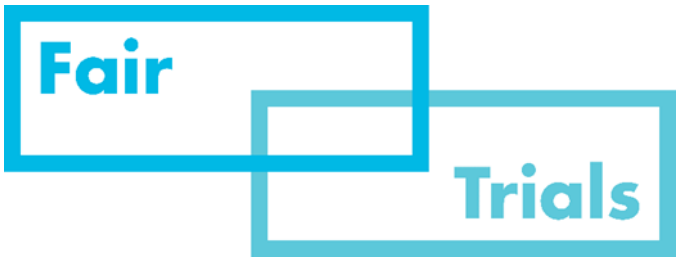


**PRACTITIONERS' TOOLS ON EU LAW**

# EU CHARTER OF FUNDAMENTAL RIGHTS

**About Fair Trials**

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

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

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: https://www.fairtrials.org/legal-experts-advisory-panel

This toolkit is created as a part of the project "Litigating to Advance Defence Rights in Europe" funded by the European Union. The Project acknowledges 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 which legal arguments to make and whether to apply EU law. The project aims 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.

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# INTRODUCTION

## A. INTRODUCTION

### 1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('**EAW'**). This system relies on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('**ECHR' or 'the Convention'**).

However, cooperation was progressively undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the began setting minimum standards in 2009 for the procedural safeguards of suspects and accused persons, regulating certain aspects of criminal procedure through a programme called the '**Stockholm Roadmap**'.[1]

Whilst the original objective of these measures is ensuring mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element. These cover the Directive 2010/64/EU on the right to interpretation and translation ('**Right to Interpretation and Translation Directive**'),[2] Directive 2012/13/EU on the right to information ('**Right to Information Directive**'),[3] and the right of access to a lawyer ('**Access to a Lawyer Directive**'),[4] procedural safeguards for children,[5] the right to the presumption of innocence and to be present at trial ('**Presumption of Innocence Directive**')[6] and the right to legal aid ('**Legal Aid Directive**')[7] (collectively, the '**Roadmap Directives**' or '**Procedural rights directives'**).

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p.1).
[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).
[3] 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, 1.6.2012, p. 1).
[4] 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, 6.11.2013, p. 1).
[5] 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 2016 L 132, 21.5.2016, p.1.).
[6] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, 11.3.2016, p. 1).
[7] 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 2016 L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

The Charter of Fundamental Rights of the European Union ('**the Charter**') was proclaimed by the European Institutions in December 2000 but it is only ten years later that the Lisbon Treaty[8] gave legal value to the Charter, meaning that EU law, including the Procedural rights directives, need to be interpreted in the light of the Charter.

This toolkit explains the procedural aspects of how the Charter can be used in the interpretation and application of the Procedural rights directives and national law that implements them. This Toolkit contains four substantive parts:

- Introduction to the toolkit and short history of the Charter
- I – Procedural aspects of the application of the Charter
- II – Substantive provisions of the Charter
- III – Limitations of Charter rights

## 2. Purpose of this toolkit

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

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Charter. The toolkit compiles the latest developments in the jurisprudence of the Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights (**'ECtHR'**) relevant to the enforcement of the key provisions of the Charter and identifies the key provisions of the Procedural rights directives where the provisions of the Charter could strengthen their interpretation and application.

Since the Charter is not an instrument that cannot be applied independently of other substantive EU law, this toolkit is designed to assist the interpretation and application of the rights enshrined in the Procedural rights directives. We have developed practical toolkits for lawyers on each of those directives and we encourage you to use this toolkit in combination with other toolkits we have produced:

- The toolkit on the Access to a Lawyer Directive;
- The toolkit on the Right to Interpretation and Translation Directive;
- The toolkit on the Right to Information Directive;
- The toolkit on the Legal Aid Directive;
- The toolkit on the Presumption of Innocence Directive;
- The online legal training on pre-trial detention.[9]

[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271, Art. 6.
[9] Follow our website on EU law materials for the upcoming and updated toolkits.

Please also refer to the toolkit on "Using EU law in Criminal Practice" for a general introduction on how to use EU law in national proceedings.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the "CJEU Preliminary Reference Toolkit".

## 3. Structure of this toolkit

The introductory part of this toolkit explains the use of this toolkit and offers a general introduction of the history of the Charter.

Part I offers a general overview of the basic principles of the European Union ('**EU**') law, including supremacy of EU law, the direct effect of the Charter, as well as the obligation of conforming interpretation.

Part II focuses on selected key provisions of the Charter that are most relevant for the interpretation and application of the Procedural rights directives. In this part, we also include an overview of the approach of the ECtHR in relation to key provisions of the Charter (e.g. the right to an effective remedy, right to a fair trial, right to liberty and security etc).

Part III covers the general principles of limitations of Charter rights, including the principle of proportionality.

## 4. How to use this toolkit

### a. How the content is organised

In each section, we start by stating the provisions of the Charter, where possible highlighting the interpretation given by the CJEU. The Charter largely builds upon the case-law of the CJEU and the constitutional principles of the Member States. There are currently a limited number of judgments interpreting certain provisions of the Charter, therefore where necessary we fill in the gaps with the relevant case-law of the ECtHR and to some extent our own interpretation.

We offer practical suggestions on how practitioners may rely on the Charter in a given case. We also suggest the rights and provisions of the procedural rights directives where a particular right or aspect of the right could be most relevant. These suggestions, however, are not exhaustive and should be taken as indicative.

In order to distinguish clearly between these different levels of analysis:

> Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border.

> *Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border.*

*They are presented in italics. In these citations we have omitted the references to the case law or other sources originally included in the text of the judgment.*

Suggestions by Fair Trials on using the Charter in interpreting a particular right or provision of the Procedural rights directives appear in blue shading, with a triple border. We try to be up front about when we are making a suggestion with the symbol '→' or marking it with the title '**Litigation strategy**'.

### b. Terminology

In this toolkit, will use the term "**lawyer**" to refer to any legal professional who is entitled, in accordance with national law, to provide legal assistance and represent suspects or accused persons at any stage of criminal proceedings; this may have the same meaning as "**defence attorney"** or "**legal counsel**" in some jurisdictions.

We use the terms "**suspect**" or "**accused person**" as they are used in the Procedural rights directives. However, for the sake of simplicity we may sometimes refer to "**person**" as the beneficiary of a particular right. For the purposes of the toolkit, by "**person**" we mean "suspects" or "accused persons" unless clearly indicated otherwise.

A "**suspect**" in the context of this toolkit may refer not only to persons who have been recognised as such in accordance with formal procedures under national law, but also persons who have not been formally declared suspects but whose "**situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him**".[10]

### c. A word of caution

This toolkit is drafted based on certain assumptions. We endeavoured to identify these clearly in the body of the text. This is both in acknowledgment of the fact that there may be other points of view, and in order to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in national criminal procedure or constitutional traditions in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. So you will need to adapt our suggestions to work within your own local context.

### d. Keep in touch

With those qualifications, we encourage you to use this toolkit in combination with the arguments laid out in other toolkits we have produced on different Procedural rights directives and EU cross

[10] See ECtHR, *Simeonovi v. Bulgaria*, App. no.21980/04, Judgement of 12 May 2017, para. 110.

border justice instruments. Let us know how you get on by contacting us via the contacts in the preface.

**We are keen to hear from you about your experience and to share lessons learned from others. We may also be able to offer support and assistance in individual cases.**

## B. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

### 1. Historical background

The original Treaties of the European Communities did not include human rights provisions since initially, the core objectives of the European Communities (**'EC'**) were economic. However, as the EC increasingly expanded its activity, the need for such provisions surfaced. In the late 1960s, the European Court of Justice (**'ECJ'**, later **'CJEU'**) recognised that "general principles of EC law", which are based on common constitutional traditions of the Member States, included also fundamental rights. When the ECJ declared that the European Commission lacked competence under the EC Treaties to join the ECHR,[11] the EU started working on its own bill of rights. The Charter of Fundamental Rights of the European Union was proclaimed by the European Institutions in December 2000, but remained a non-binding instrument. Almost ten years later, the Lisbon Treaty[12] gave the Charter the same legal value as the EU Treaties, thereby placing it among the primary sources of the EU Law.

### 2. General purpose of the Charter

The preamble of the Charter expresses the main rationale for introducing human rights[13] into the system of the EU law:

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

The Charter as a modern and relatively new instrument in EU history brings together fundamental rights as they are found in the constitutional traditions and international obligations common to all the Member States, notably treaties such as the ECHR, and expresses them in modern terms. The Charter thus sets out the fundamental rights of everyone living in the EU and it includes civil and political rights as well as economic, social and cultural rights.

[11] Opinion 2/94 on Accession of the Community to the ECHR, ECLI:EU:C:1996:140.

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

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

The Charter is addressed to the EU institutions, bodies, offices and agencies as well as to the national authorities when they are applying EU law. While it is important that EU law itself complies with the standards of the Charter, it is primarily enforced and applied at national level. Therefore the Charter is particularly relevant to national actors. In many areas, Member States enjoy a certain margin of appreciation when they transpose and apply EU law. The Charter provides additional guidance on how they must use this room for manoeuvre in a way that is compatible with fundamental rights.[14] Interpretation and application of national legislation that transposes the EU law must be guided by the fundamental rights standards as they can be found in the Charter.

The growing body of EU criminal law, which now covers six Procedural rights directives[15] and cross-border instruments,[16] must therefore also be applied and interpreted in accordance with the Charter.

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

[15] 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, 26.10.2010, 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, 1.6.2012, 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 294, 6.11.2013, 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 2016 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 2016 L 65, 11.3.2016, p. 1).

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

# I - PROCEDURAL ASPECTS

## A. PRINCIPLES OF EU LAW

### 1. Principle of supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. The principle of supremacy means that in case of conflict between EU law and the law of the Member State, the EU law prevails. The principle of supremacy was expressed in the judgment of *Costa v ENEL*[17], in which the CJEU made clear that all EU law takes precedence over all national law and can under certain conditions be invoked directly by individuals to claim their rights against national authorities.

Regarding specifically the Charter, Article 6 of the Treaty on the European Union ('**TEU**') states that the EU "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties". This statement is generally seen as confirming that the Charter has the status of "primary law", like free movement or citizenship. This means that it imposes overriding obligations over national law.

The Charter applies to Member States when they implement EU law, and it enjoys supremacy in the same way as the other treaty provisions. Charter provisions can be invoked directly by individuals as long as the provisions are precise, clear and unconditional, and do not require further implementing measures. This makes the Charter an important and powerful tool in bringing national law in line with human rights standards.

The principle of primacy essentially means that the national law may not be applied in a given case if it is not fully consistent with the Charter.[18]

### 2. Direct applicability of EU law

Direct applicability of the EU law means that a provision of EU law becomes a part of the Member States' national legal system directly and, as such, does not call for national implementation measures. Generally, primary EU law – the Treaties – and also secondary EU law, specifically regulations, are directly applicable.

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

[17] CJEU, C-6/64, *Costa ENEL*, 15 July 1964, ECLI:EU:C:1964:66.
[18] EU Agency for Fundamental Rights "Ten years on: unlocking the Charter's full potential", 2020, p.6.

## 3. Principle of direct effect

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*,[19] in which the European Court of Justice (now the CJEU) established the principle of "direct effect". Direct effect is an essential principle of EU law, which provides that where an EU law provision provides rights to individuals and has not been transposed, an individual can rely upon it and directly invoke it in domestic courts.

