etc. under the doctrine of 'effectiveness'. Whilst the Directives actually regulate procedure, and so go further than this, they impose only minimum standards and the legal basis, Article 82(2)(b), TFEU specifies that they should 'take into account the differences between the legal traditions' of the Member States' justice systems. In other words, there is no 'harmonization' and the fundamental structures of justice systems are not altered. Thus, the Directives cannot be used to create a system of exclusion of evidence where there is none.

### 4. Use existing avenues of recourse to ensure the effect of the Directives

However, national law should already provide a mechanism for enforcement of procedural rights (at least those protected by the national code), and the idea is to use these to achieve the objectives of the Directives. For instance:

- In Latvia, Article 130 of the criminal procedure code requires the trial court, when judging on the merits, to have no regard to evidence obtained in violation of fundamental principles of criminal law. The court can have limited regard to evidence obtained through lesser violations, taking into account any doubts about its reliability arising from the breach.
- In France, the court judging on the merits of a simple case, seised of an application *in limine litis*, can declare a procedural act (e.g. a police custody) 'void' if the procedural code or even ECHR principles are infringed, such that this act can no longer form the basis for its decision. The same power arises in respect of investigative acts taken by an investigative judge.

Such systems provide a mechanism linking violations of defence rights to remedial action taken by criminal courts. These mechanisms can be harnessed in order to give effect to the relevant directive. So, to use the above examples, a violation of the provisions of the Directive at the pre-trial stage should be considered akin to a violation of the ECHR or a 'fundamental principle of criminal law' and the prescribed remedy should be applied.

Legally, the key question is how to achieve this. These are our assumptions in the Toolkits:

- The principle of direct effect enables you to invoke the specific rights conferred by the Directives and you can rely on the substantive right conferred by the Directive in national courts.
- This right can be invoked when the national procedural code has failed properly to implement the Directive, or directly contradicts it. So if, for instance, national law excludes the lawyer from police questioning, where the Directive clearly requires this, the accused will be able to rely directly upon the Access to a Lawyer Directive (after its implementation deadline) and the national rule has to be set aside.
- Similarly, you have a right to an effective remedy as guaranteed by Article 47 of the Charter which you can rely upon to claim a remedy for the violation of the rights in the Directives, together with any specific remedial obligations in the Directives themselves.

- In addition, the whole body of national law, including provisions regulating remedies / admissibility of evidence, need to be interpreted and applied in such a way as to give effect to the Directive in question.
- In general, therefore, criminal courts must use any powers available to them (e.g. disregarding evidence, invalidating procedural acts) to ensure a legally effective remedy for violations of the rights under the Directives and their objective of ensuring the fairness of the proceedings is met.

This is the basis for what we mean when, throughout this Directive, we suggest that you should ‘invoke the Directive’. We are talking about claiming a remedy before the competent jurisdiction (which we think likely to be the trial court in many cases) to repair the damage done by doing something like excluding / disregarding evidence, declaring procedural acts invalid etc. This is the furthest we think you can get on the basis of the very limited harmonisation the EU Member States have been prepared to agree in the Directives.

→ Start from the basis that Article 47 of the Charter, together with specific provisions on remedies in the Directives, gives you a basis on which to claim remedies available under national law such as declaring procedural acts invalid, disregarding / excluding evidence, so as to enforce the right in question. These need to be applied in such a way as to ensure the effectiveness of the Directive.

## 5. Exploring the role of pre-trial instances

### a. The problem with delayed enforcement

Remedies such as those discussed above may, depending on the system, be reserved to the *trial* court, which means enforcement of the Directive may be delayed until then. This may be unsatisfactory, not least given the ongoing adverse effects of being under prosecution (including possibly deprivation of liberty) and the fact that it is unsatisfactory for an investigation to proceed on the basis of a non-compliant act until an opportunity arises to challenge it. You will want to ensure the Directive is given effect earlier.

Again, it is important to acknowledge the legal limits of the Directives. They are ‘minimum rules’ which respect the different legal cultures of the Member States. The Directives themselves constantly refer to procedures in national law, particularly when discussing rights of challenge / remedies (see Article 8(2) of Directive 2012/13/EU or Article 12(2) of Directive 2013/48/EU). Essentially, the Member States have made it fairly clear that they did not intend to alter the fundamental makeup of their systems and the way these work.

