MAKING DEFENCE RIGHTS PRACTICAL AND EFFECTIVE: TOWARDS AN EU DIRECTIVE ON THE RIGHT TO LEGAL ADVICE

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This article outlines the key elements of a new law proposed by the European Commission aimed at ensuring proper access to legal advice and representation for suspects in criminal proceedings in any European Union country. It also reports on how the proposed directive has been received, including criticisms by Belgium, France, Ireland, the Netherlands and the United Kingdom.

In June 2011, the European Commission proposed a new law to guarantee anyone facing criminal charges in the EU the right of immediate and confidential access to a lawyer. It gives suspects the right to communicate, on arrest, with family members and to have consular officials notified where non-nationals are arrested. The proposal also contains legal representation safeguards for people facing extradition under the European Arrest Warrant, Europe’s fast-track extradition regime.

1. CONTEXT – THE “ROADMAP” OF PROCEDURAL RIGHTS

The proposed new law is part of a wider package of basic defence rights known as the “Roadmap” of procedural safeguards for accused persons. After years of political deadlock in defence rights reform the Roadmap was adopted by the European Council in December 2010. It represents an important recognition of the need to build a proper basis for mutual trust as a foundation for ever greater mutual recognition of EU decisions. Legislative action under the Roadmap was widely seen as a necessary step towards bridging the gap between the theoretical right to a fair trial under the European Convention on Human Rights and the reality on the ground in many EU countries.

The “Stockholm Programme” (the five year legislative programme for EU justice and home affairs, adopted in December 2009) lays the foundation for the enactment of these Roadmap defence rights and other EU legislation on justice matters, such as a new uniform system for the cross-border exchange of evidence. The defence rights are dealt with on a step-by-step basis. “Measure A” confers the right to interpretation and translation of key documents and was adopted by the EU in June 2010, coming into force in July 2013. “Measure B” gives a right to information in criminal proceedings and a right to access information on the case file. This measure is at an advanced level of political agreement following recent trilogue. Further laws are to be proposed later this year and in 2012, covering:

- the right to legal aid;
- the introduction of special safeguards for vulnerable suspects; and
- a review of detention practices including the use of pre-trial detention and alternatives.

2. KEY ELEMENTS OF COMMISSION’S PROPOSAL

The key elements are:

2.1 Legal advice and representation

- suspects and accused people will have a right to legal advice and representation at every stage of a case, from arrest to appeal;
- legal advice must be provided as soon as possible and, at the very latest, on arrest;

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1 Respectively, Head of Policy and Legal Caseworker at Fair Trials International (FTI). FTI is a charity that campaigns on behalf of those facing criminal charges in a country other than their own. FTI provides assistance to individuals through its dedicated casework team, while fighting the underlying causes of injustice through policy interventions, research, training and campaigns.
• a suspect must be allowed to meet his/her lawyer for long enough and often enough to prepare a defence effectively;
• lawyers must be allowed to attend all hearings and all police/prosecutor questioning;
• lawyers must be allowed to visit detainees they represent, to check the conditions they are being held in; and
• all communications with the lawyer, whether oral or written, must be protected by complete confidentiality.

2.2 European Arrest Warrant cases

There is an express right to legal representation in the issuing country, the country seeking a person’s extradition, either for prosecution or to enforce a sentence. 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. As the case of Alan Hickey (below, section 5.1) shows, effective representation in both countries from the earliest stage can assist in early resolution of cases and sometimes renders extradition unnecessary.

2.3 Right to inform others of arrest

Previously, the right of a person arrested away from their home country to have local consular staff notified of their arrest was only enforceable by the state of the person arrested, rather than the person himself. Under the new proposal, arrested persons will have a direct right to have their own consular representatives informed of their arrest, if they want to do so. They also 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.

3. IS THERE A CASE FOR EU LEGISLATION?

3.1 The Salduz effect

In 2008 the European Court of Human Rights (“ECtHR”) issued a key judgment in the case of *Salduz v Turkey*, finding that suspects detained at the police station have the right to a lawyer. The court found: "[I]n order for the right to a fair trial to remain sufficiently “practical and effective”, Article 6 § 1 [of the ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police".

