

# FAIR TRIALS INTERNATIONAL

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Communiqué issued after the Fair Trials International Legal Experts  
Advisory Panel Meeting (London, 22 September 2011)

Draft legislative proposal on access to legal advice and notification of  
arrest (“Roadmap” Measure C)



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## Introduction

1. Fair Trials International (“FTI”) formed the Legal Experts Advisory Panel (“LEAP”) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform FTI’s work. The eighth meeting of LEAP under the current EU action grant took place at the London offices of Clifford Chance LLP on 22 September 2011. 52 LEAP members representing 18 European jurisdictions attended.
2. In September 2009, members discussed the proposal for an EU instrument guaranteeing the right to interpretation and translation facilities for all who require them, the first “Roadmap” measure. In February 2010 LEAP met to discuss the second “Roadmap” measure, the right to information on arrest and access to the case file. On each occasion, members’ concerns and recommendations were distilled into communiqués (published on FTI’s website<sup>1</sup>), which were widely distributed to Commission contacts and Parliamentary rapporteurs and shadows, to assist in shaping the Directives on each defence right.
3. In June 2011, the European Commission proposed legislation under “Roadmap” Measure C to ensure no-one facing criminal charges in an EU country is denied access to a lawyer or to communications with third parties and consular officials on arrest<sup>2</sup>. Key elements of the proposal include:

### Legal advice and representation

- a. Suspects and accused people will have a right to legal advice and representation at every stage, from arrest to appeal.
- b. Legal advice must be provided as soon as possible and, at the very latest, on arrest.
- c. A suspect must be allowed to meet his/her lawyer for long enough and often enough to prepare a defence effectively.
- d. Lawyers must be allowed to attend all hearings and interrogations, and visit detainees to check detention conditions.
- e. All communications with the lawyer, whether oral or written, must be protected by complete confidentiality.
- f. In European Arrest Warrant (EAW) cases there is an express right to legal representation in the issuing country. This would enable lawyers in both countries to work together to ensure the person’s fundamental rights (for example, the right not to be tried twice for the same offence or the right not to be detained in inhumane conditions) will not be infringed by extradition.

### Right to inform others of arrest

- g. Previously the right to inform consular officials was only enforceable by the State of the person arrested, rather than the person himself/herself. Under the new proposal arrested persons will have a direct right to have their own consular representatives informed of their arrest if they so wish. They also

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<sup>1</sup> [http://www.fairtrials.net/documents/LEAP\\_Communique\\_September\\_2009.pdf](http://www.fairtrials.net/documents/LEAP_Communique_September_2009.pdf)

[http://www.fairtrials.net/documents/LEAP\\_Communicu\\_February\\_2011.pdf](http://www.fairtrials.net/documents/LEAP_Communicu_February_2011.pdf)

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF>

have a right to communicate as soon as possible with a person they nominate (for example, a relative or employer), to inform them of the arrest.

4. Despite the importance of legal advice and representation, particularly at the early investigative stage when suspects are unaware of their rights, (for example the right to silence or to challenge the basis of their detention) standards of access to legal assistance vary greatly across the EU. There was wide consensus that lack of early and confidential legal advice causes inequality of arms and that suspects who do not receive such advice not only have their fair trial rights severely compromised, but also are at greater risk of mistreatment. Members agreed that the wide disparity in the legal systems of EU countries leads to inconsistent levels of protection for fair trial rights. It was generally felt that the growing reliance by prosecutors on mutual recognition instruments such as the EAW would lead to injustice without a legislative instrument to protect the right to legal advice at the earliest possible stage in the proceedings.
5. To help inform further analysis of how best to protect the right to legal advice and the right to notify third parties on arrest, LEAP members discussed the following questions in three workshops during the course of the meeting.
  - (i) **Should the Directive apply to “administrative proceedings” and “minor offences” or exclude these?**
6. Most members thought it was important to extend the scope of the Directive so that access to a lawyer is made available whenever there is a “deprivation of liberty” (even if the arrest is treated under domestic law as an administrative rather than a criminal measure). Practitioners from Bulgaria and Romania described a phase of early “administrative” detention under domestic law that often precedes the laying of criminal charges, but which would not be covered under the Directive as drafted: care was needed over the way “administrative proceedings” was drafted to ensure that all matters of a criminal nature were covered.
7. It was accepted that, in some cases, it was necessary for investigating officers to seek the court’s permission to conduct searches of premises without any prior notification of suspects, where there was a real risk that evidence would otherwise be compromised. In such cases the presence of a lawyer (or indeed the suspect) during searches would not be possible.
8. In the context of evidence-gathering measures where the suspect is present, such as a road-side breathalyser test, many members pointed to the benefits of providing suspects with access to legal advice, for example, about the comparative penalties for different levels of intoxicants found, as well as the penalties for refusing to undergo tests. Advice would in many cases lead to greater cooperation with police.
9. The presence of a lawyer at identity parades was noted as an important safeguard against unfair police practices.
10. A wide range of views was expressed on whether the Directive should cover cases where a person is accused of a “minor” offence. After discussion, it was generally agreed that its scope should extend to all offences that could lead to a criminal record, whether or not a prison sentence could be imposed.
- (ii) **Should there be a right to access a lawyer “in person” or can telephone advice sometimes be acceptable?**

