



1. General information about directives

- **What is a directive?**

A directive is a legislative instrument that is "binding as to the result to be achieved", but which leaves to the national authorities of the Member States "the choice of form and methods" by which they do so: Article 288 TFEU.

Each directive specifies an exact date by which it must be implemented (or transposed). Normally, it is two years after its date of publication in the Official Journal, but the transposition period is longer for some criminal law instruments.

- **Why must a directive, and the surrounding principles of EU law that govern directives, be applied and enforced within the legal systems of the Member States?**

This is a product of the primacy of EU law, including directives, over the internal laws of the Member States: Case 6/64 *Costa v ENEL* and Member States' obligation of "sincere cooperation" with the Union: Article 4(3) TEU.

The obligation falls upon all of their national authorities. Therefore, courts and prosecuting authorities must not only take appropriate measures to ensure fulfilment of the obligations that are associated with a directive, but they must also refrain from any measure that could jeopardise the attainment of its objectives.

- **What is the legal effect of a directive during the transposition period?**

The Member States are under a legally binding obligation to implement a directive. During the transposition period their national authorities must refrain from taking any measures that are "liable seriously to compromise" the result that it prescribes: Case C-439/16 PPU *Milev*, paragraph 31; Case C-212/04 *Adeneler*.

- **What is the legal effect of a directive once the transposition period has ended?**

Assuming that the directive has been properly implemented, once the transposition deadline has passed, national authorities should apply and enforce the national implementing measures.

If implementation has not occurred, or it is inaccurate or incomplete, then national authorities must seek to give effect to the provisions of the directive by means of the doctrines of direct effect or indirect effect (also known as the obligation of harmonious interpretation).

- **What is direct effect?**

Direct effect is a remedy that allows an individual to claim the benefit of an EU law right before a national court. Not all EU law is directly effective. Directives are capable of having direct effect, provided that the following criteria are satisfied:

- the provision(s) that is being relied on (not the whole directive) must be "unconditional" and "sufficiently clear and precise";
- the deadline for implementation must have passed; and
- the claim must be "vertical" against the State, or an organ or emanation of the State, and not "horizontal" against a private individual (legal or natural person).

- **What is indirect effect (or the obligation of harmonious interpretation)?**

Indirect effect is the obligation of national authorities (not just courts) to interpret national law in the light of applicable EU law in so far as it is possible to do so. Where the applicable EU law is a directive, the deadline for implementation must have expired. Unlike direct effect, the indirect effect of directives can be claimed both "vertically" and "horizontally".

- **Are there any special limitations on the operation of direct effect or indirect effect in criminal cases?**

A Member State may not rely upon its own default in order to claim the direct effect or indirect effect of a directive, thereby imposing or aggravating criminal liability, or aggravating punishment: Case 63/83 *R v Kent Kirk*; Case C-168/95 *Arcaro*.

To hold otherwise would be to violate the principles of *nullum crimen sine lege/nulla poena sine lege* that are recognised by Article 49(1) of the EU's Charter of Fundamental Rights and Article 7 ECHR, which is respected under Union law as a fundamental right.

- **If a national court cannot give effect to a directly effective right, does EU law grant any remedies?**

Unless otherwise specified, the question of remedies is a matter for national law, but this "national procedural autonomy" is subject to the overriding EU law requirements of "equivalence" and "effectiveness".

"Equivalence" means that the remedy must be equivalent to that which would be granted for an analogous breach of national law.

"Effectiveness" means that the remedy must also be "neither excessively difficult nor virtually impossible" to obtain: Case C-213/93 *Peterbroeck*.

- **Does an individual who has suffered the loss of putative rights under a directive have any other remedies?**

Separately from seeking to claim the benefit of the direct effect or indirect effect of the directive, an individual may seek damages from the Member State for its failure to afford the right(s) that the directive is meant to bestow. The criteria for a successful claim are that:

- the rule of law that has been infringed is intended to confer rights upon individuals;

- the breach of that rule by the Member State is "sufficiently serious"; and
- there must be a direct causal connection between the breach and the damage suffered by the individual: Joined Cases C-46 and C-48 *Brasserie du Pêcheur* and *Factortame (No.3)*.

Failure to implement a directive by the transposition deadline automatically qualifies as a "sufficiently serious" breach.

- **Can any other steps be taken if a Member State has failed to implement a directive, or has implemented it incorrectly or incompletely?**

The European Commission (or another Member State) can initiate enforcement proceedings before the CJEU against a Member State that has failed to discharge its EU law obligations, e.g. by failing properly to implement a directive: Articles 258 and 259 TFEU.

If the Court finds that the Member State is in breach, and the Member State fails to remedy the infringement, the Commission can bring further proceedings which may result in the Member State being fined: Article 260 TFEU.

2. The procedural rights directives

- **What is the source of the initiative to adopt the package of procedural rights directives?**

Although the initiative has a considerably longer history, the direct source is the so-called procedural rights "Roadmap" that was adopted in November 2009 (OJ 2009 C 295/01), and then incorporated into the Stockholm Programme in December 2009 (OJ 2010 C 115/01).

- **What are the measures that have been adopted so far?**

Five directives have been adopted, which are:

- Directive 2010/64/EU of the European Parliament and of the Council of 22 May 2012 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280/1);
- 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);
- 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 294/1);
- 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 65/1);
- Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ 2016 L 132/1);
- Directive (EU) 2016/... 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 (*awaiting publication in the OJ*).

The Commission has also published a Green Paper on pre-trial detention: COM(2011) 327 final.

- **What rights are provided by Directive 2010/64/EU?**

The directive covers the rights to interpretation and to translation of "essential documents" in criminal proceedings and proceedings for the execution of a European arrest warrant. Costs are to be met by the Member State, regardless of outcome.