This decision has led to progress in a number of EU States including, notably, France and Scotland, though the French reforms in particular have been criticised for not going far enough. For example, suspects there can still be questioned without a lawyer during the initial 24 hour period after arrest and there has been no reinstatement of the duty police officers used to have to advise suspects of their right to silence.

3.2 The reality on the ground

Despite the obvious importance, for fair trial purposes, of access to a lawyer at the investigative stage, the standard of access to legal assistance varies across the EU, as many reports suggest and as the cross-border experts we work with across Europe tell us. At a recent meeting of FTI’s Legal Experts’ Advisory Panel, experienced criminal defence practitioners from 18 different EU jurisdictions reported that the proposed Directive, if implemented, would substantially raise the level of basic fairness and equality of arms in their countries. A communiqué setting out their views can be found on FTI’s website.²

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³ http://www.fairtrials.net/about_us/legal_experts_advisory_panel
In some states, legal provisions in the statutory procedural code may protect the right to legal advice and representation in theory but, in practice, the system offers little effective support for it. For example, in Poland, while the suspect’s right to legal assistance applies at most stages of the proceedings, practitioners there tell us that, in practice, lawyers are rarely involved in the early stages as there is no legal aid available for such assistance. They also described lack of confidentiality when advising detained clients, to the extent that police officers would frequently sit in the same room as the lawyer and suspect.

In Belgium, meanwhile, suspects do not have the right to active legal representation during police interrogation because the law does not allow lawyers to make any interventions during questioning. In the Netherlands, the right of access to a lawyer during is also of questionable value due to the severe restrictions imposed on the lawyer’s role, making any meaningful communication between lawyer and client, and any intervention by the lawyer, impossible. Dutch lawyers have advised FTI that they are permitted to give advice prior to interrogation, but not to object to questions or provide relevant advice to suspects during questioning, about their rights or the charges against them.

In Hungary the suspect has the right to a defence lawyer during the investigative stage of proceedings; however, if the lawyer fails to appear, this will not prevent interrogation going ahead. Hungary has recently passed a law allowing the police to hold suspects of serious offences (such as murder and kidnapping) for up to 48 hours without access to a lawyer and up to 5 days without judicial review of detention. This is in direct contravention of ECHR jurisprudence and a disturbing indication that Salduz alone will not ensure “effective and practical” rights of access to legal advice and representation across the EU.

As the European Commission noted in its latest report on the operation of the EAW, the fact that all EU countries are subject to the standards set out in the ECHR as interpreted by the ECtHR, “has not proved to be an effective means of ensuring that signatories comply with the Convention’s standards.” Despite all being signatories to the ECHR, EU Member States are consistently found to have breached Convention rights. Between 2007 and 2010 the ECtHR found that EU Member States violated Article 6 rights in 1,696 cases. The number of breaches of Article 6 has increased steadily over the last ten years.

Fair Trials International, together with others including the Law Society of England and Wales, European bar associations and several NGOs known for their work in the field, therefore broadly welcomed the Commission’s proposal, agreeing that a directive in the terms put forward would have a major impact in making the right to a fair trial tangible and effective, while reducing the number of miscarriages of justice, appeals, European Court of Human Rights complaints and other consequences of fair trial violations.

All indications, both from practitioners and from recent ECtHR case law, point to the need for Europe-wide legislation improving standards for access to legal advice. In fact, the conclusions of FTI’s own detailed briefing4 and from its advisory panel meeting, as well as commentary from several other organisations including Amnesty International and JUSTICE, suggest that the proposal could indeed go even further in ensuring that the rights of suspects, accused and arrested persons are rendered practical and effective.