11. All members agreed that legal advice in person is necessary to establish trust with, and to assess the mental and physical state of, the suspect. It is particularly necessary in order to note any specific vulnerability and to ensure adequate comprehension of charges and other important information. The lawyer's presence in person is also necessary if photographic or CCTV evidence is to be shown to the suspect as such evidence might be difficult to review later, despite having a potentially important effect on the initial advice given to the suspect.
12. A range of views were expressed about telephone advice. Some thought a pragmatic approach should be taken with regard to exceptional circumstances, such as when emergency advice is needed on the consequences of refusing to take a roadside breath test, or where a suspect is considering waiving legal representation but requires advice about the effect of doing so. Some members thought that there should be no exceptions to the rule that suspects have a right to receive legal advice in person, or the exception would otherwise become the rule.
13. It was suggested that although a right to legal advice in person should be maintained, the suspect could be given the opportunity to opt for telephone advice (for example, if arrested in a remote rural area and there are no criminal lawyers, or if the lawyer the suspect wants to consult is not available to come to police station but can be reached by telephone). Many members considered that the choice whether to accept telephone advice or insist on personal attendance by the lawyer must be that of the suspect and that telephone advice should not be imposed on suspects purely for resource reasons. In particular, it was felt that if a suspect makes the choice to accept telephone advice, the reasons for doing so should be recorded, in order to ensure the choice was not induced by any misrepresentation about, for example, the likely delay in securing the presence of a lawyer.

**(iii) What protections should there be to ensure confidential communication with a lawyer is preserved as far as possible?**

14. Members all agreed that confidentiality is of paramount importance in ensuring that legal advice is effective and equality of arms is preserved. There are several jurisdictions where confidentiality is not guaranteed and this severely restricts the provision of effective advice and representation. Many members accepted that, in the unusual situation where a court order had been lawfully made enabling secret surveillance to be carried out on a lawyer suspected of criminal activity, confidentiality as between that lawyer and his or her clients could be compromised. In such situations there was a possibility that evidence incriminating the client or some other party could be obtained: the admissibility status of such evidence would be open to question. These unusual scenarios needed careful treatment, but did not in members' opinion alter the need for confidentiality to be protected in the Directive.
15. Members expressed concerns about the difficulties that will arise in maintaining confidential communications between lawyers and clients if the use of telephone advice or video-link communication is authorised. Clear and transparent safeguards would need to be devised and carefully monitored as the risks of abuse are high. UK members reported that in a pilot scheme run by the Metropolitan Police, some video conferencing facilities were situated in an open room at the police station with limited confidentiality. This is clearly unacceptable for confidentiality purposes.
16. It was reported that Polish law permits the prosecutor to ask police officers or other officials to listen in on communications between lawyer and client, either attending their meetings in person or by means of wiretaps. The Directive would significantly improve this entirely unacceptable situation.

**(iv) What should be the status of confessions or other evidence obtained when access to a lawyer has been denied?**

17. Members were generally uneasy about the use of such evidence at trial and many felt that the starting point was that evidence obtained under such circumstances should be inadmissible, unless the suspect had made an informed and legally effective waiver of the right to legal advice. Nonetheless, many acknowledged that if the evidence could be adduced without any material effect on the overall fairness of the proceedings, then in some situations the interests of justice would require its admission.

**(v) Given that the Directive requires dual legal representation in EAW proceedings, should it be extended to other mutual recognition instruments?**

18. Members with cross-border experience considered that dual representation would greatly improve the proper conduct of extradition proceedings. Many members had direct experience of how dual representation makes case management easier in cross-border cases and frequently saves time and resources, for example, avoiding the need for adjournments or appeals by ensuring the prompt provision of information about the status of the prosecution case, or, in the case of a conviction *in absentia*, about whether a retrial would be available under the law of the issuing state. It was also important to ensure any available avenues had been explored which could render extradition unnecessary: for example, the suspect is willing to admit to lesser charges as part of a “plea bargain” and the issuing state is willing to accept this.

19. Some members also noted that when the European Supervision Order is implemented, having a lawyer in the prosecuting state as well as the state of nationality/residence would be crucial in ensuring full and effective use is made of this valuable means of providing alternatives to pre-trial detention in suitable cases.