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

The CJEU has held in that regard:

> "In accordance with settled case-law, the provisions of primary law which impose precise and unconditional obligations, not requiring, for their application, any further action on the part of the EU or national authorities, create direct rights in respect of the individuals concerned".[20]

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

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

Parts of the Charter require implementing measures to give them full effect, but these rights, for example, Article 47 on the right to effective remedy and to a fair trial, may nevertheless be invoked in disputes falling within the scope of EU law. The CJEU ruled in *Egenberger* that Article 47 of the Charter can produce direct effect:

> Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such. [21]

[19] CJEU, C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 5 February 1963, ECLI:EU:C:1963:1.
[20] CJEU, C-537/16, *Garlsson Real Estate SA and others v. Commissione Nazionale per le Società e la Borsa (Consob),* 20 March 2018, ECLI:EU:C:2018:193, § 65.
[21] CJEU, C-414/16 *Egenberger*, 17 April 2018, ECLI:EU:C:2018:257, § 78.

### 4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law as far as possible in the light of the wording and the purpose of the EU law instrument in question in order to ensure its full effectiveness. In other words, national courts are under the obligation to guarantee that national legislation is interpreted and applied in so far as possible in conformity with EU law, regardless of whether the national rule at issue implements a given provision of the EU law.[22] The CJEU ruled in the *Pupino* case that:

> "In the light of all the above considerations, the Court concludes that the principle of confirming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."[23]

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

> "[I]t should also be borne in mind that, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter."[24]

## B. WHEN DOES THE CHARTER APPLY?

Article 51(1) of the Charter establishes that it applies to the institutions, bodies and agencies of the EU and to the Member States where they are implementing EU law. The notion of "when implementing EU law" is rather broad and is not always well understood.[25] According to the CJEU:

> "the Court has consistently held that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter."[26]

[22] CJEU, C-105/03, *Maria Pupino,* 16 June 2005, ECLI:EU:C:2005:386.
[23] CJEU, C-105/03, *Maria Pupino*, 16 June 2005, ECLI:EU:C:2005:386, § 43.
[24] CJEU, C-358/17, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, 13 September 2018, ECLI:EU:C:2018:715, § 51.
[25] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", 22 June 2016, p. 11.
[26] CJEU, C-358/17, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, 13 September 2018, ECLI:EU:C:2018:715, § 51.

According to the case law of the CJEU, Member States are bound by the requirement to respect fundamental rights whenever they act within the scope of EU law.[27] Therefore the notion of "when implementing EU law" covers all execution and application of the EU law:

> "Since the fundamental rights guaranteed by the Charter must (…) be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."[28]

The next step is to establish whether a subject matter falls within the scope of EU law. For the Charter to apply, at a minimum, there must be a link to EU law.[29] However, not every link to EU law is sufficient to trigger the application of EU fundamental rights. The link must be sufficiently concrete to qualify the application of national law as implementing EU law:

> "In accordance with the Court's settled case-law, in order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it."[30]

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

- Member States transpose EU law into national legislation;
- Member States adopt national measures on the basis of powers conferred to them by EU law (discretionary powers);
- When national acts involve remedies, sanctioning or enforcement that are connected to EU law;
- When national acts involve legal concepts that are mentioned in EU law; or
- When national acts fall within the exact scope of EU law and there is no implementation measure, for instance when a state has failed to implement EU law.[31]

[27] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, Explanation on Article 51.
[28] CJEU, C-617/10, *Aklagaren v Hans Akerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105 § 21.
[29] European Union Agency for Fundamental Rights, "Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level", 23 October 2018, p. 39.
[30] CJEU, Case 198/13, *Hernández v Spain,* 10 July 2014, ECLI:EU:C:2014:2055, § 37.
[31] Ibid. p. 40

## C. CHARTER RIGHTS V. CHARTER PRINCIPLES

Article 52 of the Charter sets out the scope and interpretation of "rights" and "principles" which are two types of binding provisions under the Charter. Rights can be invoked directly by individuals before national courts and they have to be respected by Member States. Charter rights are, for example, the right to a fair trial, the right to private and family life, the right to liberty and security etc.

Principles, however, work indirectly and have to be observed by Member States' acts when they are implementing EU law.[32] Charter principles are most relevant in the context of the review and interpretation of those acts. For example, Charter principles include the principle of proportionality, the principle of equality and the principle of integration of persons with disabilities.

## D. INTERPLAY WITH THE ECHR AND NATIONAL FUNDAMENTAL RIGHTS

### 1. The Charter and the ECHR

In principle the Charter and the ECHR are meant to complement each other and corresponding rights under those two instruments should have the same meaning and scope.[33] Even though the EU has not joined the ECHR, fundamental rights as recognised by the ECHR play a significant role in the EU legal order and the CJEU often refers to the case law of the European Court of Human Rights ('**ECtHR**').

The Explanations relating to the Charter state that:

> "Paragraph 3 [of Article 52] is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. (..) The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union."[34]

However, this provision does not prevent EU law from providing more extensive protection than the ECHR, which only establishes the minimum baseline.

[32] Article 52(5) of the Charter.
[33] Article 52(3) of the Charter.
[34] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, Explanation on Article 52.

### 2. The Charter and fundamental rights under national law

As to national human rights standards and constitutional traditions, Article 52(4) of the Charter specifies that:

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

National authorities and courts remain free to apply higher national standards than the Charter, provided they respect the provisions of the Charter as the minimum level of protection. In the *Melloni* case, the CJEU established that this rule applies only insofar as the difference in standards does not compromise that level of protection afforded by the Charter and the primacy, unity and effectiveness of EU law.[35] The Explanations relating to Article 52 of the Charter stipulate that:

> "(…) The rule of interpretation contained in paragraph 4 [of Article 52] has been based on the wording of Article 6(3) of the Treaty on the European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g. judgment of 13 December 1979, Case 44/79 *Hauer* (1979) ECR 3727; judgment of 18 May 1982, Case 155/79, *AM&S* (1982) ECR 1575). Under that rule, rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions."[36]

## E. INVOKING THE CHARTER BEFORE NATIONAL COURTS

Where the provisions of the Charter produce direct effect, i.e., they are sufficiently precise and unconditional, individuals may rely upon them directly in court as far as the case raises a question relating to the implementation of EU law.[37]

Where national law or practice is incompatible with EU law, EU law may be invoked together with the Charter before national courts.

Firstly, a practice based on national law or interpretation of national law can be challenged if it is incompatible with a provision of an EU directive interpreted in the light of the Charter. National measures, that is both law and practice, which come within the scope of EU law, can thus be reviewed in the light of the Charter.

Secondly, national courts are under the obligation to interpret any implementing measures (including practice) in line with the Charter. Where national norms conflict with the Charter, they

[35] CJEU, C-399/11, *Stefano Melloni v Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107, § 60.
[36] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 52.
[37] See Section B.

must apply the relevant EU law instrument instead.[38] In such case the national courts must apply the relevant EU law instrument even without undergoing the formal process of setting aside the national law.

For example, the CJEU confirmed this with regard to Article 50 of the Charter:

> "[I]t should be noted that the Court has already recognised the direct effect of Article 50 of the Charter (..) in the course of the assessment of the compatibility of provisions of domestic law with the rights guaranteed by the Charter, the national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means..
>
> [I]n the course of the assessment of the compatibility of provisions of domestic law with the rights guaranteed by the Charter, the national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[39]

The CJEU has reached the same conclusion with regard to the prohibition of discrimination in Article 21 of the Charter.[40]

[38] European Union Agency for Fundamental Rights, "Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level", 2018, p. 31.
[39] CJEU, C-537/16, *Garlsson Real Estate and Others,* 20 March 2018, ECLI:EU:C:2018:193, § 62 and 67; CJEU C-234/17, XC and Others v Generalprokuratur*,* 24 October 2018, ECLI:EU:C:2018:391, § 38.
[40] CJEU, C-482/16, *Georg Stollwitzer v. ÖBB Personenverkehr AG*, 14 March 2018, ECLI:EU:C:2018:180, §§ 30 and 45.

# II - SUBSTANTIVE PROVISIONS

This part of the toolkit will focus on the substantive provisions of the Charter which are the most relevant for interpretation and application of the EU Procedural rights directives and cross-border cooperation instruments such as the EAW. This part will therefore cover:

- Right to an effective remedy (Article 47(1))
- Right to a fair trial (Article 47(2) and (3))
- Presumption of Innocence (Article 48(1))
- Defence rights (Article 48)
- Principles of legality and proportionality of criminal offences and penalties (Article 49)
- Right to liberty and security (Article 6)
- Right to private and family life (Article 7)

This toolkit does not attempt to provide a comprehensive and exhaustive description of the content of each substantive right, but rather highlights the principles and aspects of each of those rights that could be the most helpful in placing separate guarantees of EU Procedural rights directives in context. Connecting separate guarantees under the directives with the corresponding fundamental right in the Charter will assist in the interpretation of the scope and application of defence rights. For example, access to a case file, as protected by the Access to Information Directive, is a practical tool intended to ensure proper implementation of the broader guarantee of a fair trial – ensuring an equality of arms between the prosecution and the defence. Understanding the key aspects of the relevant substantive Charter rights is therefore key in arguing for more comprehensive implementation of suspect and accused person's rights under the EU law.

## A. RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 47(1))

Article 47 of the Charter enshrines both the right to an effective remedy and the right to a fair trial. In this first section, we focus on the first paragraph of Article 47 which states that:

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

The CJEU interprets Article 47 of the Charter as follows:

> "[t]he principle of the effective judicial protection of individuals' rights under EU law […] is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

> signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter." [41]

For reference, Article 13 of the ECHR stipulates that:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

While the right to an effective remedy under the ECHR applies primarily to the Convention rights and does not require for a remedy to be judicial, an effective remedy under the Charter provides for a higher standard. The Charter provides for a remedy before a court (tribunal) and applies to all rights and freedoms arising from the EU law.[42] The Explanations on the Charter confirm this:

> "Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law."[43]

For a remedy to satisfy the requirements under Article 47 it has to be effective in law and in practice. In particular, the remedy has to offer an opportunity to examine the applicant's complaint on its merits before an independent court capable of reviewing both the relevant facts and law and to offer an appropriate preventive or at least compensatory remedy. The procedure of this review has to offer minimum guarantees of fairness similar to those required by fair trial rights, for example, the process has to be based on equality of arms and requires reasoned decisions on any restrictions of rights etc. These requirements are further explained in Chapter B.

It is also useful to turn to the ECtHR case-law, which has set a number of criteria for a remedy to be considered effective under the ECHR:

> 1. *the remedy must be accessible, prompt[44] and offer minimum guarantees of fairness by ensuring conditions that enable the applicant to challenge a decision that restricts their rights (e.g., equality of arms);[45]*
> 2. *the complaint must be addressed on its substance (merits);[46]*
> 3. *the remedy must be capable of directly remedying the situation by granting appropriate relief,[47] i.e., the remedy must be capable of preventing the alleged*

[41] CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses*, 28 February 2018, ECLI:EU:C:2018:117, § 35.
[42] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", January 2016.
[43] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 47.
[44] ECtHR, *Çelik and İmret v. Turkey*, No. 44093/98, 26 October 2004, § 59.
[45] ECtHR, *Csüllög v. Hungary*, No. 30042/08, 7 June 2011, § 46.
[46] ECtHR, *Hasan and Chaush v. Bulgaria*, No. 30985/96, 26 October 2000, § 96.
[47] ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, No. 12742/87, 29 November 1991.