Notes of caution have been expressed regarding, among other matters: the need for in-person advice with a lawyer of the defendant’s choosing; the need for safeguards relating to waivers of the right to a lawyer; the need for communication in a confidential setting; and the need for the lawyer to be given proper access to the case file and other evidence. Misgivings have also been expressed about the way in which aspects of the right to notify consular officials could water down existing protections under international instruments. Nevertheless it is clear that, without the Directive, many more individuals will continue to be denied the most basic elements of a fair trial.

4. FTI CASES SHOW EU-LEVEL SAFEGUARDS NEEDED

Fair Trials International assists hundreds of people caught up in criminal proceedings across the EU every year. Our work leaves us in no doubt that serious fair trial rights violations occur at every stage

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4 [http://www.fairtrials.net/campaigns/eu_defence_rights](http://www.fairtrials.net/campaigns/eu_defence_rights)
of criminal proceedings, many of them due to the absence of the basic safeguards that this proposed Directive would protect. Since the adoption of the European Arrest Warrant seven years ago, the need for these safeguards has become all too apparent. We have reported many cases of gross injustice occurring as a result of fast-tracked, “no questions asked” surrenders of thousands of individuals each year.

Prompt access to legal advice upon arrest is crucial in order to ensure these fair trial protections are effective in practice and that any deprivation of liberty is lawful. The presence of a lawyer at the police station and during police interrogation not only guarantees that suspects are aware of their rights, it also helps ensure that those rights are not infringed through ill-treatment or threatening behaviour by police officers.

Many of our clients complain that they were denied access to a lawyer and then pressured into signing confessions or coerced into pleading guilty following threats of lengthy pre-trial detention. The presence of a lawyer also offers a protection for the police from unfounded complaints of rights violations.

Time and again at FTI, we see cases where individuals suffer injustice as a result of rights enshrined in law simply not being respected on the ground. This is often compounded by a lack of sufficient legal aid, meaning suspects and defendants are unable to enforce their rights due to a lack of resources. The draft Directive reinforces the message that access to a lawyer is a crucial right which must be observed in practice.

4.1 FTI CASE STUDY: JAMES MILTON

James Milton (not his real name) was 16 years old and had recently moved with his mother from the UK to Malta, when he was arrested. James was taken to the police station where he was questioned aggressively for over four hours, without a lawyer or other appropriate adult present. His mother was refused entry to the interview room despite her presence at the police station and her frequent requests to see her son.

James was questioned about his friendship with a younger boy (“C”) who, it was later revealed at trial, had made sexual allegations against James in response to a complaint of sexual misconduct that had been formally lodged against C by the father of another boy. James was told none of this during the police questioning, indeed he was not informed of any charges against him or told of his legal rights. He was interrogated from 9.30pm until 2.30am the following morning and was not even given a glass of water during this time.

James’s passport was taken pending trial, so that from June 2009 until the trial in June 2010, he was unable to visit family and friends in the UK, despite his mother’s offer to post security or give up her own passport. James was acquitted of all charges at trial, the Court finding that C’s testimony was “filled with doubts and half truths” and the evidence to support the prosecution case was “grossly lacking”. After further delay the case was eventually dropped and James’s passport was returned to him, although he continues to suffer stress and depression.

If the proposed Directive had been implemented into Maltese law at the time of James’s arrest, not only would access to a lawyer have been ensured but also communication with his family or other appropriate adult – a fundamental protection for minors. The presence of a competent lawyer during questioning might have allowed the case to be discontinued at a much earlier stage.

4.2 FTI CASE: MOHAMMED ABADI

Mohammed Abadi (not his real name), an Iraqi national with refugee status in the UK, was arrested in Malaga, Spain, in 2005 for alleged terrorist activities. Immediately after his arrest, Mohammed claims he was taken to a place which police officers referred to as a “medical facility”, where he was stripped naked and humiliated. He was then driven in a car from Malaga to Madrid. During the journey he was interrogated without a lawyer present, subjected to verbal abuse from police officers and threatened with a gun.
Once in Madrid, Mohammed was told that he was not allowed access to a lawyer or any consular assistance. Over the course of five days he was kept in a freezing cold cell and subjected to sleep deprivation: his cell was brightly lit for 24 hours a day. He was refused water and all food except pork (which he cannot eat for religious reasons). He was interrogated during this period (again with no access to a lawyer) and was frequently beaten.

