



# PROCEDURAL SAFEGUARDS IN CRIMINAL PROCEEDINGS IN THE EUROPEAN UNION IN PRACTICE

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***The procedural rights directives:  
introduction & background***

# Background & objectives

- The Roadmap, the Stockholm Programme & Article 82 TFEU
- ECHR inspiration
- Objectives
  - to safeguard the fairness of the proceedings & the effective exercise of the rights of the defence
  - a common platform of rights: “minimum rules”; not dilution of standards

# Non-regression

*“Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law [in particular the UN Convention on the Rights of the Child] or the law of any Member State which provides a higher level of protection.”*

# ***The directives in detail***

# Directive 2010/64

Rights	<ul style="list-style-type: none"><li>• Interpretation;</li><li>• Translation of “essential documents”</li></ul>
Transposition deadline	<ul style="list-style-type: none"><li>• 27 October 2013</li></ul>
CJEU case law to date	<ul style="list-style-type: none"><li>• Case C-216/14 <i>Covaci</i>;</li><li>• Case C-25/15 <i>Balogh</i>;</li><li>• Case C-278/16 <i>Sleutjes</i></li></ul>

# Directive 2010/64: points to note

- Right to interpretation covers those with hearing & speech impediments: Article 2(3)
- Right to translation
  - provision for oral translation in exceptional circumstances: Article 3(7)
  - right of waiver - strict conditions apply: Article 3(8)
- Adequacy & quality



# Directive 2012/13

Rights	<ul style="list-style-type: none"><li>• Information about rights;</li><li>• Letter of rights on arrest &amp; in EAW proceedings;</li><li>• Information about accusation;</li><li>• Access to materials of the case</li></ul>
Transposition deadline	<ul style="list-style-type: none"><li>• 2 June 2014</li></ul>
CJEU case law to date	<ul style="list-style-type: none"><li>• Case C-216/14 <i>Covaci</i>;</li><li>• Cases C-124/16, C-188/16 &amp; C-213/16 <i>Tranca, Opria &amp; Reiter</i>;</li><li>• Case C-612/15 <i>Kolev</i>;</li><li>• Case C-646/17 <i>Moro</i> (AG's Opinion)</li></ul>

# Directive 2012/13: points to note

- Indicative Letters of Rights included in Annexes
- Right of access to materials of case
  - absolute right to documents essential to challenging lawfulness of arrest or detention: Article 7(1)
  - possible to refuse access to other materials in accordance with derogation under Article 7(4)

# Directive 2013/48

Rights	<ul style="list-style-type: none"><li>• Access to a lawyer in criminal proceedings;</li><li>• Confidentiality of communication;</li><li>• Communication of deprivation of liberty to a 3<sup>rd</sup> party &amp; (non-nationals) consular authorities;</li><li>• Communication with 3<sup>rd</sup> parties while deprived of liberty &amp; (non-nationals) consular authorities</li></ul>
Transposition deadline	<ul style="list-style-type: none"><li>• 27 October 2016</li></ul>
CJEU case law to date	<ul style="list-style-type: none"><li>• Case C-612/15 <i>Kolev</i></li></ul>

# Directive 2013/48: points to note

- Temporary derogations for Member States
  1. Geographical remoteness: Article 3(5)
    - ✓ Right of access to a lawyer
  2. Urgent need (a) to avert serious adverse consequences for the life, liberty or physical integrity of a person or (b) to prevent substantial jeopardy to criminal proceedings: Articles 3(6) & 5(3)
    - ✓ Right of access to a lawyer
    - ✓ Right to have third party informed of deprivation of liberty
- Strict conditions apply: Article 8
- Waiver of right of access to a lawyer - strict conditions apply: Article 9
- Vulnerable persons: Article 13

# Directive 2016/343

Rights	<ul style="list-style-type: none"><li>• Presumption of innocence;</li><li>• Avoidance of public references to, &amp; presentations of, guilt</li><li>• Burden of proof on the prosecution</li><li>• Silence &amp; privilege against self-incrimination</li><li>• Presence at trial &amp; fresh trial/remedy if not</li></ul>
Transposition deadline	<ul style="list-style-type: none"><li>• 1 April 2018</li></ul>
CJEU case law to date	<ul style="list-style-type: none"><li>• Case C-439/16 PPU <i>Milev</i>;</li><li>• Case C-310/18 PPU <i>Milev</i>;</li><li>• Case C-8/19 PPU <i>RH</i></li></ul>

# Directive 2016/800

<p>Rights</p> <p>* explicitly including in EAW proceedings</p>	<ul style="list-style-type: none"><li>• Provision of information to child &amp; holder of parental responsibility (or “appropriate adult”);*</li><li>• Assistance by a lawyer;*</li><li>• Individual assessment;</li><li>• Medical examination if deprived of liberty;*</li><li>• Audio-visual recording of questioning;</li><li>• Limitation of duration of deprivation of liberty;*</li><li>• Use of alternative measures to detention;*</li><li>• Special treatment when deprived of liberty (e.g. separation from adults);*</li><li>• Timely &amp; diligent treatment of cases;*</li><li>• Protection of privacy;*</li><li>• Presence of holder of parental responsibility (or “appropriate adult”) during court hearings &amp; otherwise;*</li><li>• Appearance in person &amp; participation in trial;</li><li>• Right to legal aid*</li></ul>
<p>Transposition deadline</p>	<ul style="list-style-type: none"><li>• 11 June 2019</li></ul>
<p>CJEU case law to date</p>	<p>[• Case C-367/16 <i>Piotrowski</i>]</p>

