FAIR TRIALS INTERNATIONAL

# Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (Paris, 24 September 2010)

(1) European Commission's draft Directive on the right to information in criminal proceedings

and

(2) Cross-border evidence gathering and the Member States' initiative for a European Investigation Order

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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 fifth meeting of LEAP took place at the headquarters of the Paris Bar Association in Paris on 24 September 2010. 20 LEAP Members representing 9 European jurisdictions attended. The meeting was chaired by HH Dennis Levy QC.

2. Since the February 2010 meeting there have been several interesting developments in European criminal justice. Highlights include progress on the Roadmap of procedural safeguards, with the Directive on interpretation and translation (Measure A of the Roadmap) voted in by an overwhelming majority in the European Parliament. Proposals have also been made for two new Directives: one, guaranteeing the right to information in criminal proceedings (Measure B of the Roadmap); the other, a Member States' initiative on evidence gathering (the European Investigation Order, or "EIO").

3. In the first part of the meeting, members returned to topic of letters of rights (previously discussed at the February 2010 meeting) in light of the Commission's recent text for a Directive on the right to information and access to the case file with annexed model Letter of Rights. As well as examining the draft text and suggesting amendments, members also explained how information on rights and charges is currently imparted in their jurisdictions, both in law and in practice, and the current barriers to effective understanding of rights and the case against the defendant, seen as key fair trial rights.

4. The second part of the meeting focused on evidence gathering in cross-border cases, both currently and under the proposed EIO Directive, which envisages a new system based on mutual recognition, to replace the current mutual legal assistance regime. The Panel began by discussing the operation of the current system and then moved on to discuss the implications of shifting to the proposed EIO system and what safeguards were necessary from a fundamental rights perspective.

**Draft Directive on the right to information in criminal proceedings and access to the case file**

5. The Panel agreed that the publication of the draft Directive is a welcome step and that a Letter of Rights offers a sound model for imparting information about rights in a clear and consistent way.

6. Members explained how this information is currently imparted in their jurisdictions and commented on existing practices which can lead to unfairness for the defence, with rights that are enshrined in law not being observed in practice.

   Bulgaria: The police need only inform the suspect of his or her rights orally: there is no formal obligation to inform the person in writing. In practice these rights are recorded in the questioning and accusation protocols, but by the time they are printed and presented to the accused for signing, the questioning has already taken place and is recorded on the same protocol. It is common for the police to try to mislead a suspect by implying that exercising rights will be detrimental to their case or unnecessary.

   The suspect is entitled to receive access to all the information on the case file once a charge is brought. In practice, however, this access is often provided only at the end of the investigation and this sometimes does not leave enough time to make an effective response or provide exculpatory evidence. Article 7 the draft Directive would not cure this effective breach of the suspect's right to access the file from the moment of his or her official accusation. Article 7 states that the accused has a right to access the case file once the investigation is concluded. This could be used by Bulgaria as justification to change the Bulgarian Criminal Procedure Code and limit access to the case file, resulting

in a lowering of protection compared to what is currently provided, if only provided in theory yet not in practice for the reasons explained.

France: Under the current *garde à vue* system a suspect can only have access to a lawyer for 20 minutes before interrogation, without any access to the case file. However, this will change within a year due to a recent ruling of the French Constitutional Court.

Netherlands: A note must be made showing that the person was informed of his/her rights. Suspects in most cases have the right to access to a lawyer; however, this right is not sufficiently observed in EAW proceedings.

Poland: Suspects receive written information on rights. In practice, however, this is often accompanied by a suggestion from police that the rights are unnecessary and there is no need to exercise them. Defendants wanting copies of the file or documents on it have to pay for this.

Portugal: Before a person is a suspect they have no right to information. Once a person has been arrested a Letter of Rights is provided. The person will be presented to a judge and a lawyer is always provided to represent the person at this first hearing.

UK: The proposed cuts to legal aid may significantly curtail the right to information in England and Wales, which could see the current system move to a telephone-only advice service. The duty solicitor scheme may also be curtailed. A great deal of prosecution evidence is served on the defence at the last minute, placing an unfair burden on the defence to review it in a short period.