Our assumptions are, therefore, these:

- The Directives cannot be used to ‘invent’ remedial systems that do not exist, and tools such as exclusion of evidence / invalidity, if reserved to the trial court under national law, cannot be relied upon until that stage.
- This said, all courts are under an obligation, for matters within their jurisdiction, to ensure the effectiveness of the Directives and they cannot allow their jurisdiction to be fettered to the extent of depriving the Directive of useful effect.

## b. The role of pre-trial instances in ensuring the effect of the Directive

One frontier we encourage you to explore is the invocability of the Directives before pre-trial instances. Systems may exist within national law to challenge the legality of investigative acts in the ordinary course, e.g. by applying to a chamber for annulment of an act or seeking the exclusion of evidence before the case is sent for trial. However, on a more routine basis, we would suggest that one of the key forums is court competent for determining the issue of pre-trial detention.

These are our assumptions about such courts:

- The jurisdiction of pre-trial detention instances will usually be limited to matters relating to detention (flight risk, availability of alternatives etc.), and they will not usually be competent to take a view on the legality of an investigative act if this is reserved for a separate court.
- It is well-established, however, that in ECtHR jurisprudence that the review of pre-trial detention must extend to a review of the reasonableness of the suspicion against the person,<sup>20</sup> which constitutes a condition *sine qua non* of detention.
- The Directives state that they are intended to safeguard the effective exercise of defence rights and do not restrict this to the trial stage. In addition, they all specifically refer to the right to liberty and the presumption of innocence protected by the Charter, suggesting that the exercise of defence rights extends to pre-trial detention decision-making.
- To the extent that a violation of the Directive may have an impact on the right to liberty and presumption of innocence at the pre-trial stage, therefore, the pre-trial detention court must, within the limits of its jurisdiction, ensure the objectives of the Directive are met.
- Pre-trial detention courts should therefore use their general jurisdiction to review the strength of the case to determine the extent to which possible violations of the Directives may have impacted upon the case (e.g. a confession obtained in breach of a Directive) and avoid basing their decisions on acts which appear to violate the Directives.

We therefore make this recommendation, which is certainly defence-friendly but which has the advantage of ensuring compliance with the Directives at the point it matters most:

→ Start from the basis that the Charter and the direct effect of the relevant provision of the Directive mean the pre-trial court must be able to take into account possible violations of the Directives when taking its decision. It should avoid basing its decision upon procedural acts which appear to violate the Directives.

## D. USING A DIRECTIVE BEFORE ITS TRANSPOSITION DEADLINE (ACCESS TO A LAWYER)

The Access to a Lawyer Directive, which articulates certain aspects of the ECtHR's case-law further to the *Salduz v. Turkey* ruling, entered into force on 27 November 2013 (twenty days after the date of its publication in the Official Journal of the EU (see Article 17)). However, at the time of publication of this Toolkit, the deadline for transposition into national law (27 November 2016) is still distant. As such, the Access to a Lawyer Directive cannot itself yet create direct effect in favour of individuals.

<sup>20</sup> [Nikolova v. Bulgaria](#) App. no 31195/96 (judgment of 25 March 1999), paragraph 58.

Fair Trials will, in due course, be publishing a separate Toolkit on this measure. However, you may wonder whether how can already use the Access to a Lawyer Directive at this stage. For that purpose, we review below some relevant case-law before setting out some examples from three Member States in which the Directives has been used in litigation, as you may wish to do with the Access to a Lawyer Directive.

## 1. Review of relevant CJEU cases

### a. *Kolpinguis*

In an early case, *Kolpinguis*,<sup>21</sup> in response to the first two questions referred, the CJEU<sup>22</sup> restated existing principles according to which a directive cannot be relied upon against an individual (as they bind only the Member States to which they are addressed) and that the duty of conforming interpretation, though it required existing legislation to be read in line with the Directive, could not aggravate criminal liability of an individual absent specific implementing measures. (The CJEU was thereby telling the Dutch authorities they could not prosecute someone for selling tap water combined with gas as ‘mineral water’ on the basis of a directive excluding the sale of water not derived from a spring as mineral water, when those authorities had not at the time of the acts in question adopted implementing laws.) It then dealt with a question asking whether a difference arose if the directive in question had not reached its transposition deadline,<sup>23</sup> to which it responded:

‘The question whether the provisions of a directive may be relied upon as such before a national court arises only if the Member State concerned has not implemented the directive in national law within the prescribed period or has implemented the directive incorrectly. The first two questions were answered in the negative. However, it makes no difference to those answers if on the material date the period which the Member State had in which to adapt national law had not yet expired. As regards the third question concerning the limits which Community law might impose on the obligation or power of the national court to interpret the rules of its national law in the light of the directive, it makes no difference whether or not the period prescribed for implementation has expired’ (paragraph 15).

