



How to initiate a preliminary reference request to the European Court of Justice in criminal proceedings?

ECBA Annual Conference – 11 May 2019

Laure Baudrihay-Gerard

Senior Lawyer, Fair Trials

laure.baudrihay@fairtrials.net



www.fairtrials.org



@fairtrials



FairTrials

Fair Trials and LEAP

- Fair Trials is the global criminal justice watchdog with offices in Brussels, London and Washington DC
- The Legal Experts Advisory Panel (LEAP) is a European **network** of experts in criminal justice and human rights which works to promote **fair trial rights** in Europe
- Our areas of work
 - Defence rights in criminal proceedings
 - Impact of cross-border judicial cooperation mechanisms on defence rights and fundamental rights more broadly



Growing body of EU law in the field of criminal procedure

The EU Procedural Rights Directives (“Roadmap Directives”)

- 1) Directive 2010/64/EU on the right to interpretation and translation
- 2) Directive 2012/13/EU on the right to information
- 3) Directive 2013/48/EU on the right of access to a lawyer
- 4) Directive (EU) 2016/343 on the right to presumption of innocence and to be present at trial
- 5) Directive (EU) 2016/1919 on the right to legal aid
- 6) Directive (EU) 2016/800 on the rights of children in criminal proceedings

Fair

Trials

LEAP's CJEU Working Group

- Continued efforts are required on the **implementation** of the Roadmap Directives in national law and practice
- Important role for the Court of Justice of the EU (“**CJEU**”) on the **interpretation** of the Roadmap Directives
- Very little case-law to date
- **CJEU Working Group** within LEAP to promote references to Luxembourg:
 - Production of **toolkits** on using EU law and the preliminary reference procedure
 - **Training** activities
 - **Support** in domestic cases where EU law questions arise
- Aim: for criminal defence practitioners to see the CJEU as a **regular and accessible forum**



Overview of presentation

1. Outline of the legal basis and stages of the preliminary reference procedure
2. State of play of CJEU case law in criminal justice
3. Practical tips for defence lawyers to initiate a reference in domestic criminal proceedings
4. Q&A



The legal basis and the three stages of the preliminary reference procedure



Decentralised enforcement of EU law

- Article 267 TFEU entitles a national court to make a reference **at any point** in the national procedure → **dialogue** between national courts and CJEU
- For a reference to be possible, there must be **question of EU law** on which a ruling from the CJEU is necessary to enable the local court to give judgment
- The court is **not obliged** to make a reference – unless it is the court of last instance
- Court of last instance **may only refuse** a reference in three circumstances
 - The question is irrelevant
 - The question has already been interpreted by the CJEU
 - The answer is obvious (no scope for reasonable doubt)



Stage 1: Domestic criminal proceedings

- **Discretion** of national courts **at any instance** to decide whether to make a reference to the CJEU on a “**genuine**” **question of EU law** to be resolved
- CJEU will not answer:
 - Questions on the compatibility of national law with EU law
 - Hypothetical questions
 - Questions based *solely* on the Charter of Fundamental Rights (cf. Article 51(1) CFR)
- New procedure for most criminal justice practitioners, so court may **invite parties to make submissions** on the need for a reference, and the formulation of the question to the CJEU

Example: Irish High Court in the “Celmer” case relating to the execution of a European Arrest Warrant issued by Poland, which led to the CJEU’s very important ruling of 25 July 2018 (C-216/18 PPU)



Stage 2: Before the CJEU

- National proceedings are **stayed**
- All parties in the domestic proceedings are entitled to make **written submissions** – as well as the EU Member States and Institutions
- An **oral hearing** typically takes place in Luxembourg
- There may be a non-binding “**Advocate General Opinion**” (where the question raises a new point of law)
- The CJEU issues its ruling on the question – **but does not rule on the merits of the case itself**

All written and oral submissions can be made in your own language

Preliminary ruling proceedings are **free of charge** and the CJEU may itself grant **legal aid**

Fair

Trials

The Urgent Procedure (“PPU”)

- An average reference takes **15 – 18 months**
- But there is an urgent procedure available under Article 267 (4) TFEU which reduces the duration to **circa 8 – 10 weeks**

Example: even in a complex case like Celmer, the reference was made on 12 March 2018 and the ruling published on 25 July 2018 → four months