7. Several Panel members voiced their agreement with the amendments suggested by FTI in its draft submission to EU working parties, as well as suggesting further improvements. Members agreed that the following were key matters for the draft Directive to deal with:

   i) Rights to be referred to: Members agreed that the following rights should be added to the list of minimum information to be imparted to suspects (if, and to the extent that, the right applies):
      - the right to legal aid if the suspect needs it;
      - the right to remain silent;
      - the right to have contact with consular officials, family members or other trusted persons;
      - special protections for vulnerable persons, minors, or those with disabilities;
      - the right to seek bail and have pre-trial detention decision reviewed regularly; and
      - the right to access to a doctor.

   ii) Continuous rights: Reference must be made in the Directive to the fact that legal rights are continuous and can be invoked at any time. For example, if a suspected or accused person decides to exercise the right to silence, it is unacceptable to attempt to make the person revoke this right by applying undue pressure through prolonged questioning. On the other hand, a person wishing to exercise a right to remain silent should understand that he or she can revoke this decision later if they wish. Similarly when information is provided on the right to interpretation or translations of key documents, or the right to legal advice and assistance, it must be explained that these are ongoing rights, exercisable as necessary until the end of the proceedings.

   iii) Scope: At present the Directive applies to those suspected or accused of an offence. This should be altered so that the protections offered by the Directive extend to anyone cooperating with the police voluntarily (e.g. witnesses – who may, in turn, become suspects). The Directive should also be amended to apply to those wanted under “conviction” as well as “accusation” EAWs.

   iv) Clarity and simplicity of language: defined terms: It was agreed that the information contained in the Letter of Rights must be simple and clear, avoiding jargon wherever possible. Greater clarity regarding terminology is necessary. A glossary should be

added to the Directive, defining key terms such as “charge”, “suspect”, “accused” and “case file”.

v) Obligation to ensure rights are understood: Members agreed that the Directive should impose an obligation on police to ensure that information about rights has been understood. This will involve providing a sufficient amount of time between a person being informed of their rights and the start of the police interview, in order that the person can fully digest the scope of their rights. Such a provision will avoid a Letter of Rights being given to a suspect and questioning beginning immediately afterwards in an attempt to prevent key rights (such as the right to silence or access to a lawyer) from being fully exercised before the suspect has acted to the detriment of the defence.

vi) Form of information: duty not to detract from its importance: Information must be imparted in an appropriate form – this must include arrangements for those with vulnerabilities or special needs. Telephone or videoconferencing facilities must be made available for situations where an interpreter is needed but cannot attend in person. The Directive must also ensure that, where information on a right is provided, nothing is said or done by police or prosecution authorities to imply that exercising the rights concerned might be detrimental or unnecessary.

vii) When information is to be imparted: The text should be amended so that it is clear that a suspect must be given the information about rights and the alleged offence *before* police questioning takes place. The Directive must also contain more clarity on *when* each right arises and for how long it continues being exercisable.

viii) Verification and recording: The provision of information must be verified by a person independent from the police, and if information is only given orally, or if interpreters are used, it must be tape or video recorded. Where rights are provided orally (for example, because a copy of the Letter of Rights is unavailable in the relevant language), an audio recording must be taken, to serve as proof that information on rights was provided and imparted appropriately.

ix) Model Letter of Rights - EAW: Misleading references to consent to surrender under an EAW being a “right” and that it may be “difficult” to change this decision at a later stage should be removed or replaced by clearer warnings about the consequences of consent.

x) Access to a lawyer: The Directive must make it clear that the right of access to a lawyer includes the presence of the lawyer as soon as a person has been arrested, and (where applicable under national law) throughout any police questioning.

xi) Access to the case file: The Directive must ensure that access to the case file is provided in sufficient time, and for long enough, to enable a proper review of prosecution documents and the appropriate follow-up steps by the defence before trial. If this is not done, defence requests for evidence can be denied by the investigating authority on the grounds that the investigation is closed and thus no more evidence can be gathered. Such an asymmetry contravenes the principle of equality of arms. There should also be an obligation on prosecution authorities to provide a full copy of the file to the defence, free of charge.

xii) Remedies: More details on remedies are needed, including a provision ensuring that, where a person has made incriminating statements in an interview, the fact the person was not made aware of applicable rights beforehand should provide discretion to the trial court to rule the evidence inadmissible. In addition, once the Directive has come into force in Member States, the Commission will have jurisdiction to impose fines on Member States that are systematically failing to implement its terms or eradicate a prosecutorial culture which ignores its protection. Complaints on such matters can be made by individuals and more should be done to raise awareness of this. Finally, provision should be made for disciplinary action against police or

prosecution authority staff who fail to comply with the obligation to provide information in the manner envisaged under the Directive.

xiii) Training: Provision should be made for the training of police, prosecutors and defence lawyers on the requirements of the new legislation.

**Cross-border evidence gathering and the Member States' initiative for a European Investigation Order**

8. The Panel shared their experiences of the current cross-border evidence-gathering system, governed by the MLA regime. Many Members noted practical difficulties with this system. For example, some States do not prioritise requests, particularly where they are made by a judge directly as opposed to the relevant country's central authority or where made for the defence. This can lead to lengthy delays in responses. This is exacerbated by excessive bureaucracy and a lack of funds dedicated to dealing with requests. The UK, for example, processed over 7,000 requests for MLA last year but is under-resourced and obtaining evidence from the UK can take up to two years.