Though the case is interesting, the point about pre-deadline effects of the directive was essentially academic: the CJEU had found that a directive could not be relied upon against an individual to aggravate their criminal liability in any event, such that it (literally) did not make a difference whether the directive was past its transposition deadline at the time the state sought to do so. But it is also true that the CJEU did not say in terms that the duty of conforming interpretation could *not* apply prior to the transposition deadline.

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<sup>21</sup> Case 80/86 *Kolpinghuis Nijmegen*, [ECLI:EU:C:1987:431](#).

<sup>22</sup> For judgments prior to 1 December 2009, the correct term should be the ‘Court of Justice of the European Communities’ but we use the same acronym of ‘CJEU’ to avoid confusion.

<sup>23</sup> The directive in question was notified on 17 July 1980, making its transposition deadline 17 July 1984, and the offences in question took place in August 1984, so the issue did not actually arise. The national court may have thought the notification to have taken place upon publication in the Official Journal on 30 August 1980, which it may have understood to make the transposition deadline 30 August 1984, which would have led it to ask whether the state could rely on the directive against the individual prior to its transposition deadline.

## b. Wallonie and subsequent cases

A more noted case of this nature is *Wallonie*,<sup>24</sup> which concerned a directive limiting the circumstances in which waste disposal could be carried out without a permit. A national law, adopted prior to the transposition deadline, exempted operators engaged in waste disposal as part of the industrial process from the requirement for a permit and the referring court regarded this as contrary, in normative terms, to the directive in question. Asked whether Member States were precluded from adopting measures contrary to the directive during the period prescribed for its transposition, the CJEU said:

'Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period (...) Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period (...) Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed' (paragraphs 43-46).

By Article 5 'the Treaty', the CJEU is referring to Article 5 of the then Treaty Establishing the European Community, which now takes the form of Article 4(3) of the Treaty on European Union, providing that 'the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' (the provision which also forms the basis for the doctrine of direct effect). By Article 188 of the Treaty, the CJEU is referring to what is now Article 288 TFEU, which provides that Directives are binding on Member States as to the result to be achieved but leave to them the form and methods for achieving this. These same foundations are then used in subsequent cases developing the *Wallonie* principle, including the case of *Adeneler*,<sup>25</sup> which raised the question of the role of courts in interpreting legislation prior to the implementation deadline. The CJEU said:

'Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect (...) the obligation to refrain from taking measures, as set out in the previous paragraph, *applies just as much to national courts*. It follows that, from the date upon which a directive has entered into force, *the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive* (paragraphs 121-123) (emphasis added).

<sup>24</sup> Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* ([ECLI:EU:C:1997:216](#)).

<sup>25</sup> Case C-212/04 *Adeneler* ([ECLI:EU:C:2006:443](#)).



These principles can be used to found arguments, as French and Spanish lawyers have done (see section 2 of this chapter) that Member States' criminal courts cannot adopt decisions prior to the transposition deadline which are liable seriously to compromise the achievement of a directive's objectives after the deadline. This might include the adoption of actions pursuant to a restrictive understanding of national law (e.g. one excluding lawyers from intervening in questioning) which would lead to results (i.e. people being convicted and/ or remaining in prison on the basis of these interrogations) which would be contrary to the Access to a Lawyer Directive after its deadline.

### c. *Mangold*

Another important case is *Mangold*,<sup>26</sup> which concerned Directive 2000/78/EC implementing the principle of equal treatment in employment, including limitations on discrimination on grounds of age in Article 6. Mr Mangold had been employed on a fixed-term contract as he was over 52, as permitted by a law – adopted after the entry into force of the directive and due to expire shortly after the transposition deadline – designed to encourage employment of older persons who were presumed unable to obtain employment on other terms. This law, however, used blunt methods and was not consistent with the principle of proportionality, being based solely on an age criterion. Mr Mangold argued that its application to him was contrary to Article 6 of Directive 2000/78, despite the latter not having reached its transposition deadline.