**(vi) Should arrested persons have the right to communicate “in person” with consular officials or is telephone or written communication enough? What about confidentiality?**

20. Members suggested that consular communications and access in person should be protected by express confidentiality provisions. Attention was also drawn to Article 36(1)(a) of the Vienna Convention on Consular Relations, which states that consular officials shall be free to communicate with their foreign nationals and have access to them, and *vice versa*: and to Article 36(1)(c), which provides that detained persons are entitled, if they request it, to have consular officials of their state notified of their detention and that, where notified, consular staff have a right to visit their detained nationals, converse and correspond with them. It was widely agreed that the Directive required amendment to give effect to the intention of these provisions, which was clearly to safeguard personal contact between consular officials and detained persons and to ensure that rights expressed in the Vienna Convention as belonging to consular officials are also expressed as rights of detained persons and enforceable by them.

**(vii) Are there any other aspects of the draft Directive that require strengthening?**

21. Members highlighted the following additional areas where the Directive should be clarified:

**Communication with family**

22. Art. 5.1 should be amended to make clear that an arrested person must be allowed to call at least one person (employer or family), in addition to their lawyer. This is mentioned in the explanatory memorandum but is not clear from Article 5.1 itself.

#### **Notification of consular staff**

23. The notification should be made by the individual arrested in person, rather than by others on his or her behalf.
24. It was noted that the current proposal could have the (presumably unintended) effect of diminishing protection under existing international legal instruments for detainees who are nationals of states *without* diplomatic or consular representation in the country of detention, and refugees or stateless persons. Under the European Prison Rules (para 37.2), the UN Standard Rules for the Treatment of Prisoners (para 38 (2)) and the UN Body of Principles for all people held in detention (Principle 16), these individuals must be allowed similar facilities to communicate with the diplomatic representative of the state which takes charge of their interests, or the national or international authority whose task it is to serve the interests of such persons. If a detainee does not wish to notify consular authorities (for example, because he is seeking asylum from his country of origin), these additional protections could prove extremely important. The previous draft Framework Decision on procedural safeguards included such provisions<sup>3</sup>.

#### **Waivers**

25. Members felt that in practice there would be few if any occasions when a suspect would genuinely wish to waive the rights safeguarded under this measure. Some members considered that alleged waivers usually resulted from suspects failing to understand the full impact of waiver.
26. Art. 9.1(a) needs to be clearer as to who should explain the consequences of waiving the right to a lawyer. It was felt that the explanation should not be provided by police officers and there should be no waiver for vulnerable persons, juveniles, non-nationals, or people with mental health difficulties (this reflects the legal position in some states such as Portugal and Italy).

#### **Competence of lawyer**

27. Some members raised the concern that a right of access to legal advice was useless if the lawyer providing the advice was incompetent. It was agreed that it was not possible to legislate for competence, but that provision for a system of accreditation for police station work may provide a practical solution.

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<sup>3</sup> 44. Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 9318/04 COPEN 61 which provides:

“Foreign nationals may refuse to see a consular official who is the representative of their government, for example, if they are asylum seekers or refugees fleeing persecution in their State of origin. Those falling into this category may contact representatives from a recognised international humanitarian organisation.”

## **Remedies**

28. Art 13.3 raised concerns. It was suggested that "...Unless the use of such evidence would not prejudice the rights of the defence" should be amended to read: "Unless the defence decides to rely on this evidence, or expressly consents to its use at trial". Concerning the use of evidence obtained in breach of confidentiality, or otherwise in breach of the right to access legal advice, see paragraphs 14 and 17 above.

## **Additional points regarding access to legal advice**

29. In addition to debating the above matters, several members of the panel drew attention to two further points regarding access to legal advice:

- The Measure C proposal does not purport to make legislative proposals regarding the right to legal aid, but rather to lay down minimum rules about access to legal advice and representation. Accordingly, no objections should be raised that are concerned solely with the potential cost of its implementation or its effect on legal aid provision in individual Member States.
- Access to a lawyer is only meaningful if full and timely access to information (including documents on the case file) is also allowed and if the defendant is given sufficient time and facilities to confer with the lawyer in confidence.

## **Conclusion**

30. After wide-ranging discussion on the Commission's draft Directive, the following key points emerged:

- Access to legal advice and representation from the earliest stage (including every police interview) was a key, if not the key, fair trial guarantee. This right is insufficiently safeguarded under the legal systems of EU countries in which several LEAP members practise, some of which had been found consistently wanting in the way this right is protected under local law and/or practice. Suspects whose fair trial rights are compromised as a result of a breach of Article 6 ECHR should not have to exhaust domestic remedies and then take a case to the European Court of Human Rights in order to obtain redress. A Directive is necessary to make this right directly enforceable.
- Legal advice in person with one's chosen lawyer is preferable to telephone advice in virtually all cases.
- Confidentiality is of paramount importance and requires more effective protection. The Directive would help protect confidentiality in jurisdictions where it is not presently safeguarded.
- Clarification is needed so that the Directive reflects the intention expressed in the explanatory memorandum that an arrested person should be able to contact at least one other person, in addition to their lawyer and (where appropriate) consular official.
- The Directive should reflect and not water down the existing international protections regarding notification of consular officials or other relevant organisations, including the Vienna Convention on Consular Relations.