> *violation or its continuation, or of providing adequate redress for any violation that had already occurred.*[48]

The right to an effective remedy plays an important role in the implementation of the Procedural rights directives. For example, Article 12 of the Directive on Access to a Lawyer gives suspects and accused persons the right to an effective remedy under national law in the event of a breach of the rights under this directive. Recital 52 explicitly refers to the right to an effective remedy under the Charter in the implementation of those provisions.

> **Some suggested areas of relevance:**
> → remedies for violations of access to lawyer - Article 12 of Access to a Lawyer Directive
> → remedies for violations of the Presumption of Innocence Directive – Article 10 of the Presumption of Innocence Directive
> → requests for remedies for unjustified/impermissible derogations from rights under other Procedural rights directives
>
> **For more information and litigation strategies consult:**
> Toolkit on the Access to a Lawyer Directive;
> Toolkit on the Access to Information Directive;
> Toolkit on the Right to Interpretation and Translation Directive;
> Toolkit on the Presumption of Innocence Directive.

## 1. Connection to the right to a fair trial

The first paragraph of Article 47 of the Charter on the right to an effective remedy stresses the connection between the right to an effective remedy and the right to a fair trial:

> 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**. (*emphasis added*)

The minimum guarantees required by Article 47 would, therefore, include: "a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" and the "possibility of being advised, defended and represented."

The CJEU confirmed that the right to effective judicial protection is connected to both the right to an effective remedy and the right to a fair trial under the ECHR:

> Moreover, the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Lastly, the

[48] ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, § *158.*

> right to an effective remedy for every person whose rights and freedoms guaranteed by the law of the European Union are infringed has also been reaffirmed by Article 47 of the Charter.[49]

It is clear from the case-law of the ECtHR that the right to an effective remedy is also seen as connected with the procedural guarantees of the right to a fair trial:

> *The Court considers that, in the evaluation of the effectiveness of a remedy for the purposes of Article 13 of the Convention, the requirements of Article 6 may be relevant. As a rule, the fundamental criterion of fairness, including the equality of arms, is a constituent element of an effective remedy. A remedy cannot be considered effective unless the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the Convention are provided. Moreover, the national authority that provides the remedy in question must be independent and capable of providing redress.*[50]

The CJEU rulings on the principle of effective judicial review in the context of the EU sanctions regimes reveal the content of effective judicial review under the Charter and should, in principle, be also applicable in other areas of EU law, including the rights enshrined in the Procedural rights directives. The CJEU stated, for instance, in the *Melli Bank* case, that the principle of effective judicial review required the relevant authority to disclose information about sanctions to the person concerned*:*

> The effectiveness of judicial review means that the European Union authority in question is bound to disclose the grounds for a restrictive measure to the entity concerned, so far as possible, either when that measure is adopted or, at the very least, as swiftly as possible after that decision, in order to enable the entity concerned to exercise, within the periods prescribed, its right to bring an action. Observance of that obligation to disclose the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Courts of the European Union, and also to put the latter fully in a position to carry out the review of the lawfulness of the measure in question which is the duty of those courts.[51]

The CJEU also requires that authorities, where exercising their powers to restrict the rights of individuals, give sufficiently reasoned decisions in order to enable individuals to exercise their right to effective remedy:

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[49] CJEU (General Court), T-461/08, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE*, 20 September 2011, ECLI:EU:T:2011:494, § 118.
[50] ECtHR, *Csüllög v. Hungary*, No. 30042/08, 7 June 2011, § 46.
[51] CJEU (General Court), T-496/10, *Melli Bank plc v Council of the European Union*, ECLI:EU:C:2012:137, 20 February 2013, § 74.

> [T]he requirement of effective judicial protection is satisfied, the contracting authority must comply with its duty to give reasons (..) by providing an adequate statement of reasons to any unsuccessful tenderer who so requests, in order to ensure that the latter may rely on that right under the best possible conditions and have the possibility of deciding, with full knowledge of the facts, if there is any point in his applying to the court having jurisdiction. The duty to state reasons for a contested decision is an essential procedural requirement, intended inter alia to ensure that the person adversely affected by the measure in question has the right to an effective remedy.[52]

The CJEU also stated that judicial review of restrictive measures should be comprehensive, including the facts and case-specific reasoning:

> [T]he effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights requires, in particular, that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person, the Courts of the European Union are to ensure that that decision is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.[53]

Therefore, the minimum guarantees of fairness under Article 47 of the Charter have been interpreted as including at least:

- the right to have the issue of a potential violation of EU law examined on merits before an independent judicial body (court or tribunal);
- the right information (obligation to disclose facts and reasons for restriction of rights);
- the right and practical opportunity to be heard in adversarial procedure (based on the principle of equality of arms); and
- the right to a reasoned decision.

## B. RIGHT TO A FAIR TRIAL (ARTICLE 47(2) AND (3))

The right to a fair trial is clearly a key right linked to the implementation and application of the Procedural rights directives. But on a broader level, the right to a fair trial, taken together with the right to an effective remedy, is instrumental in upholding the very values on which the Charter is based, namely "the indivisible, universal values of human dignity, freedom, equality and solidarity; it

[52] CJEU (General Court), T-461/08, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE*, 20 September 2011, ECLI:EU:T:2011:494, § 122.
[53] CJEU (General Court), T-720/14, *Arkady Romanovich Rotenberg v Council of the European Union*, ECLI:EU:T:2016:689, 30 November 2016, § 71.

is based on the principles of democracy and the rule of law."[54] The underlying rationale for the right to a fair trial before an independent and impartial court is to keep the state power in check and offer protection against arbitrariness.

The second and third paragraphs of Article 47 of the Charter provide that:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

According to the Explanations on the Charter, the right to a fair and public hearing under Article 47 corresponds to Article 6(1) of the ECHR, which reads as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

The right to a fair trial under the Charter encompasses a set of rights and principles that are essential in the interpretation and implementation of Procedural rights directives. Procedural rights covered by each of the directives set out more detailed guarantees, but their common purpose is to uphold the fundamental right to a fair trial as guaranteed by the Charter throughout the EU. The Right to Information Directive, for example, states in that regard:

> "This Directive builds on the rights laid down in the Charter, and in particular Articles 6, 47 and 48 thereof (..). This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to promote the right to liberty, the right to a fair trial and the rights of the defence. It should be implemented accordingly."[55]

In this section, we cover some of the aspects of the right to a fair trial that are most relevant in the implementation of the rights covered in Procedural rights directives.

[54] Preamble of the Charter of Fundamental Rights of the European Union.
[55] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Recitals 14 and 41.

## 1. Nature of fair trial guarantees under the Charter and the ECHR

Before covering the substantive aspects of the right to a fair trial which may be relevant in the implementation and application of the EU procedural rights directives, it is important to understand the difference in the nature of these guarantees under the Charter and the ECHR.

In contrast with the ECHR where unjustified procedural rights violations do not necessarily result in a violation of the right to a fair trial,[56] under EU law the procedural rights enshrined in the Directives are rights on their own and a breach of any of these rights requires a remedy. This is a fundamental difference in the level of protection afforded to different defence rights under the Charter and the ECHR.

In the specific context of Article 6 ECHR, this means that, as a general rule, a criminal trial must have taken place before ECtHR can decide whether it was or was not fair taken as a whole. The ECtHR has developed a method of evaluation also known as the "overall fairness test" according to which it looks at the entirety of the criminal proceedings to make that assessment:

> *"Compliance with the requirements of fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of the isolated consideration of one particular aspect or one particular incident*."[57]

Although, with some exceptions, the content of the rights under the two instruments is intended to be largely similar, the nature of procedural guarantees as "rights" under the Directives and "aspects of the right to a fair trial" under the ECHR determines the effectiveness of their protection and consequently availability of a remedy.

In that regard, for example, Article 12 of the Access to a Lawyer Directive states:

> "Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive."

Therefore, when litigating potential violations of defence rights such as the right to access the case file, the right to receive information about rights, access to a lawyer etc., it is useful to rely primarily on EU law and the Charter, which offer a higher standard of protection in requiring an effective remedy for any violation of each of those rights.

[56] Contrary to the general approach of the EU directives, the specific rights set out in Article 6(3) ECHR – such as the right of access to a lawyer guaranteed by Article 6(3)(c) – are generally not seen as self-standing norms (rights) but specific aspects of the general right to a fair trial contained in Article 6(1) ECHR. Compliance with these various aspects of the right to a fair trial is factored into a broader assessment of the fairness of the proceedings as a whole.

[57] ECtHR, *Pishchalnikov v. Russia*, No 7025/04, 24 September 2009, § 64; ECtHR, *Beuze v. Belgium*, No 71409/10, 24 September 2009, § 150.

## 2. Equality of arms

**Some suggested areas of relevance:**
→ Effective participation in trial - Article 8(1) of Presumption of Innocence Directive
→ Information about reasons for arrest and access to case file in detention proceedings – Articles 6(2) and 7(1) of Access to information Directive
→ Information about charges and access to case materials to prepare for trial – Articles 6(1) and 7(2) of Access to information Directive
→ Access to a lawyer (in all contexts: detention proceedings, EAW proceedings and criminal proceedings) – Access to a Lawyer Directive
→ Right to legal aid, 'interests of justice' – Article 4(1) of the Legal Aid Directive

**For more information and litigation strategies consult:**
Toolkit on the Access to a Lawyer Directive;
Toolkit on the Access to Information Directive;
Toolkit on the Right to Interpretation and Translation Directive;
Toolkit on the Presumption of Innocence Directive.

Criminal proceedings are inherently unequal in terms of powers and resources available to the prosecution versus the individual. The underlying rationale for defence rights is to balance that inequality by giving rights to suspects and accused persons throughout the whole criminal procedure. On the EU level, these rights can be found in the Procedural rights directives and implicitly also in the Charter. Most aspects of the Procedural rights directives, such as access to a lawyer, interpretation and translation services, access to legal aid and to case materials, have to be interpreted in the light of the principle of equality of arms.

The right to a fair hearing is based on the principle of equality of arms and includes the principle of adversarial proceedings.[58] The CJEU repeatedly held in its case law that the principle of equality of arms is an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law. Equality of arms is relevant not only for criminal proceedings on the merits of the case, but is also an underlying principle in pre-trial proceedings, such as the review of detention orders or any other proceedings seeking an effective remedy for a breach of the rights under the Procedural rights directives. The ECtHR has stated in relation to detention proceedings:

> *"The proceedings must be adversarial and must always ensure "equality of arms" between the parties. An oral hearing may be necessary, for example in cases of detention on remand. Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention. It may also require*

[58] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", January 2016, p.40.

> *that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him."*[59]

In *Sanchez Mocillo and Abril García,* a case concerning an effective remedy in civil context, the CJEU ruled as follows:

> "It is settled case-law that the principle of equality of arms, together with, among others, the principle *audi alteram partem*, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent."[60]

Furthermore, the right to adversarial proceedings provides that the parties should be able to participate effectively by knowing and understanding the case and by being able to comment on it.[61] This implies timely and adequate access to lawyer, timely access to all case materials necessary to prepare a defence and the ability to present a defence before the court on equal terms with the prosecution. The CJEU held in *ZZ v Secretary of State for the Home Department*[62] that:

> "Having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them."

The principle of equality of arms is therefore the underlying guiding principle that should determine the interpretation and application of the more detailed defence rights in all proceedings, including the criminal case on the merits, detention hearings and other hearings related to an effective remedy as required under the EU law.