- The national court must **request** a PPU
- Typically granted in cases where a person is in **detention** pending the outcome of the proceedings
→ Key to stress this option to national courts who may be reluctant to refer for fear of prolonging the duration of the proceedings



Stage 3: Back to the national court

- The CJEU's ruling only provides an interpretation of the relevant provisions of EU law, but it is still incumbent upon the national court to apply the ruling to the facts before it and **decide the case on the merits**
- In some cases, for instance where the CJEU requires the application of a test or a proportionality assessment, this may still **leave room for argument** by the defence
- Once the CJEU gives judgment in a preliminary ruling, it **binds** the referring national court – as well as other national courts before which the same issue is raised
 - **Potential benefit for your client and for all suspects/accused persons in the EU**



State of play of CJEU case-law: key trends



European Arrest Warrant Framework

Decision 13 June 2002 (002/584/JHA)

- Over 30 rulings since 2007 on the EAW
- **Two key trends:**
 1. **Refusal to execute on grounds of fundamental rights concerns:** risk inhuman and degrading treatment due to prison conditions (*Aranyosi and Caldaru*, C-404/15, 15 April 2016) and risk of violation of the right to a fair trial (*Ministry for Justice and Equality, “Celmer”*, C-216/18 PPU, 25 July 2018)
 2. **Concept of an “issuing judicial authority”** (autonomous EU law concept) two AG opinions of 30 April 2019 indicating that the German and Lithuanian Public Prosecutors do not meet the requirements due to lack of independence (Cases C-508/18 and C-509/18)



Roadmap Directives

- Very few rulings to date – see our mapping document available on <https://fairtrials.org/publication/cjeu-materials>
- No rulings on key issues, such as:
 - Meaning of **effective remedies** in the EU Directive on Access to a Lawyer, where that right has been violated
 - Meaning of **effective participation of lawyers during questioning**
 - **Access to interpretation** and a test to **measure the quality of interpretation**, a right enshrined in EU law
 - See: Court of Appeal of Évora in Portugal on 20 December 2018 (file number 55/16.9GBLGS.E1) – Justice Rapporteur Gomes de Sousa (see news piece: <https://fairtrials.org/news/right-interpretation-and-translation-positive-signs-Portugal>)*
 - **Timing and extent of access to the file** at the police station before the initial questioning
 - See: AG Bobek Opinion of 5 February 2019 in Case C-646/17 – reference from Tribunale di Brindisi (Italy) – on scope of application of Right to Information Directive*

How can a defence practitioner initiate a reference?



Key hurdles

- Persuading the **national judge** to make a reference to the CJEU (and even that EU law applies in the case at hand)
- Persuading the CJEU to **accept** the reference (the CJEU is in principle bound to give an answer to a question, but is not obliged to answer **hypothetical questions** or questions which do not disclose an issue of EU law or questions on the Charter alone)



Assist the national court draft the preliminary reference request

- **No standard form** set by CJEU but the request must contain:
 1. Summary of subject matter of the dispute and facts
 2. Provisions of applicable national law
 3. Reasons to enquire about interpretation of EU law
 4. Questions themselves (which must be self-standing)
- Maximum 10-pages long
- In language of the national proceedings (use **clear and simple drafting** in submissions to the CJEU in order to facilitate translation into French)
- The CJEU is bound by the question(s) as formulated by the referring court : it cannot take the initiative to answer a question of EU law that has not been asked → **key to focus on the formulation of question itself**

For more practical information, see our toolkit available at: <https://fairtrials.org/publication/cjeu-materials>



Example 1: Template reference request on access to the case file

Set of facts:

- Your client is arrested and held in pre-trial detention
- You are denied access to the case file

Question for the CJEU:

- Highlight the disparity of practices across the EU Member States
- What is the meaning of “essential” in Article 7(1) of the Right to Information Directive which gives a detained person right of access to case materials “essential” to challenge the arrest/detention?



Example 2: Template reference request on proportionality in issuing an EAW

Set of facts:

- EAW issued by Member State A for the interrogation of your client → arrested in Member State B
- But the European Investigation Order (“EIO”) also allows Member State A to request Member State B to interrogate your client without need for arrest
- You seek to resist the execution of the EAW in Member State B on the grounds that it was not proportionate because a less restrictive measure (the EIO) was available

Questions for CJEU:

- Does the EAW Framework Decision, in the light of the EU law principle of proportionality, require that the issuing authority consider whether issuing an EIO for the interrogation of the suspect could serve as an effective alternative to an EAW?
- If an EIO is an effective alternative, must the executing judicial authority suspend the surrender and ask for any information necessary to enable it to assess whether surrender of the requested person is likely to breach the principle of proportionality?