The deadline for implementation was 27 October 2013.

- **What rights are provided by Directive 2012/13/EU?**

The directive covers the right to information of suspects and accused persons regarding their rights in criminal proceedings and the accusation against them, and the right to information of persons subject to a European arrest warrant regarding their rights. This includes the provision of a "letter of rights" on arrest or when subject to European arrest warrant proceedings and the right of access to materials of the case.

The deadline for implementation was 2 June 2014.

- **What rights are provided by Directive 2013/48/EU?**

The directive covers the right of access to a lawyer in criminal proceedings and for those subject to a European arrest warrant; the right to have a third party informed of deprivation of liberty; and the right to communicate with third persons and with consular authorities while deprived of liberty.

The deadline for implementation is 27 November 2016.

- **What rights are provided by Directive (EU) 2016/343?**

The directive covers the presumption of innocence for natural persons only; restrictions on public references to, or indications of, guilt of suspects or accused persons; the right to remain silent and the privilege against self-incrimination; and the right to be present at trial.

The deadline for implementation is 1 April 2018.

- **What rights are provided by Directive (EU) 2016/800?**

The directive applies to children, who are defined as those under the age of 18. It covers the rights to information of the child and the party with parental responsibility for her/him; a significant number of other rights (e.g. to legal assistance, medical examination, audio-visual recording of questioning, limitations on deprivation of liberty, protection of privacy); and the right to be accompanied by the party with parental responsibility.

The deadline for implementation is 11 June 2019.

- **What rights are provided by Directive (EU) 2016/... (legal aid)?**

The directive establishes minimum rules regarding the right to legal aid for suspects and accused persons in criminal proceedings, and for persons subject to a European arrest warrant. Member States must ensure that the particular needs of vulnerable persons are taken into account in its implementation. The directive states explicitly that Member States may apply a means test, a merits test, or both in decisions regarding the granting of legal aid.

The deadline for implementation will be 30 months after the date of publication in the Official Journal (which should be approximately mid to late May 2019).

- **What are the key points to think about/notice in reading the directives?**

Key points include:

- what is the content of the rights that the directive confers, and how clearly defined is it?
- at what point in the proceedings do the rights arise (how soon)?
- what are the implications if there is a delay?
- does the directive establish requirements regarding the *quality* of provision?
- does the directive make provision for the allocation of costs (i.e. is it the Member State, or the suspect/accused who is responsible for financing access to the rights that it provides)?
- how (well) do the directives fit together? The later ones cross-refer to the earlier ones, and each measure is meant to contribute to a cumulative package of protection. Are they successful in doing that, or are there inconsistencies or gaps?
- all of the directives have a "non-regression" Article, which is designed to ensure that they do not have the effect of undermining the protection that is afforded by the Charter of Fundamental Rights, the ECHR, international law or the internal law of Member States if it is superior to that conferred by the directive in question.

- **If the correct interpretation of the directive is unclear, what can be done to establish its proper meaning?**

Any court or tribunal in a Member State, including any criminal court, may stay the proceedings before it in order to make a reference for a preliminary ruling from the CJEU on the correct interpretation of Union law. Courts and tribunals of last resort must do so.

Once the CJEU has issued its ruling, it is transmitted to the referring national court, whose responsibility it is to apply it to the proceedings in connection with which the question arose.

As it takes several months to secure a preliminary ruling, an expedited procedure has been introduced for cases that concern individuals who are in custody: Article 267 TFEU.

- **If none of the directives appears to guarantee a particular procedural right, or the right is covered by a directive for which the implementation**

period has not yet expired, are there any other sources of procedural rights in EU law that might bridge the gap?

Yes! Secondary sources of procedural rights are (a) the Charter of Fundamental Rights, which now has "the same legal value" as the treaties: Article 6(1) TEU; or (b) fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, which constitute general principles of Union law: Article 6(3) TEU.

3. Framework decisions

- **What is a framework decision?**

A framework decision is a legislative instrument that was available to the Union from 1 May 1999 (the date that the Treaty of Amsterdam entered into force) until 1 December 2009 (when the Treaty of Lisbon entered into force), and which was solely for use under Title VI of the pre-Lisbon TEU –the so-called "third pillar" on "police and judicial cooperation in criminal matters".

- **How does a framework decision differ from a directive?**

Like a directive, a framework decision is binding as to the result to be achieved, but the choice of form and methods is left to the national authorities of the Member States. Framework decisions therefore also specify a deadline for implementation, all of which have now long since expired.

Contrasting with directives, the pre-Lisbon TEU stated explicitly that framework decisions do not have direct effect: Article 34(2)(b) TEU(A). They are, though, covered by the obligation of harmonious interpretation, i.e. indirect effect: Case C-105/03 *Pupino*.

- **What is the legal effect of a framework decision now that the Treaty of Lisbon has reformed the treaties and enabled the Union to legislate in the criminal law field by means of directives?**

Protocol (No 36) on Transitional Provisions to the treaties provides that all surviving third pillar measures retain their original legal effect unless and until they are "repealed, annulled or amended" through the exercise of post-Lisbon treaty powers: Article 9. Therefore, they remain good law for the time being.

The Protocol has, however, implemented one important change. Originally, the Commission and the CJEU had limited jurisdictions with respect to third pillar measures. Since 1 December 2014, the restrictions have been removed.

As a result, the Commission may now bring enforcement proceedings against the Member States for failure properly to implement framework decisions, which it could not do previously; and all national courts and tribunals may, as of right, make references for preliminary rulings in respect of the correct interpretation of third pillar laws.

The Union is committed to replacing all surviving third pillar measures with post-Lisbon legislation. Progress is being made towards fulfilling that pledge, but it remains a long way from completion.