The principle of equality of arms could be relied upon for an expansive interpretation of defence rights, while any restrictions have to be construed narrowly and only applied if the defence is not placed in a less advantageous situation compared with its opponent, i.e. in criminal cases, the prosecution.

For example, Article 7(2) of the Directive 2012/13/EU on the right to information requires that Member States "ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence." Although not explicitly included in the wording of that provision, the interpretation of that provision in accordance with the principle of equality of arms requires that access to material evidence is

[59] ECtHR, *A. and others v. The United Kingdom,* No. 3455/05, 19 February 2009, § 204.
[60] CJEU, C-169/14, *Sánchez Morcillo and Abril García*, 17 July 2014, ECLI:EU:C:2014:2099, § 49.
[61] Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, "The EU Charter of Fundamental Rights; A Commentary", published by Hart Publishing (2014), p.1260.
[62] CJEU, C-300/11, *ZZ v Secretary of State for the Home Department,* 4 June 2013, ECLI:EU:C:2013:363, § 55.

given in the pre-trial stage before the first interview of the suspect. For more on this aspect see the Toolkit on the Right to Information Directive.

## 3. Time and facilities to prepare defence

Paragraph 2 of Article 47 of the Charter states that: "[e]veryone shall have the possibility of being advised, defended and represented." The Charter can be understood as referring to the right to adequate time and facilities to prepare the defence, which is a key guarantee of fairness.

> **Some suggested areas of relevance:**
> → Information about charges and access to case materials to prepare for trial – Articles 6(1) and 7(2) of Access to Information directive
> → Access to a lawyer – Article 3 of Access to a Lawyer Directive
>
> **For more information and litigation strategies consult:**
> Toolkit on the Access to a Lawyer Directive;
> Toolkit on the Access to Information Directive.

Many of the procedural rights included in the Procedural rights directives are aimed at ensuring that the suspect or accused person is given the essential "tools" to prepare a defence in due time. Adequate "time" and "facilities" are one of the underlying rationales for such rights, including timely information about the charges, full and timely disclosure of evidence, access to a lawyer and ability to consult with a lawyer in a private and confidential setting.

For example, in relation to the timing aspect, Article 6 of the Access to Information Directive states that:

> (1) Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

The time aspect is further stressed in relation to changes in the information about the accusation in Article 6(4) of the same directive:

> (4) Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.

Similarly, the facilities aspect is enshrined in Article 4 of the Access to Lawyer Directive which demands respect for confidentiality of lawyer-client conversations. Recital 33 of that directive points to 'arrangements' states are under obligation to provide to guarantee that confidentiality for suspects and accused persons in custody:

> The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality.

The requirement to provide adequate time and facilities to prepare defence is expressly stated in Article 6(3)(b) of the ECHR which states:

> *(3) Everyone charged with a criminal offence has the following minimum rights:*
> *(..)*
> *(b) to have adequate time and facilities for the preparation of his defence.*

The adequacy of time depends on multiple factors and is generally assessed on a case-by-case basis taken into account the nature and stage of the proceedings as well as the complexity of case. The ECtHR has stated in this regard:

> *When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and stage of the proceedings.*[63]

In relation to the adequacy of facilities, the ECtHR considers, for example, that access to the case file is an essential aspect of the requirement to provide adequate "facilities" to prepare defence:

> *Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings. The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings.*[64]

The ECtHR extended the notion of "adequate facilities" to the disclosure of exonerating evidence:

> *Failure to disclose to the defence material evidence which contains such particulars that could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence,*

[63] ECtHR, *Gregacevic v. Croatia,* No. 58331/09, 10 July 2012, § 51.
[64] ECtHR, *Huseyn and others v. Azerbaijan,* Nos. 35485/05 35680/05 36085/05, 26 July 2011, § 175.

> *and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention.*[65]

The concept of "adequate time and facilities" extends more broadly to the ability of a lawyer to prepare the defence:

> *[The applicant"s court-appointed lawyer] did not have the time and facilities he would have needed to study the case-file, prepare his pleadings and, if appropriate, consult his client (cf. Article 6 para. 3 (b) of the Convention) (art. 6-3-b). Short of notifying [the applicant's retained lawyer] of the date of the hearing, the Court of Appeal should - whilst respecting the basic principle of the independence of the Bar - at least have taken measures, of a positive nature, calculated to permit the officially-appointed lawyer to fulfil his obligations in the best possible conditions.*[66]

The principle of equality and adversarial nature of the proceedings require that adequate time and facilities in terms of disclosure of evidence, information about reasons for arrest and access to a lawyer are also given to detained suspects and accused persons in detention proceedings.

## 4. Right to a hearing

Paragraph 2 of Article 47 provides that: "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

> **Some suggested areas of relevance:**
> → Right to be present at trial and effective participation in trial - Article 8 of the Presumption of Innocence Directive
>
> **For more information and litigation strategies consult:**
> Toolkit on the Presumption of Innocence Directive

The right to be present in a criminal trial and the ability to make full use of that presence is an important aspect of the right to a fair trial. It derives from the right to human dignity, which is a fundamental value of the EU enshrined in Article 1 of the Charter. It implies that every accused person has the right to know and face their accusers. This, in turn, requires the right to be heard in person in an oral hearing before an independent judge.

When a hearing is held in a criminal case, the suspect's or accused person's physical presence at the hearing is a necessary precondition for the effective exercise of multiple defence rights. The ECtHR has stated in this regard:

> *[A] person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine*

[65] ECtHR, *Leas v. Estonia*, No. 69677/08, 6 March 2012, § 81.
[66] ECtHR, *Goddi v. Italy,* No.8966/80, 9 April 1984, § 31.

*or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (..).*[67]

Article 8 of the Directive on the Presumption of Innocence Directive also guarantees the right to be present at the trial and to participate effectively. This right includes at least all proceedings in which the court will examine a case in order to make an assessment of guilt or innocence. The ECtHR has held in this regard:

*The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance.*

*The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him.*[68]

## 5. Right to a reasoned decision

**Some suggested areas of relevance:**

→ Any decisions to derogate from or limit the rights in the Procedural rights directives, including restrictions on access to a lawyer, legal aid etc.

→ Decisions in proceedings requesting an effective remedy for any violations of defence rights, including on exclusion of evidence, compensation, extensions of time limits to prepare defence etc

→ Decisions on the issuing or execution of EAWs

**For more information and litigation strategies see:**

Toolkit on the Access to a Lawyer Directive;
Toolkit on the Access to Information Directive;
Toolkit on the Right to Interpretation and Translation Directive;
Toolkit on the Presumption of Innocence Directive

Although not expressly stipulated in Article 47, the right to a reasoned decision is another core requirement for a fair trial. It is closely connected to the proper administration of justice and it is a key safeguard against arbitrary restrictions of rights. On a more practical level, the right to a reasoned decision is the main guarantee that allows to verify whether the suspect or accused person

[67] ECtHR, *Marcello Viola v. Italy*, No. 45106/04, 5 October 2006, § 52.
[68] ECtHR, *Jussila v. Finland,* No. 73053/01,23 November 2006, §§ 40-41.

has been heard in the decision-making process, to understand the basis of the decision and if necessary, to enable appeal.

Courts and tribunals have the duty to state the reasons on which they base their decisions. This means that, as a general rule, a person should be able to understand what decision the court (judge) has taken, what is the basis for the decision as well as the reasons on which it is based. The duty to reason decisions applies not only to judgments on merits, but to rulings in any instances where a person's rights under EU law may be limited.

For example, Article 8 of the Access to Lawyer directive explicitly requires temporary derogations from the right to early access to a lawyer to be properly reasoned:

> Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.

The extent to which this duty applies depends on the nature of the decision and must be determined according to the circumstances of each case. As a minimum a reasoned decision shows that a case has been heard properly, all important aspects have been properly assessed and there is clear basis for the court's decision in law as well as in fact. In this regard, the CJEU has also found:

> "The observance of the right to a fair trial requires that all judgments be reasoned to enable the defendant to see why judgment has been pronounced against him and to bring an appropriate and effective appeal against it."[69]

The CJEU has further elaborated on the reasoning of decisions in the context of freedom to provide services:

> "The right to be heard in all proceedings, which is affirmed by Articles 47 and 48 of the Charter and which forms an integral part of respect for the rights of the defence, which is a general principle of EU law, requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision; the obligation to state reasons for a decision are sufficiently specific and concrete to allow the person concerned to understand the reasons for the refusal of his request is thus a corollary of the principle of respect for the rights of the defence."[70]

[69] CJEU, C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, 6 September 2012, ECLI:EU:C:2012:531, § 53.
[70] CJEU, C-230/18, *PI v Landespolizeidirektion Tirol*, 8 May 2019, ECLI:EU:C:2019:383, § 79.

The ECtHR does not interpret the right to a reasoned decision as requiring a detailed answer to every argument raised by the defence, but it is clear that specific important points raised by the defence cannot be ignored:

> *"The Court has held the context of its examination of the fairness of civil proceedings, that by ignoring a specific, pertinent and important point of the applicant, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention. It observes a similar issue in the present case, where that requirement, although being even more stringent in the context of criminal proceedings, was not met."*[71]
>
> *"Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings. Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical."*[72]

Higher courts can generally endorse the judgment of a lower court if they agree with the judgment. However, if the defence raises specific arguments challenging a lower court's judgement, these arguments have to be properly assessed and a higher court must give reasons for accepting or more importantly rejecting them. The ECtHR has stated this, for example, with regard to a defence argument that excluded crime scene examination reports and witness statements could not be relied on for conviction:

> *The Supreme Court panel still relied on those reports and that witness evidence, without providing any response to the applicant's argument, even though it was specific and, in the circumstances of the case, highly pertinent and important. (..) The Court considers that the Supreme Court's reasoning and the procedure it followed did not meet the requirements of fairness inherent in Article 6 § 1 of the Convention.*[73]

## 6. Definition of 'tribunal'

Article 47 of the Charter refers to the right to "a fair and public hearing (…) by an independent and impartial tribunal previously established by law".

> **Some suggested areas of relevance:**
> → Definition of 'issuing judicial authority' in Article 6(1) of the Framework Decision on the EAW
> → Definition of a 'tribunal' in the context of the right to an effective remedy
>
> **For more information and litigation strategies see:**

[71] ECtHR, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 21 April 2011, § 280.
[72] ECtHR, *Moreira Ferreira v Portugal (No. 2)*, No. 42310/04, 11 July 2017, § 84.
[73] ECtHR, *Shabelnik v. Ukraine (No. 2)*, No. 15685/11, 1 June 2017, §§ 52-54.

Toolkit on the Access to a Lawyer Directive;
Toolkit on the Access to Information Directive;
Toolkit on the Right to Interpretation and Translation Directive;
Toolkit on the Presumption of Innocence Directive.

According to the case law of the CJEU on Article 47 of the Charter, in order to qualify as a tribunal, the body must:

- be established by law;
- be permanent;
- be independent and impartial;
- include an *inter-partes* procedure:
- have compulsory jurisdiction; and
- apply rules of law. [74]

Independence and impartiality are often analysed together.[75] The requirement for a tribunal to be independent generally relates to the structure of that tribunal. In *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg,* the CJEU stated that:

> "The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision (…). The concept has two other aspects. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (…). The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity (…) and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law." [76]

Impartiality depends more on the individual characteristics of a decision-maker. As set out by the CJEU in *Chronopost SA and La Poste v. Union française de l'express*:

> "There are two aspects to the requirement of impartiality: (i) the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary; and (ii) the tribunal must be objectively

[74] CJEU, C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 17 September 1997, ECLI:EU:C:1997:413, § 23.
[75] European Union Agency for Fundamental Rights and Council of Europe, "Handbook on European Law relating to access to justice", January 2016, p.34.
[76] CJEU, C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg,* 19 September 2006, ECLI:EU:C:2006:587.

> impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect (…)."[77]

The CJEU, however, recently lowered the standard of 'judicial authority', by ruling that public prosecutors in France and Sweden could qualify as an 'issuing authority' for the purposes of EAWs.[78] In this context, it is important to stress that the ECtHR generally refused to consider public prosecutors an 'independent and impartial tribunal' within the meaning of Article 6 § 1 of the ECHR for different reasons such as "their intervention lacks the guarantees of a judicial procedure (such as the participation of the person concerned or the holding of hearings); they make decisions of their own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity; they enjoy considerable discretion in determining what course of action to pursue; and finally, they can hardly be deemed as sufficiently impartial since they may subsequently act in proceedings against the person concerned."[79] Lack of adverserial proceedings based on equality of arms before a public prosecutor also falls short of the requirements set by the CJEU under Article 47 of the Charter.

## C. PRESUMPTION OF INNOCENCE (ARTICLE 48(1))

Article 48(1) of the Charter reads as follows:

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

> **Some suggested areas of relevance:**
> → All aspects of the presumption of innocence, including the presentation of suspects and accused persons and public references of guilt by public authorities under the Presumption of Innocence Directive
>
> **For more information and litigation strategies consult:**
> Toolkit on the Presumption of Innocence Directive

The presumption of innocence is a fundamental guarantee of a fair trial and is designed to ensure that suspect or accused persons are not treated as guilty in court or in public (e.g. in the media) before a final judgment by a competent court to that effect. In contrast with other fair trial guarantees, that right may continue to apply after the trial has concluded, e.g. in cases of acquittal. This is partially because in addition to its role in safeguarding the fairness of a criminal trial, the

[77] CJEU, Joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v. Union française de l'express (UFEX) and Others*, 1 July 2008, ECLI:EU:C:2008:375, § 54.
[78] See e.g. CJEU, C-556/19 PPU and C-626/19 PPU, *JR and YC*, 12 December 2019, ECLI:EU:C:2019:1077.
[79] The Role of Public Prosecutor Outside the Criminal Law Field in the Case-Law of the European Court of Human Rights, Research Report, Council of Europe, March 2011.

presumption of innocence is also closely connected to the right to human dignity.[80] The presumption of innocence requires that every suspect, accused person, or detained person is treated and portrayed in a dignified manner in and outside of the courtroom.

The presumption of innocence has a fundamental value in preserving the right to a fair trial and safeguarding defence rights. This is clearly expressed in Recital 12 of Directive 2014/41/ regarding the European Investigation Order in criminal matters ('**EIO Directive'**):

> The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.[81]

Because violations of the presumption of innocence can take various forms, for example, portrayals of suspects or accused persons by media or public statements of guilt by state officials, they can sometimes be difficult to remedy within the same criminal proceedings. Therefore, violations of the presumption of innocence may at times require a remedy outside the criminal proceedings such as a civil lawsuit or administrative proceedings.[82]

The presumption of innocence and its various aspects are covered in detail in Directive 2016/343 on strengthening certain aspects of the presumption of innocence. Therefore, Article 48(1) of the Charter is especially relevant in applying the provisions of that directive. Please also refer to our 'Presumption of Innocence Directive Toolkit' for more detailed interpretation and litigation strategies on presumption of innocence under the EU law.

## D. DEFENCE RIGHTS (ARTICLE 48(2))

Article 48(2) of the Charter states:

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

Defence rights apply not only to criminal proceedings on substance, i.e. trial on the merits of the case, but also to other proceedings where the rights and interests of individuals may be affected:

[80] See Fair Trials, "Innocent until proven Guilty? The presentation of suspects in criminal proceedings", June 2019, p.47.
[81] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Recital 12.
[82] Administrative proceedings in this context are understood as complaint mechanism against the state alleging state responsibility in situation where a civil lawsuit against an individual acting in official capacity is not possible.

> "When the authorities of the Member States take measures which come within the scope of EU law, they are, as a rule, subject to the obligation to observe the rights of defence of addressees of decisions which significantly affect their interests."[83]

In particular, the CJEU has emphasised that:

> "[T]he rights of the defence must be observed in all proceedings initiated against a person which may well culminate in a measure adversely affecting that person."[84]

These would undeniably involve all detention proceedings, EAW proceedings or any proceedings related to the criminal trial, including proceedings to obtain effective remedy for violations of suspect's or accused persons procedural rights.

Article 48 of the Charter refers to defence rights in very general terms whereas, according to the Explanations relating to the Charter, the corresponding provisions of the ECHR – Articles 6(2) and 6(3) – are considerably more elaborate:

> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *(b) to have adequate time and facilities for the preparation of his defence;*
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
> *(d) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Defence rights under Article 48(2) are closely connected to the guarantees of a fair trial and the right to an effective remedy under Article 47 and can overlap to some extent with the guarantees described under those sections. One example would be the right to be heard and the right to a reasoned decision. The CJEU stated with regards to defence rights in Article 48 of the Charter:

> "The right to be heard in all proceedings, which is affirmed by Articles 47 and 48 of the Charter and which forms an integral part of respect for the rights of the defence, which is a general principle of EU law, requires the authorities to pay due attention to

[83] CJEU, C-230/18, *PI v Landespolizeidirektion Tirol*, 8 May 2019, ECLI:EU:C:2019:383, § 80.
[84] CJEU, C-358/17, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, 13 September 2018, ECLI:EU:C:2018:715, § 60.

> the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision."[85]

The main defence rights under Article 48(2) correspond to the rights of suspects and accused persons under the Procedural rights directives. The content of these rights together with detailed interpretation and litigation strategies are explained in toolkits on each of these directives. We encourage you to refer to those toolkits for each of these defence rights:

- Right to a lawyer – Toolkit on the Access to a Lawyer Directive;
- Right to legal aid – Toolkit on the Legal Aid Directive;
- Right to interpretation and translation – Toolkit on the Right to Interpretation and Translation Directive;
- Access to information about rights and about accusation – Toolkit on the Right to Information Directive;
- Right be informed about reasons for arrest – Toolkit on the Right to Information Directive;
- Access to case file – Toolkit on the Right to Information Directive;
- Right to be present at trial and effective participation in trial – Toolkit on Presumption of Innocence Directive;
- Right to remain silent and not to incriminate oneself – Toolkit on Presumption of Innocence Directive.[86]

As mentioned above in Section 1, in contrast with the ECHR where unjustified procedural rights violations do not necessarily result in a violation of the right to a fair trial,[87] under EU law the procedural rights enshrined in the Directives, i.e. defence rights, are rights on their own and a breach of any of these rights requires a remedy. This is a fundamental difference in the level of protection afforded to different defence rights under the Charter and the ECHR. In the specific context of Article 6 ECHR, this means that as a general rule a criminal trial must have taken place before ECtHR can decide whether it was or was not fair. The ECtHR has developed a method of evaluation also known as the 'overall fairness test' according to which it looks at the entirety of the criminal proceedings to make that assessment. Therefore, we encourage you to rely on the EU law and the Charter to advance the defence rights before national courts.

## E. PRINCIPLES OF LEGALITY AND PROPORTIONALITY OF CRIMINAL OFFENCES AND PENALTIES (ARTICLE 49)

[85] CJEU, C-230/18, *PI v Landespolizeidirektion Tirol*, 8 May 2019, ECLI:EU:C:2019:383, § 79.
[86] Follow our website on EU law materials for the upcoming and updated toolkits.
[87] Contrary to the general approach of the EU directives, the specific rights set out in Article 6(3) ECHR – such as the right of access to a lawyer guaranteed by Article 6(3)(c) – are generally not seen as self-standing norms (rights) but specific aspects of the general right to a fair trial contained in Article 6(1) ECHR. Compliance with these various aspects of the right to a fair trial is factored into a broader assessment of the fairness of the proceedings as a whole.

## 1. Principle of legality

Article 49(1) and (2) of the Charter provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed was criminal according to the general principles recognised by the community of nations.

The provisions under Article 49 correspond to Article 7 of the ECHR, which reads as follows:

> *"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Not shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
>
> *2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

The principle of legality is a fundamental principle in EU law and its purpose of to provide safeguards against arbitrary prosecution and punishment. According to the Explanations relating to the Charter, Article 49 follows the traditional rule of the non-retroactivity of laws and criminal sanctions.

Article 49(1) and (2) corresponds to Article 7 of the ECHR and has the same meaning and scope.[88] The ECtHR held in *SW v United Kingdom* that the guarantee enshrined in Article 7 is an essential element of the rule law and should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[89] Accordingly, only the law can define a crime and prescribe a penalty.

The CJEU held in the case *Advocaten voor de Wereld*:

> "The principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States (…) implies that legislation

[88] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 49.
[89] ECtHR, *SW v. United Kingdom*, No. 20166/92, 22 November 1995, § 34.

> must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable."[90]

The concept of 'law' as used in Article 7 ECHR covers both domestic legislation and case-law, which not only has to be passed in appropriate procedure, but also has to be accessible and foreseeable.[91] Foreseeability of criminal law is a key guarantee which requires that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it or after taking appropriate legal advice, what acts or omissions will make him criminally liable and what penalty will be imposed for the act committed or omission.[92] Whether law is sufficiently foreseeable is always apprised from the point of view of the person charged at the time when the offence charged was committed.[93] With regard to clarity, the CJEU held:

> It follows from that case-law that the concept of 'law' ('droit') for the purposes of Article 7(1) corresponds to 'law' ('loi') used in other provisions of the ECHR and encompasses both law of legislative origin and that deriving from case-law. Although that provision, which enshrines in particular the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege),* cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, it may, according to that case-law, preclude the retroactive application of a new interpretation of a rule establishing an offence. [94]

At the same time, the CJEU reference to the ECtHR case law makes clear that the interpretation of criminal law cannot be extensive:

> "The principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law."[95]

Finally, the principle of legality in Article 49(1) of the Charter provides for the retroactive application of a more lenient penalty. This does not mean that the Charter or an EU legal instrument could

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[90] CJEU, C-303/05, *Advocaten voor de Wereld,* 3 May 2007, ECLI:EU:2007:261, § 49-50; CJEU, C-405/10, *Özlem Garenfeld,* 10 November 2011, ECLI:EU:C:2011:722, § 48.

[91] ECtHR, *SW v. United Kingdom*, No. 20166/92, 22 November 1995, § 35.

[92] ECtHR, *Del Río Prada v Spain*, No. 42750/09, 21 October 2013, § 79.

[93] Ibid., § 112 and 117.

[94] CJEU, Joined cases C-189/02 P, C-205/02 P to C-208/02, *P Dansk Roerindustri*, 28 June 2005, ECLI:EU:C:2005:408, § 216-219.