9. It can also be more difficult for the defence to make a request for evidence than it can for the prosecution and police authorities. This inequality of arms can severely constrain the defence's ability to gather exculpatory evidence and prepare for trial. Overall, the success of MLA depends largely on the procedures and systems followed by the requested Member State. Despite these problems with the current system, the Panel shared the concerns FTI had highlighted in its briefing paper on the EIO, as well as raising further potential problems. The following points were discussed.

10. Mutual recognition as an approach to evidence-gathering: Serious concerns were expressed as to the use, in the current circumstances, of mutual recognition as the sole basis for cross-border investigations and evidence sharing between EU countries. The chief reasons for this concern were: the continuing absence of EU wide minimum defence safeguards; the wide variance among Member States in methods and standards of evidence gathering and handling; and the absence of a comprehensive EU-wide system of data protection in the criminal justice context.

11. The EAW has been operating long enough to show how mutual recognition instruments lack the necessary flexibility to allow judges or prosecution authorities discretion to refuse to issue or execute requests even when there are compelling fundamental rights and proportionality objections. Moreover, new mutual recognition instruments should not be introduced in the continuing absence of minimum procedural defence safeguards.

12. More research needed on MLA: Insufficient research has been carried out to determine what more could be done to promote the wider, more efficient use of MLA. Unless this is done, there is a risk of replacing a system that could work well with increased resources, information and training; and a further risk of replicating existing flaws.

13. The Panel agreed that there are a number of problems with the draft Directive on the EIO. The following issues were highlighted as particular areas of concern:

    i) Scope: An EIO should only be allowed to be issued if a similar investigative measure would be available to the prosecution authorities in the issuing State. This would avoid "forum shopping". Furthermore, the use of the EIO for "fishing expeditions" should be prohibited by inserting a requirement that an EIO must relate to a specific offence, which there is a reasonable belief has been committed.

    ii) Issuing and executing authorities: The decision to issue and execute an EIO should only be made by a judicial authority. There must be transparency and accountability of decisions to issue EIOs. Decisions should be taken by judicial officers independent of the executive, who have sufficient skill and experience to weigh the public interest in investigating an offence against the potential impact on fundamental rights.

iii) Grounds for refusal: There is currently no discretion to refuse an EIO on the grounds of double jeopardy, territoriality or dual criminality – unlike under the European Evidence Warrant. These important safeguards should be included.

iv) Proportionality: There is also no basis on which to refuse an EIO where the requested investigative measure is disproportionate to the offence suspected or committed. This means that time and money could be wasted on unnecessary evidence-gathering and that fundamental rights may be infringed for trivial reasons or to a greater degree than is necessary. A proportionality test, in both issuing and executing State, should be added. However, this should be done in a way which is sensitive to the fact that different Member States may have different concepts of what constitutes a serious offence.

v) Fundamental rights: Regarding fundamental rights as a ground for refusal, the text is inadequate. The draft Directive makes a passing reference to fundamental rights without including violation of human rights as a specified ground for refusal in the relevant Article on grounds for non-execution. This is insufficient to establish a foundation for States to protect human rights either when issuing or executing EIOs.

vi) Data protection and record keeping: The EIO proposal makes no reference to the need for officials in issuing and executing States to keep proper records of how evidence is gathered, stored, analysed and transferred. Without such an audit trail, there is a risk that the defence, other affected persons and the court itself would be unaware of contamination or loss of evidence, such as DNA samples or banking records. They would also be unable to challenge the way important and sensitive data had been kept or handled.

vii) Defence: There is no reference in the EIO proposal to the rights of the defence to have EIOs issued on its behalf, in order to obtain evidence needed for a fair trial. Any Directive must enable defence evidence-gathering on reasonable request by the defence, or at the court's own initiative.

viii) Admissibility: There is a risk that the EIO would not operate successfully without minimum standards of evidence gathering in place to ensure admissibility yet the EIO makes no reference to this issue. This is a particular concern given that there will probably be an increase in cross-border requests for evidence following the introduction of the EIO due to its mandatory nature. A similar increase in extradition requests occurred following implementation of the EAW.

ix) Interpretation/Translation issues: The EIO poses problems from a translation perspective as many evidential documents need to be translated. In this context the tight deadlines in the EIO need greater flexibility to ensure the accuracy of translations do not suffer. The draft Directive is also silent about preserving the original evidence (pre-translation or interpretation) so that accuracy can be checked.

x) Remedies: It is unfair that the EIO only allows a remedy to be sought in the issuing State. This will mean that suspects and defendants may have to mount challenges in legal systems they are not familiar with and at great expense. The reasons for issuing an EIO should therefore be open to scrutiny where this is necessary in the interests of justice, in the executing State as well as the issuing State.