The CJEU gave a ruling which is considered controversial. It referred to the *Wallonie* case-law, holding that Member State could not adopt specific measures which would compromise the objective of Directive 2000/78, noting that Directive 2000/78 required legislative progress to be made along the way to its ultimate transposition deadline (paragraphs 66-73). It then said:

'In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of (...) age (...)', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law (...) Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned (...) In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in

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<sup>26</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [ECLI:EU:C:2005:709](https://eur-lex.europa.eu/eli/cj/oj/2005/709).



respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (paragraphs 74-77).

In referring to a 'general principle of Community [now EU] law', the CJEU is referring to uncodified norms which have been recognised in the case-law of the CJEU over time and which have equivalent status to primary treaty law. These are recognised by the CJEU on the basis of 'common constitutional traditions' of the Member States, i.e. where certain principles are universally shared, they are deemed to form part of EU law too. As such, the CJEU is effectively saying that though the transposition deadline of the directive articulating this general principle had not passed, the general principle itself was applicable and as such could be invoked directly in order to set aside a conflicting national norm. Bearing in mind that the Directives, explicitly, articulate fundamental rights (which are general principles), an argument of this kind could be made.

## 2. Pleading the ECHR with support of the Directive

Unlike EU law, whose supremacy arises from the Treaties, the status of the ECHR in national law depends upon the constitutional arrangements. However, there are arguably ways in which the Access to a Lawyer Directive could be used before its deadline, to support high-level litigation based on the ECHR. Some lessons can be drawn from cases following the *Salduz v. Turkey* decision.

In the UK, the Supreme Court found the system of police custody in Scotland contrary to the ECHR,<sup>27</sup> noting for this purpose the practices in many countries and the case-law of the ECHR, which showed there was a clear standard. The result was that the non-compliant legislation was urgently reformed.

In France, in a July 2010 decision<sup>28</sup> the Constitutional Council found the law excluding lawyers from police custody unconstitutional. A reform was adopted, and was due to enter into force in July 2011. In the meantime, initial decisions of the Court of Cassation said, police custodies conducted in line with the existing legislation would be considered valid, prior to entry into force of the new legislation.<sup>29</sup> But the plenary chamber of the Court of Cassation then intervened to hold that it was incumbent upon the courts to ensure respect for Article 6 ECHR there and then,<sup>30</sup> leading prosecutors to issue urgent guidance in the image of the new law not yet in force. The later ruling was – quite possibly – the result of France being held in violation of Article 6 by the ECtHR around the same time, so that it became patently clear that in preserving the effects of the existing law was preserving a situation contrary to international law.

Arguably, the Access to a Lawyer Directive would, in equivalent situations today, provide additional support for arguments based on the ECHR, showing that there is a full EU consensus around certain norms and giving national courts greater support in giving effect to the ECHR in accordance with the constitutional arrangements which apply in the Member State concerned. However, as the Dutch case discussed below makes clear, this is not a simple exercise.

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<sup>27</sup> *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43.

<sup>28</sup> Decision 2010-14/22 QPC of 30 July 2010.

<sup>29</sup> Judgments 5699, 5700 and 5701 of 19 October 2010.

<sup>30</sup> Judgments 589, 590, 591, 592 of 15 April 2011.

### 3. National pre-deadline uses of the Directives

#### a. The Paris template pleading

In March 2013, the *Conférence* of the Paris Bar (a yearly cohort of young lawyers) issued a template pleading<sup>31</sup> relying (15 months before its transposition deadline) on Article 7(1) of the Right to Information Directive, which it argues requires the provision of the police file to an arrested person's lawyer. The pleading relies on the *Kolpinguis* and *Wallonie* cases, and argues that there is an obligation incumbent upon the national court to read the national legislation in conformity with the Right to Information Directive, obliging the judge to ensure sufficient access to materials (or a remedy in default). Though some decisions of the lower courts concurred, we are not aware of any decision prior to the Right to Information Directive's deadline which followed this rule, which would have required a fairly significant departure from the exact text of the criminal procedure code. We would point out, though, that the initiative had the effect of placing the legislator under scrutiny.<sup>32</sup>

#### b. Litigation before the Dutch Supreme Court

In April 2014, the Dutch Supreme Court gave a decision<sup>33</sup> in a case raising the issue of the right to assistance of a lawyer during questioning.<sup>34</sup> The Court had, in 2009, found that this was not provided by national law. After this, the ECtHR gave judgments making it very clear that this was required by Article 6 ECHR,<sup>35</sup> and, of course, the EU adopted the Access to a Lawyer Directive, Article 3(3) clearly provides that the lawyer should be able to participate effectively in questioning. The case decided in 2014 called upon the Court to establish whether such a right could be claimed in the Netherlands. This was, of course, 31 months before the transposition deadline of the Access to a Lawyer Directive.

