Report

Defence rights in the EU

October 2012
About Fair Trials International

Fair Trials International (FTI) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person’s right to a fair trial is respected, whatever their nationality, wherever they are accused.

FTI pursues its mission by providing assistance through its expert casework practice to individuals arrested outside their own country. It also addresses the root causes of injustice through broader research and campaigning and develops local legal capacity through targeted training, mentoring and networking activities. FTI is particularly active in the field of EU criminal justice policy.

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This report also includes selected results from a survey of defence practitioners from across the EU carried out by the Dutch charity EuroMoS under the direction of Jozef Rammelt of the Dutch law firm Keizer Advocaten, with research assistance from Bas Leeuw, Assistant Professor of Criminal Law at the University of Leiden. FTI would like to thank EuroMoS for providing us with the data and comments from this survey for inclusion in this report. An overview of the responses to the EuroMoS survey, prepared by FTI, is available at Appendix 2.

Finally, we would like to thank our Legal Experts Advisory Panel (LEAP), a network of almost 100 experts in criminal justice and human rights from 24 EU Member States, and the members of our European Young Defenders Network for their help in compiling the research referred to in this report. Thanks also to Sarah Barker, Hannah Chalmers, Mellissa Curzon-Berners and Neale McDonald for additional research.

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Foreword by Peter Lipscomb OBE, Chair of Fair Trials International’s Board of Trustees

Amid the on-going economic strains currently evident throughout Europe, it is vital not to overlook the fundamental values which characterise the EU and should bind Europe together, and to which all members of the EU have subscribed. These include democratic government, freedom of speech, religious toleration and the right to a fair trial as enshrined in the European Convention on Human Rights and the EU Charter on Fundamental Rights.

Fair Trials International has long been concerned that the fundamental right to a fair trial, to which all EU countries have signed up, is not being respected in practice. The charity sees this repeatedly in the cases it works on across Europe and this report now offers further compelling evidence of the practical barriers to a fair trial. Its analysis of European Court of Human Rights’ findings against EU countries over the last five years, together with the new evidence from a survey of defence lawyers in all EU countries, highlights essential themes, common across many countries: excessive periods of pre-trial detention, lack of access to an effective interpreter or lawyer (with legal aid where needed), denial of information and the resources needed to prepare a defence – all key aspects of a fair trial.

All this matters deeply. The vigorous pursuit of crime is of course an essential safeguard of our society. But if in the process we fail to respect the basic human rights of the individual, then the very values which we are seeking to preserve, and which form the bedrock of our society, are undermined. The failure of European countries to protect basic defence rights is also undermining the EU’s efforts to increase the cooperation needed to fight cross-border crime. There is, for example, growing and understandable concern about the injustice caused by fast-track extraditions under the European Arrest Warrant.

The EU has finally started to tackle this problem through the Procedural Rights Roadmap: creating binding guarantees of basic elements of the right to a fair trial. But passing two new directives on interpretation and on the right to information is not enough. These new laws need to be used effectively in practice and, at a minimum, the promised laws on legal assistance and legal aid, consular and family contact, and special protections for vulnerable suspects must all follow. Concerted EU action is also needed to tackle excessive and unjustified pre-trial detention in Europe.

It is hoped that this report will help to sustain the Roadmap’s momentum and encourage the EU and its Member States to work even more rigorously to protect the values which they have guaranteed to preserve.

Peter Lipscomb OBE
1 October, 2012
Executive Summary

1. Fair Trials International wants to see respect for fundamental rights at the heart of EU justice policy. Every year, we help hundreds of people arrested across Europe to defend their basic right to a fair trial. The evidence we have gathered from our European casework has convinced us that there are major barriers to a fair trial throughout the EU.

2. Since the launch of our “Justice in Europe” campaign three years ago, we have been working to assess how far the right to a fair trial is respected in practice in Europe. As well as drawing on the experiences of hundreds of people who request our help, a year ago we and the Dutch NGO, EuroMoS, launched a survey of defence lawyers in all 27 EU countries to identify the most common types of fair trial abuse they encounter in their daily practice. In addition, we worked with international law firm Clifford Chance to analyse five years’ worth of data on EU countries’ violations of liberty and fair trial rights, as found by international and domestic human rights monitors and by the European Court of Human Rights.

3. This report brings together our key findings. It shows that:
   - EU countries are responsible for a growing number of violations of the European Convention on Human Rights: liberty and fair trial rights are those most commonly breached;
   - In many states, legal advice is not always provided, confidential access to clients is not guaranteed, and legal aid provision is inadequate;
   - Standards of interpreting are often poor, as is access to prosecution information;
   - Police misconduct against suspects in custody is going unpunished;
   - Equality of arms and the presumption of innocence are not respected;
   - There is insufficient protection for vulnerable suspects and defendants such as children and mentally or physically disabled people; and
   - Unnecessary and excessive detention before trial blights many states’ systems and causes prison overcrowding; detainees often have no way to challenge their detention and alternatives are not available or not used.

4. Recognising the need for higher standards, in 2009 the EU adopted the “Procedural Rights Roadmap”, promising a series of new laws requiring states to protect key elements of the right to a fair trial. Directives have since been adopted guaranteeing interpreting and translation facilities, and information about rights and charges. If these are implemented and enforced effectively they will have a major impact on defence rights in the EU.