After five days in these conditions Mohammed was brought before a judge at a hearing where he was represented by a court-appointed lawyer. Mohammed was not allowed to speak to the lawyer before or after the proceedings. He was then moved to another prison where remained until 2007, during which time he was again denied legal assistance. A refugee without British nationality, he was denied any consular assistance.

When he was finally granted bail in 2007 it was under stringent conditions, including the confiscation of his passport and weekly reporting at a police station in Madrid. Trapped in Spain, unable to work and ineligible for benefits, Mohammed became homeless and had to live on the street. When he did manage to find accommodation it was regularly searched by police officers and his belongings were seized.

When Mohammed was finally brought to trial in summer of 2010, he was acquitted of all charges after a cursory hearing lasting minutes, apparently on the basis that there was no evidence against him. Since returning to the UK, Mohammed has been suffering from severe anxiety and depression as a result of his treatment in detention.

Mohammed’s case illustrates the need for stronger protection for access to a lawyer from the earliest stages of arrest and investigation, when the most serious abuses tend to happen, and the need for better protection of the right to consular assistance.

5. DUAL REPRESENTATION IN ARREST WARRANT CASES

The Framework Decision on the EAW makes no reference to legal representation in the issuing State. Article 11(3) of the draft Directive would provide the requested person with “the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State”.

Ensuring dual representation, particularly when funded by legal aid, clearly has cost implications. However, effective and timely communication between defence practitioners in both issuing and executing States can actually save money. For example, contact between defence practitioners in the two Member States can prevent the need for voluminous evidence requests being made. Defendants might also be more inclined to consent to surrender if they were confident that certain arrangements had been made by lawyers acting for them in the issuing State.

In many cases, representation in the issuing State can facilitate negotiations between the defence and the issuing judicial authority, leading to the withdrawal of the warrant altogether. This saves resources which would have been wasted in needless extradition hearings and unnecessary surrender and pre-trial detention (which all have huge personal implications too). It has been estimated that the average cost of executing a single EAW to surrender is €25,000.

Our own cases at FTI frequently bear out the importance of having a lawyer in the issuing State, for example, to establish whether the EAW has been issued for prosecution or mere investigation purposes. The latter would amount to an improper use of the EAW, yet specialist legal advice from the issuing country is often required to make this point in extradition proceedings and provide the court with evidence regarding what constitutes “conducting a criminal prosecution” under the law of the issuing State. Furthermore, the absence of legal representation in the issuing State can mean that the defendant lacks important knowledge about the contents of the prosecution case file. Without this information, the defendant may be unable to raise important points before the courts of the executing State, such as potential violation of double jeopardy laws.
It is important to ensure the Directive retains specific provisions in relation to legal assistance in the issuing State in EAW proceedings. Some Member States suggested at the consultation stage that such provisions would not be necessary or that clarification of the right of access to a lawyer in the executing state would be sufficient. FTI's work assisting individuals caught up in the EAW process, as shown by the numerous cases cited in our report on this measure, illustrate the importance of providing these individuals with rapid legal assistance, free of charge for those unable to pay for it, in both the issuing and executing State, and the great savings that can be made when effective representation is provided early.

5.1 FTI CASE STUDY: ALAN HICKEY

Alan Hickey, a lorry driver from London, was convicted in France of people-trafficking and sentenced to serve 18 months in prison in December 2009. Alan pleaded guilty to this offence after the judge told him orally that if he did so, he would be free sooner, whereas if he pleaded not guilty, he would spend years in pre-trial detention. While he was in prison in France, Alan found out that Belgium had issued an EAW seeking his surrender from France to stand trial for people-trafficking “with aggravating circumstances” and as part of a criminal conspiracy.