In her conclusions in the case,<sup>36</sup> which she discussed at the LEAP Annual Conference in February 2015, Advocate General Taru Spronken suggested that, in line with the now developed ECtHR case-law and the Access to a Lawyer Directive, the Court should find in favour of the party claiming that right. She pointed out, among others, that the Access to a Lawyer Directive merely articulated case-law of the ECtHR (which is supposed to have direct effect in the Netherlands) and thus fell to be applied immediately. This was essentially an example of the use of the Access to a Lawyer Directive as evidence of the existence of a clear standard which should be applied in accordance with the existing constitutional arrangements, discussed above.

However, the Court did not follow the reasoning, finding that it was beyond its powers to create this right which was provided by the legislation and which fell to the legislature to create. It also commented that the Access to a Lawyer Directive was not yet directly effective. As Dutch LEAP

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<sup>31</sup> Available at <http://www.laconference.net/defense-penale/modeles-de-conclusions.html>.

<sup>32</sup> See A. Tinsley, J. Finelle 'Access to the criminal case file: French example shows potential impact of Roadmap Directives', EUTopia, 3 June 2014, available at: <http://eutopialaw.com/2014/06/03/access-to-the-criminal-case-file-french-example-shows-potential-impact-of-roadmap-directives/>.

<sup>33</sup> Hoge Raad, decision of 1 April 2014 (ECLI:NL:PHR:2014:770) (in Dutch).

<sup>34</sup> For full discussion of the case, see Bas Leeuw 'Does judicial restraint lead to ECHR non-compliance?', 26 June 2014; Wouter van Ballegooij 'Should the Dutch Supreme Court look to Strasbourg, Luxembourg or the Hague?'; Jozef Rammelt 'And suddenly, nothing changed', all available at [www.fairtrials.org/press/](http://www.fairtrials.org/press/).

<sup>35</sup> See, inter alia, *Navone v. Monaco* App. No 62880/11 (Judgment of 24 October 2013), paragraph 79.

<sup>36</sup> Conclusions of 26 November 2013 (ECLI:NL:PHR:2013:1424) (in Dutch).

members have commented on Fair Trials' news section, the Court appeared, paradoxically, to have thus used the Access to a Lawyer Directive as a justification for not following a clear evolution in the case-law of the ECtHR. That said, as in France, the case placed the legislator under the microscope.

### c. Template pleadings in Spain

A LEAP member in Spain, working with *Asociación Libre de Abogados*, a lawyers' network, sought to confront the situation arising in police stations in which lawyers have been admonished by police for advising clients to remain silent, together with the lack of access to the case file prior to questioning. They circulated a template pleading for the purposes of *habeas corpus* applications challenging the regularity of police arrests, which was made available to colleagues, drawing upon the Directives.

In respect of the Right to Information Directive, the pleading makes straightforward arguments based on direct effect of Article 7(1), arguing that the latter entitles them to the police file prior to questioning. In respect of the Access to a Lawyer Directive, the pleading relies upon subsequent cases developing the *Wallonie* principle. It then argues that, due to the violation of the suspect's rights, the police arrest is not regular. One such case is pending before the Constitutional Court.

## 4. Some pre-deadline ideas

We think it will, realistically, be challenging to obtain positive results on the basis of the Access to a Lawyer Directive prior to its transposition deadline (the same goes for other directives which may in due course be adopted further to the Roadmap). We propose some arguments below, though we would say clearly that some of these are very far-reaching.