[95] CJEU, Joined Cases C-74/95 and C-129/95, *X*, 12 December 1996, ECLI:EU:C:1996:491, § 25 (Referring to ECtHR, *Kokkinakis v Greece,* No. 14307/88, 25 May 1993, § 52); ECtHR, *SW v. United Kingdom*, No. 20166/92, 22 November 1995, § 35.

determine criminal liability (sentence) of the accused person; it is still a matter of national law to determine appropriate sentence for each criminal offence.[96] However, where a later amendment to criminal law would provide for lesser sentence and benefit the suspect or accused person, the Charter obliges Member States to apply that later law. This principle forms part of the general principles of EU law, which national courts must respect when applying national legislation adopted for the purpose of implementing the EU law.[97]

## 2. Principle of proportionality in criminal proceedings

> **Some suggested areas of relevance:**
> → Deduction of period of detention served in the executing Member State prior to surrender under an EAW - Article 26 of the Framework Decision on the EAW
> → Proportionality of the condition of a life sentence - Article 5(2) of the Framework Decision on the EAW

Article 49(3) of the Charter enshrines the principle of proportionality of criminal penalties. It states:

> "The severity of penalties must not be disproportionate to the criminal offence."

According to the Explanations relating to the Charter, Article 49(3) "states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities".[98] At the moment there is little CJEU guidance on the interpretation of this provision with regard to national substantive criminal law, however, the principle of proportionality of punishment has been applied extensively in cases relating to fines applied for infringements of competition law:

> As regards the principle of proportionality and the principle that the punishment must fit the offence, those principles require that fines must not be disproportionate to the objectives pursued, that is to say, to compliance with the European Union competition rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters should be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity. In particular, the principle of proportionality obliges the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified.[99]

The ECtHR generally considers the issue of criminal sanctions to be outside the scope of the ECHR. It has referred to the principle proportionality of criminal sanctions in extradition cases, where it verifies whether if extradited, the person would be subject to torture or inhuman or degrading

[96] CJEU, Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi,* 3 May 2005, ECLI:EU:C:2005:270, § 75-79
[97] Ibid., § 69.
[98] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 49.
[99] CJEU, T-265/12, *Shenker Ltd v. The Commission*, 29 February 2016, ECLI:EU:T:2016:111, § 245.

treatment or punishment. A criminal penalty that is 'grossly disproportionate' to the criminal offence could be considered inhuman:

> *Consequently, the Court is prepared to accept that while, in principle, matters of appropriate sentencing largely fall outside the scope of Convention, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, the Court also considers that the comparative materials set out above demonstrate that 'gross disproportionality' is a strict test and (..) it will only be on 'rare and unique occasions' that the test will be met.*[100]

This principle is referred to in Article 5(2) of Council Framework Decision on the European Arrest Warrant ('**Framework Decision on the EAW'**) in relation to life sentences:

> "[I]f the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure."

The principle of proportionality of criminal sentences could also be applied to lesser punishments, as Advocate General Sharpston suggested in her Opinion in the *Radu* case*:*

> At the hearing, counsel for Germany used the example of a stolen goose. If that Member State were asked to execute a European arrest warrant in respect of that crime where the sentence passed in the issuing Member State was one of six years, she thought that execution of the warrant would be refused. She considered that such a refusal would be justifiable on the basis of the doctrine of proportionality and referred the Court to Article 49(3) of the Charter, according to which "the severity of penalties must not be disproportionate to the criminal offence".[101]

The CJEU has also applied the principle of proportionality of criminal sentences to the deduction of time spent in arrest or detention in connection with the execution of the EAW from the total length of custodial sentence in the issuing Member State:

> As regards, in the third place, the objective pursued by Article 26(1) of Framework Decision 2002/584, it must be stated (..) that the obligation under that article to deduct the period of detention arising from the execution of the European arrest warrant from the total period of detention which the person concerned would be required to serve in the issuing Member State is designed to meet the general

[100] ECtHR, *Harkins and Edwards v. the United Kingdom*, Nos. 9146/07 and 32650/07, § 133.
[101] Opinion of Advocate General Sharpston, Case C-396/11, *Ciprian Vasile Radu*, 18 October 2012, ECLI:EU:C:2012:648, § 103.

> objective of respecting fundamental rights, as referred to in recital 12, and recalled in Article 1(3), of Framework Decision 2002/584, by preserving the right to liberty of the person concerned, enshrined in Article 6 of the Charter, and the practical effect of the principle of proportionality in the application of penalties, as provided for in Article 49(3) of the Charter.[102]

## F. RIGHT NOT TO BE TRIED OR PUNISHED TWICE (ARTICLE 50)

> **Some suggested areas of relevance:**
> → Principle of double jeopardy as a mandatory ground of refusal to execute EAW - Article 3(2) of the Framework Decision on the EAW

Article 50 of the Charter states:

> "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

According to the Explanations relating to the Charter of Fundamental Rights, Article 50 is to be read in accordance with Article 4 of Protocol 7 to the ECHR, which reads as follows:

> *"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

The principle of double jeopardy also known as *ne bis in idem* principle applies in EU law and prevents a person from being prosecuted twice for the same acts.[103] The CJEU clarified the principle in the context of competition law:

> "[T]he rationale behind the principle of *ne bis in idem*, it must be borne in mind (..) that, as a corollary to the principle of *res judicata*, that principle aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he will not be tried again for the same offence."[104]

[102] CJEU, Case C-294/16, *JZ v Prokuratura Rejonowa Łódź - Śródmieście*, 29 February 2016, ECLI:EU:C:2016:610, § 42.
[103] Read more about the principle of *ne bis in idem* in EU law in "The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union", Eurojust, 2017.
[104] CJEU, C-617/17, *Powszechny Zakład,* 3 April 2019, ECLI:EU:C:2019:283, § 33.

This principle is particularly relevant in the context of cross-border cooperation within the EU. Article 3(2) of Framework Decision on the EAW[105] sets out a ground for obligatory non-execution, pursuant to which the executing judicial authority must refuse to execute the EAW if it is informed that the requested person has been finally judged in a Member State in respect of the same acts if the sentence, if any, has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. The CJEU stated in this regard:

> "The purpose of that provision is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, and reflects the principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, according to which no one may be tried or punished twice in criminal proceedings for the same criminal offence."[106]

The CJEU repeatedly held that Article 50 not only applies within the jurisdiction of one Member State but also between the jurisdictions of several Member States.[107] Although Article 50 of the Charter and Article 4 of Protocol 7 to the ECHR have the same legal meaning, the ECHR only applies in a national context, i.e., prohibits double prosecution within the same state. The Charter, on the other hand, also offers a transnational protection by protecting an individual who has already been tried in one Member State from criminal proceedings based on the same actions in another Member State.

The CJEU also held that, pursuant to Article 50 of the Charter, the protection conferred by the *ne bis in idem* principle is not limited to situations where the person concerned has been subject to a criminal conviction, but extends also to those where that person is finally acquitted.[108]

### 1. When is an offence 'criminal'?

The CJEU issued several judgments clarifying the *ne bis in idem* principle laid down in Article 50 of the Charter. The CJEU took into consideration findings of the ECtHR, particularly in relation to the assessment of what constitutes a criminal sanction. In *Akerberg Fransson,* the CJEU held that the definition of what constitutes a 'criminal penalty' is based on three alternative criteria which are the same criteria found by the ECtHR in the *Engel*, commonly known as the 'Engel criteria':

> "The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur." [109]

[105] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States [2002] O.J. L190/1, Articles 3(2), 4(3) and 4(5).
[106] CJEU, C-268/17, *AY*, 25 July 2018, ECLI:EU:C:2018:602, § 39.
[107] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, Explanation on Article 50.
[108] CJEU, C-596/16 and C-597/16, *Enzo di Puma and others*, 10 March 2018, ECLI:EU:C:2018:192, § 39.
[109] CJEU, C-617/10, *Aklagaren v Hans Akerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105 § 35; see also ECtHR, *Engel and Others v Netherlands*, No. 5100/71; 5101/71; 51102/71; 5354/72; 537072, 8 June 1976, § 82-83.

The substantive question in *Akerberg Fransson* was whether the *ne bis in idem* principle permitted a cumulation of an administrative sanction followed by a criminal sanction. The Court ruled that administrative sanctions may, in fact, qualify as 'criminal' depending on the assessment in accordance with *Engel* criteria in each individual case.[110]

### 2. The notion of '*idem*'

In the context of double jeopardy in order to determine whether a person could potentially be charged twice for the same criminal offence, the CJEU places a decisive weight on the facts, rather than the national legal classification of the offence in question. It defines the notion of '*idem*' as the same set of factual circumstances, regardless of the legal classification of the offence or the legal interest protected. The CJEU confirmed this in *Van Esbroeck*:

> "The relevant criterion for the purposes of the application of [the principle of *ne bis in idem*] is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected."[111]

## G. RIGHT TO LIBERTY AND SECURITY (ARTICLE 6)

**Some suggested areas of relevance:**
→ Proportionality of issuing and execution of the EAW
→ Obligation to assess alternatives to the EAW
→ Information about reasons for arrest and access to case file in detention proceedings – Articles 6(2) and 7(1) of Access to information Directive
→ Access to a lawyer in detention and EAW proceedings – Articles 3 and 10 of Access to a Lawyer Directive

**For more information and litigation strategies consult:**
Toolkit on the Access to a Lawyer Directive;
Toolkit on the Access to Information Directive.

Article 6 of the Charter briefly states that:

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

Article 6 of the Charter corresponds to Article 5 of the ECHR, which is more elaborate in its wording, referring to both the basis and the procedural requirements for deprivation of liberty:

[110] CJEU, C-617/10, *Aklagaren v Hans Akerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105 § 36.
[111] CJEU, C-436/04, *Van Esbroeck*, 9 March 2006, ECLI:EU:C:2005:630, § 42.

> *"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *(a) the lawful detention of a person after conviction by a competent court;*
>
> *(..)*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *(..).*
>
> *2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
>
> *3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
>
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
>
> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."*

According to the Explanations on the Charter, Article 6 of the Charter and Article 5 ECHR have the same scope and meaning. Therefore, the minimum guarantees and strict limitations that apply under the ECHR also apply under the Charter and the limitations that may be legitimately imposed may not exceed those permitted by the ECHR. The CJEU stated in this regard:

> "[T]he rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR and that the limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR, in the wording of Article 5 thereof. However, the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'."[112]

[112] CJEU, C-601/15, *PPU, J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 47.

On many points, in particular regarding the procedural aspects of detention, the Charter (in combination with the Procedural rights directives) provides a higher standard of protection than the ECHR. For example, the right to access to a lawyer under the EU law applies before the first interview of the suspect and can only be temporarily restricted based on an exhaustive list of reasons.[113] The same applies to access to case materials, which must be provided before a detention hearing, and the requirement for authorities to provide reasons for the detention as well as the essential evidence supporting those reasons.[114] The right to know one's rights in detention procedures also enjoys a higher standard under EU law, which requires that Member States provide a full and written explanation of detainees' rights in a Letter of Rights.[115]

## 1. Connection with fair trial guarantees

The right to liberty and security is closely connected to the right to a fair trial where a person is deprived of liberty in the context of criminal proceedings. Procedural guarantees required in the context of detention review hearings may be more limited than in a full criminal trial, however where these guarantees overlap, their content and interpretation under Article 47 of the Charter will be relevant for detention proceedings. The ECtHR has listed the rights that should always be ensured in detention proceedings:

> "The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.
>
> Thus, the proceedings must be adversarial and must always ensure "equality of arms" between the parties. An oral hearing may be necessary, for example in cases of detention on remand. Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention. It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him."[116]

[113] 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, Articles 3(5) and 3(6).
[114] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Articles 6(2) and 7(1).
[115] Ibid., Article 4.
[116] ECtHR, *A. and others v. The United Kingdom,* No. 3455/05, 19 February 2009, §§ 203-204.