Coordinated litigation

- The need for a reference on a specific issue could be made clear through the **repeat invocation of similar arguments**
- Preparation and circulation of a **template reference request** on the issue
- **Concerted effort** at national level, organising conferences, including academics in the discussion, publishing articles in the media

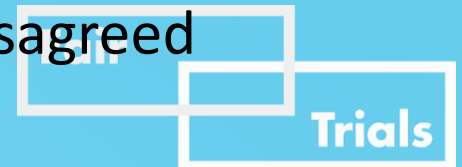
Example: *El-Dridi*, C-61/11 PPU, concerning the interpretation of Directive 2008/115/EC (the 'Returns Directive') governing the return of irregular migrants, following several references by Italian criminal courts seised of cases of detention of migrants on a criminal legal basis, in which similar arguments were raised by lawyers pursuant to discussions with academics in relation to the compatibility of Italian law with the Returns Directive

Fair

Trials

Leveraging on judicial politics

- A court may want to make a reference as a means of **overruling a higher court's judgment** with which the referring court disagrees
- Example:
 - *Nikolova* concerned the interpretation of Directive 2000/43/EC (the 'Race Equality Directive') and the practice in Bulgaria of placing electricity meters atop 7m-high posts in areas of with concentrations of Roma population, widely considered to be discriminatory against that group
 - A reference was made with the aim – openly recognised in the order for reference – of overruling a Supreme Court judgment with which the referring court disagreed



Turning to the ECtHR

- Initiate an action against a Member State before the European Court of Human Rights ('ECtHR') arguing an **infringement of Article 6 of the European Convention on Human Rights ('ECHR')** for the failure by a court of final instance to respond adequately to a request for a reference to be made
- *Dhahbi v. Italy* (App. No 17120/09, Judgment of 8 April 2014) established, for the first time, a violation of Article 6 owing to the **failure to provide any reasons** for such a refusal
- *Repcevirag Szovetkezet v Hungary* (App. No 70750/14, Judgment of 30 April 2019) indicated that if reasons are provided, the ECtHR is not competent to assess the **merits** of the reasons

Fair

Trials

EU advocacy: the role of the European Commission

- The **European Commission** will always intervene in preliminary ruling proceedings and it has an authoritative voice
- It will often take a **pro-citizen line** and may be the individual's only ally against the views of the Member States → it is worth trying to contact relevant policy officers beforehand
- Consider making a **complaint** to the Commission about the court's refusal to make a reference → the threat of **infringement proceedings** may prompt the national court to make a reference



Other forms of advocacy

- Get an **NGO** involved in the domestic proceedings by way of **third-party intervention** or through the submission of an **amicus brief**
- NGOs have a role in creating discussions with judges, academics and other stakeholders – something not to be undervalued in view of the greater role of doctrine in some jurisdictions (e.g. Germany)
- NGOs could play a key role in facilitating this, for instance **organising roundtables** to help develop consensus around the need for references on key points
- NGO-led activities could also involve case-based **litigation training** where participants bring with them issues from their own jurisdictions to discuss litigation solutions



Q&A

Fair

Trials

Discussion points

- What domestic initiatives could help address the resistance from national courts in making references to the CJEU?
- Does comparative analysis of practices in other national jurisdictions help convince courts that the applicable national standard is insufficient?
- Is training of criminal defence practitioners (lawyers, prosecutors, judges) in EU law and/or the preliminary reference procedure itself necessary?



To find out more...

- Useful material on our website (<https://fairtrials.org/publication/cjeu-materials>)
 - Preliminary reference toolkit
 - CJEU case-law mapping
 - Toolkits on using EU law in criminal practice and on each of the EU procedural rights directives
 - Online legal training on access to a lawyer
 - Online legal training on pre-trial detention
- Contact us directly





Thank You!

Laure Baudrihayé-Gérard
Senior Lawyer, Fair Trials

laure.baudrihayé@fairtrials.net



www.fairtrials.org



[@fairtrials](https://twitter.com/fairtrials)



[FairTrials](https://www.facebook.com/FairTrials)