### **Arguments based on the Wallonie doctrine**

- The national authorities, both the investigative ones and the courts, are bound by the obligation now articulated in Article 4(3) TEU to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties', which includes the Access to a Lawyer Directive. The obligations under Article 288 to achieve the objectives of that directive have already come into being by virtue of that measure entering into force.
- Arguably, relying on *Kolpinguis*, the duty of conforming interpretation arises prior to a directive's transposition deadline, so if the national law can be interpreted and applied in line with the Access to a Lawyer Directive, it should be.
- More clearly established is the obligation of the Member State to refrain from taking, prior to the transposition deadline of a directive, measures liable seriously to compromise the achievement of the latter's objectives after that deadline (*Wallonie*). This includes the courts, which are bound to refrain from adopting interpretations of national law in this period which would mean the results would not be achieved following the transposition deadline (.
- Whilst the *Wallonie* case-law plainly refers to legislative measures, arguably, measures of a more particular nature (such as investigative actions) should also be avoided in the period prior to the transposition deadline of the Access to a Lawyer Directive if they are liable seriously to compromise the objectives of the latter. So, in particular, if a person is to be questioned, doing so in a manner contrary to the

Access to a Lawyer Directive (e.g. preventing the lawyer from participating) would be to take a positive action such as to compromise the fairness of the proceedings, contrary to the objective of the Access to a Lawyer Directive.

**Arguments based on the Mangold doctrine**

- ➔ The right of access to a lawyer is an aspect of the right to a fair trial commonly recognised by all the constitutions of the Member State, and may be considered a general principle of EU law. This is confirmed by the Charter, of which Articles 47 and 48 protect the right to a fair trial and defence rights. The fact that the Access to a Lawyer Directive confers a specific set of rights for enforcing the latter does not detract from the existence of the norm of primary law itself.
- ➔ The Charter right / general principle are already within the scope of EU law by virtue of the Access to a Lawyer Directive, and although specific measures have not been taken yet to implement the latter, the Charter / general principle can nevertheless be relied upon by the individual, and conflicting national legislation set aside (indeed, if it conflicts it will have to be changed in the implementation process anyway).

**CJEU reference?**

- ➔ Seek a reference to the CJEU asking about the effects of the *Wallonie* and *Mangold* case-law in the context of criminal cases, in particular as to the extent to which a 'result' contrary to the Access to a Lawyer Directive should be understood as including a conviction and application of penalties based on actions incompatible with that directive, even though these are taken on the basis of measures applicable prior to the adoption of legislation implementing the latter.

**Arguments based on ECHR effects**

- ➔ Depending on the status of the ECHR in your jurisdiction, you may wish to argue that national laws are inconsistent with the ECHR. The Access to a Lawyer Directive simply clarifies, articulates and makes subject to EU law enforcement mechanisms obligations which exist anyway in the ECHR, and those obligations can therefore be invoked as ECHR norms in the manner foreseen by the national constitutional arrangements. For instance, if the national law does not permit lawyers to intervene in questioning, you can say that – as clarified by the Directive – the ECHR standards clearly include a right of participation of the lawyer so the courts should attach consequences to the inconsistency with the ECHR in accordance with the applicable constitutional arrangements.

## E. USING JUDICIAL DECISIONS / LEGAL INFORMATION FROM OTHER COUNTRIES

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In proceedings relating to the European Arrest Warrant, it is frequently useful for people to invoke decisions given by courts in other countries. And indeed, there is a limited amount of judicial dialogue between the jurisdictions. Thus, the *Ramoci* decision of the Italian Court of Cassation,<sup>37</sup> for instance, is cited in many jurisdictions as an example of teleological interpretation of national law in

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<sup>37</sup> Sezioni unite [30.01.2007](#).

application of the *Pupino* principle.<sup>38</sup> Fair Trials, working with members of the LEAP network, has itself made submissions to courts in the Czech Republic<sup>39</sup> and Belgium<sup>40</sup> detailing decisions from France, Germany, Ireland and the United Kingdom.

With the Directives, there is at least some possibility that decisions from some other courts may become relevant. We have already seen that members of the LEAP network are able to rely upon decisions emanating from comparable jurisdictions (e.g. using French and Belgian decisions in Luxembourg). We certainly believe that there is some value in informing courts of the approach taken by their peers elsewhere when faced with similar issues arising under the Directives. This is the first time that there has been binding legislation on defence rights, so this is a fairly untested subject. We encourage you to use Fair Trials as forum for exchanging decisions: [let us know](#) if you receive decisions, so that we can share them with others like you looking for inspiration elsewhere.