For example, Directive 2013/48/EU on access to lawyer explicitly requires that access to a lawyer is ensured without undue delay after deprivation of liberty.[117] The content of effective legal assistance, including confidentiality of communications, is the same as required under the right to a fair trial. Similarly, principles of equality of arms and adversariality apply to detention proceedings as well as to a full criminal trial.[118] The right to be heard, the right to be present where an oral hearing is required, the right to submit and challenge evidence and other rights connected with the effective participation and adversarial proceedings also apply to detention proceedings. The CJEU has also noted that the presumption of innocence does not apply in detention proceedings provided that such decisions which are based on level of suspicion or incriminating evidence, do not refer to the person in custody as being guilty.[119]

The same can be said about the terms 'court', 'judge' and 'an officer authorised by law to exercise judicial authority' used in Article 5 ECHR, which require the same standard of independence and impartiality as a 'tribunal' under the right to a fair trial. The ECHR stated in this regard:

> *The Court has held that both independence and impartiality are important constituent elements of the notion of a 'court' within the meaning of Article 5 § 4 of the Convention. The Court considers that these principles, developed in the context of Article 6 § 1 of the Convention, apply equally to Article 5 § 4.*[120]

The CJEU however lowered the minimum standard required by Article 5 ECHR when interpreting the term 'issuing judicial authority' under the EAW.[121] Nevertheless, this approach may be challenged by relying on the minimum standard required the Charter combined with the jurisprudence of the ECHR on the independence of a judge or 'judicial authority' capable of authorising the deprivation of a person's liberty.

The above list of overlapping guarantees is not exhaustive but underlines the close connection between the procedural aspects of detention proceedings and criminal trials. The basis of those similarities stems from the obligation to ensure an effective judicial remedy for all cases of deprivation of liberty. This necessarily requires a possibility to challenge detention through adversarial proceedings before an independent and impartial court capable of ordering the release of the person. This requires the person to be able to present their arguments on equal terms with their opponent requesting detention. Other, more detailed guarantees such as timely access to the case file, access to a lawyer and interpretation services, should be interpreted in the light of this general objective.

[117] 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, Articles 3(2)(c).
[118] See Section 2.
[119] CJEU, C-310/18, *Emil Milev*, 19 September 2018, ECLI:EU:C:2018:732, 48.
[120] ECtHR, *Baş v. Turkey,* No. 66448/17, 3 March 2020, § 266-277.
[121] See Fair Trials commentary on "CJEU, Cases C-627/19 PPU, C-625/19 PPU, and joined cases C-566/19 and C-626/19 PPU", December 2020.

## 2. Equality of arms and adversarial proceedings

**Some suggested areas of relevance:**
→ Right to be present at trial – Article 8 of the Presumption of Innocence Directive
→ Information about reasons for arrest and access to case file in detention proceedings – Articles 6(2) and 7(1) of Access to information Directive
→ Access to a lawyer in detention and EAW proceedings – Articles 3 and 10 of Access to a Lawyer Directive
→ Right to interpretation and translation of essential documents in detention and EAW proceedings – Articles 2 and 3 of the Interpretation and Translation Directive

**For more information and litigation strategies consult:**
Toolkit on the Access to a Lawyer Directive;
Toolkit on the Access to Information Directive;
Toolkit on the Right to Interpretation and Translation Directive.

Pre-trial detention must be subject to regular judicial review, which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate. This process is in essence an adversarial process where equality of arms between the parties must be guaranteed. For proceedings to be compatible with the requirements of the equality of arms principle, they must, at a minimum, require the respect of the rights guaranteed by the Procedural rights directives such as access to a lawyer, timely and adequate access to the case file, right to interpretation and translation services etc. The judicial authority charged with detention review must take that decision speedily and a decision to continue detention must be well reasoned, including assessment of less-intrusive alternative measures to detention. The ECtHR stated with regard to detention review proceedings:

> *"The Court reiterates that proceedings conducted under Article 5 § 4 of the Convention before a court examining an appeal against detention must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person. Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention. It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer."* [122]

The adversarial nature of detention proceedings requires that the parties, in principle, have the right to be informed of and to discuss any document or observation presented to the court for the purpose of influencing its decision. It also entitles the detainee and his/her lawyer to be informed within a reasonable time about the scheduling of a hearing, without which the right would be devoid of substance.[123] The adversarial nature of detention proceedings necessarily entails the right of the

[122] ECtHR, *Černák v. Slovakia*, No. 36997/08,17 December 2013, § 78.
[123] ECtHR, *Venet c. Belgique*, No. 27703/16, 22 October 2019, § 42-45 (French only).

defence to seek and submit its own evidence in detention proceedings, including calling of witnesses. The ECtHR clarified this indirectly when referring to the right to an oral hearing in detention review proceedings:

> *In matters of such crucial importance as the deprivation of liberty and where questions arise involving, for example, an assessment of the applicant's character or mental state, the Court's case-law indicates that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing. In such a case as the present, where characteristics pertaining to the applicant's personality and level of maturity and reliability are of importance in deciding on his dangerousness, Article 5 § 4 requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.*[124]

## 3. Requirement of lawfulness and non-arbitrariness

> **Some suggested areas of relevance:**
> → Proportionality of issuing and execution of the EAW
> → Obligation to assess alternatives to the EAW

The right to liberty requires that any decision depriving someone of their liberty must always be made in 'accordance with a procedure prescribed by law',[125] which is a fundamental safeguard against arbitrary deprivation of liberty. The CJEU confirmed this in *J.N.*:

> It should also be noted that, according to the case-law of the European Court of Human Rights relating to Article 5(1) of the ECHR, if the execution of a measure depriving a person of liberty is to be in keeping with the objective of protecting the individual from arbitrariness, that means, in particular, that there can be no element of bad faith or deception on the part of the authorities, that execution of the measure is consistent with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) ECHR and that the deprivation of liberty concerned is proportionate in relation to the ground relied on.[126]

The principle of legal certainty requires that grounds for deprivation of liberty under national law are sufficiently accessible, precise and foreseeable in their application. In *Al Chodor,* the CJEU noted that the meaning of Article 6 of the Charter has to be defined in light of the established case law of the ECtHR, which requires any measure on deprivation of liberty to be accessible, precise and foreseeable. While referring to the ECtHR case law, the CJEU stated:

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[124] ECtHR, *Waite v. the United Kingdom,* No. 53236/99, 10 December 2002, § 59.
[125] ECtHR, *Tsarenko v. Russia,* No. 5235/09, 3 March 2011, § 62.
[126] CJEU, C-601/15 PPU*, J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 81.

> "According to the European Court of Human Rights, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness."[127]

The principle of legal certainty also requires procedural safeguards against arbitress such as effective and accessible mechanism for review. The ECtHR stated in that regard:

> *"Factors relevant to this assessment of the 'quality of law' – which are referred to in some cases as 'safeguards against arbitrariness' – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention and the existence of an effective remedy by which the applicant can contest the 'lawfulness' and 'length' of his continuing detention."*[128]

## 4. Principle of proportionality (detention as the last resort)

> **Some suggested areas of relevance:**
> → Proportionality of issuing and execution of the EAW
> → Obligation to assess alternatives to the EAW

Deprivation of liberty, including in the context of criminal proceedings, should only be applied as a measure of last resort where a security measure is necessary to safeguard an important public interest but no other less intrusive measure can be applied in the individual circumstances of the suspect or accused person. This applies to all types of deprivation of liberty - arrest, detention on remand, detention for the purposes of execution of EAW and other types of deprivation of liberty. The CJEU stated in *J.N.*:

> As regards the proportionality of the interference with the right to liberty that has been found to exist, it should be recalled that the principle of proportionality requires, according to settled case-law of the Court, that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued (..) in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary.[129]

Article 6 of the Charter requires that deprivation of liberty should always be proportionate. The ECtHR emphasised the use of proportionality in decision-making, in that the authorities should

[127] CJEU, C-528/15, *Al Chodor,* 15 March 2017, ECLI:EU:C:2017:213, § 38.
[128] ECtHR, *JN v. the United Kingdom,* No. 37289/12, 19 May 2016, § 77.
[129] CJEU, C-601/15, *PPU, J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 56.

consider less restrictive alternatives prior to resorting to detention, and the authorities must also consider whether the "accused's continued detention is indispensable".[130] The need to justify strict necessity and proportionality of deprivation of liberty relates to the general requirements that have to be fulfilled to justify restrictions of fundamental rights and freedoms under Article 52(1) of the Charter. The CJEU put this in the following terms:

> Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.[131]

The ECtHR also emphasised that detention may only be imposed as an exceptional measure stating in *Ambruszkiewicz v Poland* that:

> *"The detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances."*[132]

## H. RIGHT TO PRIVATE AND FAMILY LIFE (ARTICLE 7)

> **Some suggested areas of relevance:**
> → Assessment of the proportionality of issuing and executing an EAW
> → Obligation to assess alternatives to the EAW
> → Right to communicate with third persons while in custody - Article 6 of Access to a Lawyer Directive

Article 7 of the Charter provides that:

[130] ECtHR, *Ladent v Poland,* No. 11036/03, 18 March 2008, § 55.
[131] CJEU, C-601/15, *PPU, J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 81.
[132] ECtHR, *Ambruszkiewicz v Poland,* No. 38797/03, 4 May 2006, § 31.

> "Everyone has the right to respect for his or her private and family life, home and communications."

This provision of the Charter corresponds to Article 8 of the ECHR, which reads:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

## 1. Detainees' right to communicate with the outside world

The right to a private and family life enshrined in the Charter is relevant to the Procedural rights directives.

Article 6 of the Access to a lawyer directive obliges Member States to ensure that "suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them." The right to communicate with the outside world is an essential right for persons in detention and protects among other aspects also the right to private and family life. Recital 52 of that directive expressly refers to private and family life in the implementation of its provisions:

> "This Directive upholds the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. This Directive should be implemented in accordance with those rights and principles."

While the right to contact the outside world, be that a friend or a family member, could also serve as a safeguard for other rights such as the protection of the integrity of a person (i.e., the prevention of ill treatment), the right to maintain close contact with family is an important right to protect in itself. The ECtHR jurisprudence on prisoners' right to maintain close contact with their family is established and obliges prison authorities not only to abstain from unnecessary restrictions, but also to assist the detainee with maintaining close contact with their family. In a recent judgement it stated:

> *"Detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a prisoner's*

> *right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family."*[133]

Depending on the length and circumstances of detention maintaining contact with family should include not only the possibility to talk via phone or written correspondence, but also a possibility to visit the detainee in person. The European Prison Rules recommend in that regard that "prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons." [134]

## 2. Investigative measures and the right to a private life

Right to a private life and the secrecy of communications can also be infringed through investigative measures such as house searches, covert surveillance of telephone or electronic communications and other similar measures. In principle the ordering and implementation of these investigative measures should follow the same safeguards as established under national law both for the issuing and executing state. For example, Article 30(5) of the EIO Directive sets additional grounds for refusal to execute an EIO issued for the interception of telecommunications in the Member State from which technical assistance is needed. It states that "the execution of and EIO [..] may also be refused where the investigative measure would not have been authorised in a similar domestic case. The executing State may make its consent subject to any conditions which would be observed in a similar domestic case."

As of writing this toolkit the CJEU has yet to rule on the relevant provisions of the EIO Directive or the assessment of legality of issuing such order for house searches, surveillance or other similar measures. Therefore, it is useful to refer to the well-established ECHR standards in this area.