# Directive 2016/1919

Rights	<ul style="list-style-type: none"><li>• Legal aid in criminal proceedings;</li><li>• Legal aid in EAW proceedings</li></ul>
Transposition deadline	<ul style="list-style-type: none"><li>• 25 May 2019</li></ul>

# Directive 2010/64, Article 1(2)

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



# Directive 2010/64, Article 1(3)

*Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before the court following such an appeal.*

# Directive 2016/1964 Article 3(1)

Member States shall ensure that the information referred to in Article 2 is collected or  
collected and the  
collected in a  
time,  
document  
they are  
and to  
proceeding

“promptly”

“without delay”

“in due time”

“without undue  
delay”

## Directive 2010/64, Article 3(2) & (3)

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

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

***Directives  
& their obligatory force***

# Key points about directives

- Article 288 TFEU:
  - *“binding, as to the result to be achieved, upon each Member State to which it is addressed”*
  - But they have *“the choice of form & methods”*
- Must be transposed into national law by the stated deadline
- Compare framework decisions: Article 34(2)(b) TEU (Amsterdam version)

# Obligations on national courts

1. Must apply EU law by the principle of “sincere cooperation” in Article 4(3) TEU
2. Must refrain from “seriously compromising” the objectives of a directive during its implementation period: Case C-212/04 *Adeneler*; Case C-439/16 PPU *Milev*
3. Should (be able to) apply domestic implementing law rather than the parent directive

➤ *But what if there is no implementing law, or the implementing law is defective in some way?*

# Remedies before national courts

1. Remedies that seek to give effect to the rights that are conferred by a directive

- Direct effect
- Indirect effect (also known as the “interpretive obligation”)

2. Remedies that provide financial compensation for loss of rights that purport to be conferred by a directive

- State liability in damages

# Direct effect

- Conditions:
  - ✓ the implementation deadline has expired
  - ✓ the provision (not entire directive) is “unconditional” & “sufficiently clear & precise”
  - ✓ the claim is “vertical”, i.e. against the State or an “organ” or “emanation” of the State
- Must not contravene Article 49(1) CFR/Article 7 ECHR



## Directive 2010/64, Article 3(1)

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

# Remedies

- National procedural autonomy, i.e. a matter of national law
- BUT:
  - ✓ remedy must be equivalent to that provided for an analogous breach of national law: *“equivalence”*
  - AND
  - ✓ remedy must be “neither virtually impossible nor excessively difficult” to obtain: *“effectiveness”*

# Indirect effect

- National court must read relevant national law in the light of the directive *in so far as it is possible to do so*
- Conditions:
  - ✓ the implementation deadline has expired
  - ✓ there must be some national law to interpret -!
- Must not contravene Article 49(1) CFR/Article 7 ECHR

# State liability in damages

- Conditions:
  - ✓ the provision must be intended to confer rights on individuals
  - ✓ there must be a “sufficiently serious breach” by the Member State (or an “organ” or “emanation” of the State)\*
  - ✓ there must be a causal connection between the breach & the damage suffered by the individual

\* Failure to implement a directive by the deadline automatically satisfies this condition

- Freestanding: can be claimed in addition to, or instead of, direct effect/indirect effect

***Obtaining assistance from the  
CJEU & consequences of failure to  
apply the directives***

# Preliminary rulings procedure: Article 267 TFEU

## CJEU judgments 2016 : Date lodged to date of judgment

	Mean	Range
PPU cases (n=7)	72 days (10 weeks, 2 days)	38 - 118 days
Other preliminary rulings (n=9)	571 days (81 weeks, 4 days)	256 - 890 days
Enforcement proceedings (n=1)	659 days (94 weeks, 1 day)	

# Enforcement proceedings

<p>Articles 258 (&amp; 259) TFEU</p>	<ul style="list-style-type: none"><li>• European Commission (&amp; other Member States) can initiate proceedings against a Member State for failure to implement EU law</li></ul>
<p>Article 260 TFEU</p>	<ul style="list-style-type: none"><li>• Commission can initiate further proceedings against Member State for failure to comply with ruling</li><li>• CJEU can order Member State to pay a lump sum or penalty payment</li></ul>

# ***Concluding points***



# Final points

- Special arrangements: Denmark, Ireland [& UK]
- Consequences of failure to apply:
  - Loss of substantive rights for individuals
  - State liability: Case C-224/01 *Köbler*
- Circumstances not covered by the directives:  
are suspects/defendants unprotected?

# Fundamental rights protection

## Charter of Fundamental Rights

- Title VI: Justice
- Article 6(1) TEU: Charter has *“same legal value as the Treaties”*

## Article 6(3) TEU

- Fundamental rights, as guaranteed by the ECHR & as they result from the constitutional traditions of the Member States = general principles of Union law

**NB *Vizgirda v Slovenia*  
(59868/08);**

***Beuze v Belgium* (71409/10)**

## ECHR (+ certain Protocols)

- All Member States are signatories: Article 49 TEU

# The Roadmap (2009)

- Measure A: Translation and Interpretation
  - Measure B: Information on Rights and Information about the Charges
  - Measure C: Legal Advice and Legal Aid
  - Measure D: Communication with Relatives, Employers and Consular Authorities
  - Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable
  - Measure F: A Green Paper on Pre-Trial Detention
- Cumulative impact of measures & cross-referencing between them



***Thank you for listening!***