Alan was not given clear information about whom he was meant to have conspired with, or when or where the conspiracy was meant to have taken place. He was concerned that the Belgian charges related to the same matter for which he had already been sentenced in France. This would mean that extradition should be barred on “double jeopardy” grounds. However, given the lack of information about the charges in Belgium, Alan’s French lawyer did not raise this issue at the extradition hearing. Alan’s extradition was ordered before any further information could be gathered from Belgium.

Meanwhile in Belgium, hearings began in Alan’s absence. Fair Trials International found a lawyer to act for Alan in Belgium on a pro bono basis, to represent him in his absence and to try and uncover more information about the Belgian case. If we had not intervened, a court-appointed lawyer assigned to represent Alan in his absence would have had no chance to take instructions from him. Worryingly, even once instructed, Alan’s lawyer was only granted limited access to the case file: only two hours to read 17 boxes of prosecution documents. Alan’s lawyer managed to get his trial delayed until after his surrender to Belgium.

Once extradited to Belgium, Alan was able to instruct a lawyer, who was able to convince the Belgian judge that some of the charges arose from the same events for which he was convicted in France. Alan pleaded guilty to the other offence and was given a suspended sentence. Alan’s extradition in breach of the double jeopardy rule could have been avoided if he had been provided with effective legal representation in both France and Belgium from an early stage.

6. MIXED MESSAGES FROM “COALITION OF UNWILLING”

The UK and Irish Governments, whilst having opted into the previous two Roadmap measures, chose not to opt into this one. In the UK, the proposal was considered by the European Scrutiny Committee in July. While the government told the Committee it supported the need for an EU measure safeguarding the right to legal advice and representation, its recommendation was for the UK not to opt in. The government said it had a number of concerns with the text, including the requirement of absolute confidentiality of communications with lawyers and the need for legal representation to be offered at all investigatory stages, such as the search of a property, as well as the potential cost of implementation.

For the first time, the opt-in/opt-out question was put to a vote in the UK House of Commons which took place following a debate on 7 September. Despite the Liberal Democrats’ previously strong stance on the need to accompany stronger prosecutorial powers with better protection for basic defence rights, all 46 of the Liberal Democrat votes cast were for the Government’s motion against opt-in (compared to 182 Labour votes against).

Perhaps this is more a sign of the compromises of coalition politics than of any change of heart by the Lib Dems on EU justice reforms or fundamental rights. Certainly there is no sign of any change of
heart among MEPs in the ALDE group, notably Baroness Sarah Ludford MEP, who warmly welcomed the Commission’s proposed directive, calling it “a further essential step in a programme of strong EU safeguards to guarantee fair trials across Europe” and expressing her hope that the UK would opt in once its objections had been resolved.

One might think that, by opting out, the UK government would forfeit any influence it might otherwise have had in Council negotiations on the measure, but apparently not. The UK stated that, despite not opting in at this stage, it intended to take a full role in future negotiations on the text, in the hope of producing a text it could opt into later. The UK and Ireland then co-opted the Netherlands, France and Belgium (countries that do not enjoy opt-outs from EU criminal justice legislation, and whose procedural systems are widely seen as offering insufficient access to legal advice and representation) into issuing a joint statement criticising the protections contained in the draft proposal, published on 21 September.

In their statement the five countries, while criticising the breadth of the protections proposed, insist they remain committed to EU action to protect basic defence rights. Given these somewhat mixed messages about their commitment to fair trial rights, it is worth taking a look at their key concerns.

(i) **Directive will “hamper the effective conduct of investigations”**

It is argued that the presence of a lawyer at every investigative act and even in “minor” cases fails to “strike the right balance” between the right to legal advice and the effectiveness of justice systems.

(ii) **Relationship with ECHR requirements “unclear”**

It is argued that decisions of the ECtHR are directed at individual countries making it difficult to extract general rules from them: it is also said that in any event the proposal goes beyond the case law, giving as an example the right to have visits from the legal adviser to check conditions of detention.