Since investigative measures such as house searches or secret surveillance interfere with the right to a private life, they should only be carried out if and when specifically allowed under the national law by an independent, preferably judicial, authority.[135] Moreover, national law allowing for such measures has to be of certain quality. Pursuant to Article 8(2) of the ECHR, for interferences to be considered lawful, the national law permitting surveillance measures must be clear, foreseeable, accessible and provide adequate safeguards against abuse. The ECtHR has recognized that the technology available to carry out surveillance is becoming increasingly sophisticated, therefore any surveillance measures have to be based on a law that is particularly precise.[136] It has recognized that:

> *The law must be able to give individuals an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any measures of*

[133] ECtHR, *Khoroshenko v. Russia,* No. 41418/04, 30 June 2015, § 106.
[134] See Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 24.1. and 24.4.
[135] ECtHR, *Klass and others v. Germany*, No. 5029/71, 6 September 1978, § 56.
[136] ECtHR, *Kopp v. Switzerland*, No. 23224/94, 25 March 1998, § 2.

> *secret surveillance and collection of data*[137] *as well as the scope and manner of exercise of discretion afforded to the authorities.*[138] *The national law must set out, as minimum safeguards to avoid abuses in relation to secret surveillance: the nature, scope and duration of the possible measures, the grounds required for ordering them.*[139]

Clear conditions and limits of use of such investigative measures under the law must be accompanied by adequate safeguards such as judicial oversight. The ECtHR has recognized in *Klass* that review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated.[140] Although investigative measures such as surveillance or even home searches at least until their execution may be kept secret, they should be subject to a prior authorisation by court or other body offering at least as strong guarantees of independence and impartiality as a judge:

> *"[S]ince the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. (..) The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."*[141]

The procedures for issuing such investigative measures, as well as for reviewing them during and after their implementation play an important role in the assessment of legality of interference with right to a private life through these measures. The ECtHR stated in *Roman Zakharov:*

> *"In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive*

[137] ECtHR, *Malone v. the United Kingdom*, No. 8691/79, 2 August 1984, § 67; ECtHR, *Khan v. United Kingdom,* 35394/97, 12 May 2000, §§ 26-28; ECtHR, *Shimovolos v. Russia*, No. 30194/09, 21 June 2011, § 68; ECtHR, *Bykov v. Russia,* No. 4378/02, 10 March 2009, § 78.

[138] ECtHR, *Roman Zakharov v. Russia,* No. 47143/06, 4 December 2015, §§ 229-230.

[139] ECtHR, *Shimovolos v. Russia*, No. 30194/09, 21 June 2011, § 68; *see also* ECtHR, *Weber and Saravia v. Germany,* Dec., No. 54934/00, 29 June 2006, § 95.

[140] ECtHR, *Klass and others v. Germany*, No. 5029/71, 6 September 1978, § 55.

[141] Ibid.

> *measures are such as to keep the "interference" to what is "necessary in a democratic society"".*[142]

The judicial review should include not only a formal review of legality (adherence to formal requirements of the request) of such measures, but also include the verification of their necessity and proportionality in each individual case. This assessment should take into account not only the reasons for which the investigative measures are sought, but also the impact of the particular measure on the individual circumstances of the persons affected by them, including aspects such as the reputation of the suspect or accused person. The ECtHR has concluded that in *Petrović*:

> *The notion of "necessity" implies that the interference is proportionate to the legitimate aim pursued. Regarding, in particular, searches of premises and seizures, the Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to. Concerning the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, it must consider the specific circumstances of each case, including but not limited to the severity of the offence in question, the manner and circumstances in which the search warrant was issued, the availability of other evidence at the time, the content and scope of the warrant in question, and the extent of possible repercussions on the reputation of the person affected by the search.*[143]

## 3. Right to private and family life and the EAW

The right to private and a family life should also be an important factor to assess upon the issuing and execution of the EAW. According to the European Commission's Handbook on how to issue and execute a European arrest warrant (the '**EAW Handbook**'):[144] "an EAW should always be proportional to its aim. Even where the circumstances of the case fall within the scope of Article 2(1) of the Framework Decision on the EAW, issuing judicial authorities are advised to consider whether issuing an EAW is justified in a particular case."

The EAW Handbook mentions a number of factors that should be assessed in that analysis, including the seriousness of the offence, the likelihood of custodial sentence and other factors. We noted in Section 4 (the principle of proportionality/use of detention as a last resort) above that detention should only be ordered when it is strictly necessary and proportionate. This assessment should take into account private and family ties in the executing Member State and the likely impact of detention and surrender to another Member State on those ties. The CJEU stated in *J.N.*:

> As regards the proportionality of the interference with the right to liberty that has been found to exist, it should be recalled that the principle of proportionality requires, according to settled case-law of the Court, that measures adopted by the EU

[142] ECtHR, *Roman Zakharov v. Russia,* No. 47143/06, 4 December 2015, § 232.
[143] ECtHR, *Dragan Petrović v. Serbia,* No. 75229/10, 14 April 2020, § 73.
[144] Handbook on how to issue and execute a European arrest warrant, European Commission, 6 October 2017, section 2.4.

> institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued (..) in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary.[145]

The existence of social and family ties in the executing Member State should also be taken into account in the assessment of less intrusive, alternative measures of mutual cooperation such as the European Investigation Order. In this context, the EAW Handbook notes that "issuing judicial authorities are advised to consider whether in the particular case issuing an EAW would be proportionate and whether any less coercive Union measure could be used to achieve an adequate result".[146]

Article 4(6) of the Framework decision on the EAW allows the executing Member State to refuse the execution of the EAW and to assume the execution of custodial sentence itself if there is a legitimate interest to do so. The CJEU stated that presence of family, social and professional ties in the executing Member State are one of those legitimate interests:

> "In order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6) of the Framework Decision, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State."[147]

The ECtHR also recognised that a refusal to take into account the prisoner's family situation in assessing their transfer to a facility closer the residence of their family breached the right to a private and family life:

> *Detaining an individual in a prison which is so far from his or her family as to render family visits very difficult or even impossible may in certain circumstances constitute disproportionate interference with family life (..). In examining whether the interference was also 'necessary in a democratic society' (..) there is no appearance that they attempted, in any meaningful way, to consider the applicant's and his*

[145] CJEU, C-601/15 PPU*, J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 56.
[146] Handbook on how to issue and execute a European arrest warrant, European Commission, 6 October 2017, section 2.4. and 2.5.
[147] CJEU, C-66/08*, Szymon Kozłowski*, 15 July 2008, ECLI:EU:C:2008:437, § 48, see also: Handbook on the transfer of sentenced persons and custodial sentences in the European Union, OJ C 403, 29 November 2019, Section 3.2.3.

*mother's arguments concerning their personal situation, including serious health-related and budgetary constraints on the applicant's parents' ability to travel in order to visit him in the Ladyzhynska Colony. Accordingly, the Court finds that the interference with the applicant's family life in the present case, on the basis of the law, as interpreted and applied by the domestic authorities, was not 'necessary' in a democratic society within the meaning of Article 8 § 2 of the Convention.*[148]

[148] ECtHR, *Rodzevillo v. Ukraine,* No. 38771/05, 14 January 2005, §§ 83-85, see also European Union Agency for Fundamental Rights and Council of Europe, "Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers", 2016, p.41.

# III - LIMITATION OF RIGHTS

Article 52(1) of the Charter sets out the general scheme and principles that have to be observed when Charter rights are being limited:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

According to the Explanations relating to the Charter, the wording of the first paragraph of Article 52 is based on the case-law of the CJEU. A later interpretation of these principles was given by the CJEU, for example, in *J.N.*:

> "Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others."[149]

The case law of the CJEU clearly establishes that restrictions may be imposed on the exercise of fundamental rights only if those restrictions correspond to the objectives of general interest pursued by the EU and do not constitute, in light of the aim pursued, a disproportionate and unreasonable interference. Therefore, limitations on Charter rights must comply with all four of the following criteria:

(1) be provided by law ;
(2) respect the essence of those rights and freedoms;
(3) have a legitimate aim that corresponds to general interest pursued by the EU or protection of rights of others; and
(4) be subject to the principle of proportionality.

## A. NON-DEROGABLE RIGHTS

Some rights under the Charter are non-derogable, which means that these rights cannot be subject to any restrictions or limitations whatever the circumstances. The Explanations relating to the Charter explicitly mention the principle of *ne bis in idem* as non derogable. However, the EU FRA in its handbook "*Applying the Charter of Fundamental Rights of the European Union in law and*

[149] CJEU, C-601/15 PPU, *J. N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, § 50.

*policymaking at national level*" suggests that the following rights relevant to this toolkit can be considered absolute:

- human dignity (Article 1 of the Charter);
- the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the Charter);
- the presumption of innocence and right of defence (Article 48 of the Charter);
- the principle of legality (Article 49(1) of the Charter); and
- the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50 of the Charter)."[150]

With regard to defence rights, however, even though the Charter and the ECHR do not provide for derogations from these rights, in practice certain derogations and limitations are permissible. These are mentioned in this toolkit and elaborated on in more detail in the toolkits on specific Procedural rights directives.

## B. APPLICATION OF RESTRICTIONS

Specific permissible limitations of suspect's and accused person's rights can be found in the Procedural rights directives.

For example, Article 3(5) of the Access to a Lawyer Directive allows a temporary derogation from early access to a lawyer in exceptional circumstances and only at a pre-trial stage due to geographical remoteness of the suspect or accused person. Similarly, Article 8(2) of the Presumption of Innocence directive allows for a derogation of the accused person's right to be present at trial provided that appropriate safeguards are in place allowing for a trial *de novo* where the accused has been convicted in his/her absence. These derogations are listed exhaustively and must always be interpreted narrowly.

Generally, if a specific limitation is provided for in a directive, or if national law or practice appears to limit rights under the Procedural rights directives where no limitations are provided, it is for the national authorities to prove that the limitations are permissible, necessary and proportional. This means that the burden to 'prove' that the restriction is permissible under EU law, namely, that it is provided by law, does not restrict the essence of the fundamental right, pursues a legitimate aim (public interest) and is necessary and proportional to that aim, lies on the relevant authorities.

For a more detailed checklist of the compatibility of restrictions of fundamental rights with the Charter, we refer you to the checklist prepared by the European Union Agency for Fundamental Rights in Chapter 8 of the handbook *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*.

[150] European Union Agency for Fundamental Rights, "Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level", Handbook, 2018, pp. 70-71.

# FINAL REMARKS

The Charter is a comprehensive catalogue of rights applicable in all situations there the EU law comes into play. As a relatively recent document it offers a set of rights and principles not found in other well-established human rights instruments. The Charter has become even more relevant in ensuring the full implementation of the Procedural rights directives and respect for defence rights in criminal proceedings across the EU.

While it has an enormous potential to support arguments based on the rights found in Procedural rights directives, to date the Charter remains underused in domestic proceedings before national courts. It is the role of practitioners to use the Charter together with the Procedural rights directives and other EU mutual recognition instruments and make sure they are enforced by domestic courts across the EU.

We hope that this toolkit will support the efforts of lawyers across Europe and invite you to:

- Contact us for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the Using EU law Toolkit, our Preliminary reference Toolkit and our online training video on the preliminary ruling procedure in criminal practice.
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings and updates on relevant case-law.
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper "Towards an EU Defence Rights Movement" for concrete ideas on articles, litigation, conferences etc.