You may also find it helpful to put comparative law information in the hands of the courts. For instance, Fair Trials has gathered a significant amount of information from LEAP on the substantive rules and modalities relating to access to case materials, which it has compiled in a report<sup>41</sup> and a submission to a Swedish court.<sup>42</sup> These matters may help show courts that there are different approaches, create doubt as to the requirements of the relevant directive, and motivate them to refer important questions to the CJEU.

## F. CJEU REFERENCES

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When issues of interpretation of the Directives arise, it is not for criminal courts alone to resolve them. The interpretation of the Directives, Charter and other relevant principles, will be for the CJEU to resolve, via preliminary rulings on questions referred by courts in the Member States in accordance with Article 267 TFEU. You should be familiarise yourself with other materials made available by Fair Trials and, when you think it appropriate, be ready to request a reference. So:

- ➔ Consult Fair Trials' Guide to the CJEU.<sup>43</sup>
- ➔ Consult Fair Trials' online training module on the CJEU.<sup>44</sup>
- ➔ Establish whether provision is made in the procedural code for a reference to be made by the criminal court to the CJEU

At various points in this Toolkit, we will suggest that it might be necessary to seek a reference to the CJEU to clarify the exactly meaning of the Directives. The above materials provide some basic answers as to the challenges to obtaining a reference and some tactics / arguments you can use in response. For present purposes, we would underline some points to bear in mind.

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<sup>38</sup> Cited above note 14.

<sup>39</sup> Available [here](#).

<sup>40</sup> Available [here](#).

<sup>41</sup> LEAP, *Survey report: Access to the Case File*, available at <http://www.fairtrials.org/wp-content/uploads/Access-to-file-report.pdf>

<sup>42</sup> See 'Fair Trials intervenes over access to the case file', <http://www.fairtrials.org/press/fair-trials-intervenes-over-access-to-case-file/> (the submission is available at the bottom of the page).

<sup>43</sup> Available at: <http://www.fairtrials.org/wp-content/uploads/2012/10/CJEU-Guide-final1.pdf>.

<sup>44</sup> Available at: <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

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

## G. STRATEGIC APPROACHES

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### 1. Work with Fair Trials

You are one of thousands of lawyers who will be seeking to use the Directives in practice. This is new for everyone, and we are keen to hear about what is working and what is not, how police and courts are reacting, and what success you are having relying on the ideas and arguments put forward in our Toolkits. We will be sharing examples between jurisdictions and using the information we hear from practitioners to inform our strategies on obtaining rulings from the CJEU.

- ➔ Let Fair Trials know what results you are having when relying on the Directives and the arguments supplied in our Toolkits, via the contacts on p. 1.

### 2. Tactics & cooperation

Ensuring the Directives have effect could take time and require more than just making arguments before the courts. LEAP members in Spain, for instance, have and France, for example, have led linked initiatives to use Article 7(1) of the Right to Information Directive to get access to the police file prior to questioning, combining litigation with briefings to police and court services, governments and complaints to the European Commission as to non-implementation.

LEAP considered this matter at a specific roundtable and has issued a paper (cited below) which sets out some of the main activities. These include: (A) litigation and building the capacity of lawyers, including through production of template pleadings using EU and comparative law arguments, and training materials such as the present document; (B) participating in national implementation exercises, including legislative processes but also the formulation of best practices and policies of ministries of justice, courts etc.; (C) collating information and case examples documenting issues in the implementation of the Directives, and communicating these to the European Commission which, has enforcement powers; and (D) raising awareness of the Directives through journal articles and publications. These are all things which we encourage you to consider doing and you should feel free to approach Fair Trials, as coordinator of LEAP, to explore potential cooperation in your country.

- Consult LEAP's paper *Strategies for effective implementation of the Roadmap Directives: Towards an EU Defence Rights Movement*.<sup>45</sup> Make contact with Fair Trials if you would like to discuss potential collaboration.
- Consult the Fair Trials / LEAP Communiqué on Strategic approaches to litigation at the CJEU on the European Arrest Warrant and Roadmap Directives.<sup>46</sup>

We hope you achieve results with the Directives. Good luck!

**Fair Trials Europe**

**Legal Experts Advisory Panel**

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<sup>45</sup> Available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

<sup>46</sup> Available at: <http://www.fairtrials.org/publications/report-of-the-meeting-on-18-june-2014-strategic-approaches-to-litigation-at-the-court-of-justice-of-the-eu-on-fair-trial-rights-in-criminal-cases-and-the-european-arrest-warrant/>