(iii) **Failure to take account of different ways domestic systems operate**

The note points to substantial variations in the way different countries seek to protect fair trial rights at different stages of proceedings, stating that the proposal fails to strike a balance between these and would have “significant adverse impact on national legal systems”.

(iv) **Failure to evaluate financial impact and cost to legal aid systems**

Perhaps most tellingly, the note points to the wide variation in legal aid provision across the EU and says that this measure would cause some countries “very substantial additional costs”.

FTI and others who have responded to this note consider that these complaints lack real substance and depart from the clear mandate laid down in the Roadmap itself. Constructive negotiations on the measure would arguably have been a better approach in resolving concerns about elements of the text. We also note that while the UK rightly considers itself broadly compliant with the protections in the proposed directive, the rest of the countries in the “coalition” have systems which have been found not to comply with them and indeed to be Salduz-non-compliant in ways which seriously undermine the right to a fair trial. Fair trial rights are not variables to be weighed in the balance with the legitimate interests of the state in prosecuting crime: Article 6 rights are absolute and the fact that some states may incur additional cost in raising their standards to give these rights sufficient protection is not a relevant objection.

In response to the minority group of states, six leading organisations in the field (Fair Trials International, the Irish Council for Civil Liberties, Amnesty International, the Open Society Justice Initiative, JUSTICE and the European Criminal Bar Association) have written an open letter to the five countries’ ministries of justice, responding in detail to their criticisms of the draft directive. The letter can be found on our website.

5 [http://www.fairtrials.net/press/category/C5](http://www.fairtrials.net/press/category/C5)
7. CONCLUSION

European Member States today cooperate more than ever before in justice matters, often on a virtually “blind faith” basis. Cases such as MSS v Belgium and Greece\(^6\) show the legal risks that judges run when they place unquestioning trust in other EU countries’ courts’ commitment to upholding ECHR rights. Far more must be done to establish a real basis for EU countries to trust to this extent in the fairness of each other’s justice systems.

Equally, people facing charges in Europe must be confident they will be treated fairly, wherever they are charged. This is, unfortunately, a long way from reality. For trust to be established, basic defence rights must be guaranteed by the legal systems of every single Member State and be enforceable by nationals and non-nationals alike. Only by continuing on the path towards better basic defence rights can Europe build a sound basis for continued cooperation in the fight against crime.

Lack of access to legal advice contributes to the serious inequality of arms that characterises so many criminal cases across the EU. If people do not receive legal advice and representation, they will not understand their legal rights and they will therefore not exercise them. If people are not allowed to communicate with trusted contacts on arrest, they are at greater risk of isolation and ill-treatment, further undermining their chance of a fair trial. Non-nationals often find themselves at a severe disadvantage when interacting with police authorities due to language barriers and a lack of knowledge about their rights under the local legal system. In this context access to a lawyer and consular authorities is vital to ensure that basic rights are observed.

The draft Directive offers the opportunity to create a consistent set of clear and enforceable rights which apply across the EU. It would also create new avenues for enforcement. Rather than the lengthy and costly process of exhausting domestic remedies before taking a case to the ECtHR, the Directive would ensure that basic rights are enshrined in domestic law and remedies available at national level if they are violated. The Commission would be able to take infringement proceedings against Member States who failed to implement or properly apply the Directive, and the legislation would enjoy precedence over conflicting domestic law due to the principle of direct effect. These measures offer the opportunity for efficiency savings in both time and expenditure for member states.

We are now counting the costs of implementing measures such as the EAW without EU-wide minimum defence guarantees in place to ensure the fair treatment of suspects. Not only are individuals suffering serious injustice, as the cases regularly demonstrate, but faith in the criminal justice policy mandate of the EU is being eroded as a result of the unquestioning adherence to the “mutual recognition” concept that is required by measures like the European Arrest Warrant.

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\(^6\) The MSS ruling was discussed in New Journal of European Criminal Law, Vol 2/2011/02, pp 133 ff, *The European Arrest Warrant: The Role of Judges When Human Rights Are at Risk*, Catherine Heard & Daniel Mansell