5. However, we have yet to see proposals on three other crucial Roadmap rights: legal aid; protections for vulnerable suspects; and minimum standards on the use of pre-trial detention. Negotiations on a Directive guaranteeing access to legal advice and representation are proving difficult, despite the obvious and urgent need for a binding law on this important safeguard, without which a fair trial is impossible. This report provides the evidence, supported by cases, to show why measures on all these issues are urgently needed.

6. Fair Trials International has identified five priorities for EU action over the next two years to raise justice standards to an acceptable level.
1) **Completion of the Roadmap:** The momentum generated towards improving defence rights must be maintained, to deliver strong new laws on the remaining three Roadmap rights: legal advice and representation; legal aid; and protections for vulnerable suspects.

2) **Effective implementation:** The laws already passed under the Roadmap – on interpreting and translation; and information for accused persons – must be fully implemented and enforced by all EU countries. This must be monitored effectively by the European Commission, with enforcement action against Member States where necessary.

3) **Pre-trial detention:** Reform of pre-trial detention in the EU is needed to put an end to its excessive and unjustified use in many Member States. The EU should facilitate work to prevent unnecessary and unjustified trial delays.

4) **European Arrest Warrant:** Vital safeguards must be introduced into the European Arrest Warrant Framework Decision, to address the injustices that continue to be suffered under this system. Future judicial cooperation measures must also contain effective safeguards for human rights and against overuse.

5) **Audio-recording of police interviews:** This offers an efficient, cost-effective method of ensuring that fundamental rights are protected in police stations and that accurate records of interviews are available (particularly where interpreters are used). We recommend an EU-wide system introducing this practice.

7. Despite the economic downturn affecting many EU countries, it is vital that Europe remains committed to completing the Roadmap. Basic rights to liberty and a fair trial are not “luxuries” but defining features of a just society. Until they are safeguarded, Europe’s important collaboration in the fight against serious cross-border crime will be impeded, as mutual trust between states suffers. If this happens, the validity of the EU’s mandate to legislate on criminal justice issues will be thrown into question, as will Europe’s credibility in its attempt to influence third countries to raise justice standards and respect for the rule of law.
A. Fair Trials International’s ‘Justice in Europe’ campaign and the Roadmap’s context

“EU citizens should never feel that their rights are weakened because they leave home. Nonetheless, this is what can happen when people are sent abroad to stand trial.”

Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship

8. At Fair Trials International, we see hundreds of cases each year that demonstrate the truth of this statement. These cases leave us in no doubt that respect for even the most basic fair trial rights is still lacking in much of today’s European Union. This is backed up by the day-to-day experiences of defence lawyers across Europe, who routinely see suspects’ rights violated in police stations, court rooms and prisons.

9. The rights to liberty and a fair trial are defining features of a just society but, sadly, sixty years after the European Convention Human Rights (ECHR) was agreed, EU countries are being held responsible for a growing number of violations of these rights at the European Court of Human Rights (ECtHR). The rights to liberty and to a fair trial are the ECHR rights most commonly breached.

10. In 2009, in recognition of the need to address this, FTI launched its ‘Justice in Europe’ campaign, calling on Europe to work together to improve protection for basic fair trial rights. Since then, we have worked closely with the European Commission and Members of the European Parliament to develop strong legal measures to protect defence rights so that every person suspected or accused of a criminal offence in Europe receives a fair trial. We have also worked to build consensus on the need for reforms to end unnecessary and unjust pre-trial detention in the EU and to improve the operation of the European Arrest Warrant.

11. We are informed in this work by our Legal Experts Advisory Panel (LEAP), a network of almost 100 experts in criminal justice and human rights, who meet with us on a regular basis to discuss EU justice issues of mutual concern. We publish LEAP’s recommendations in the form of communiqués, to assist the Commission and the European Parliament in developing strong provisions for new laws to protect basic rights and to identify necessary reforms in respect of existing EU crime and policing laws.¹

12. FTI has recently conducted a survey, together with Dutch NGO EuroMoS, of over a hundred defence practitioners from across the EU, including many LEAP members, about the barriers to a fair trial in practice in their country. The results of this survey provide important fresh insights into an area which has traditionally been dominated by judges, prosecutors and politicians. They show that serious violations of fair trial rights are still a daily occurrence in many EU countries. We have also worked with international law firm Clifford Chance to compile research on the extent to which all 27 EU Member States are failing to comply with their fundamental rights obligations in the criminal justice context, as found by the ECtHR, treaty-monitoring bodies and NGOs concerned in the field of defence rights.

¹ All published LEAP communiqués are available at Appendix 9.
This report presents:

The results of an EU-wide survey of lawyers on the real barriers to a fair trial

Defence lawyers have important, first-hand experience of how justice systems work in practice. In November 2011, FTI launched a joint project with Dutch NGO EuroMoS: ‘Advancing EU Defence Rights’. As part of the project, more than 100 defence practitioners (representing every EU Member State) completed a survey on the extent to which basic defence rights are respected in practice in their jurisdiction.

Summaries of responses to selected questions from the survey are used throughout this report. Rather than describing rules and procedures supposed to be followed under local law, the survey presents the reality of the situation faced by suspects and defendants, as indicated by the day-to-day experiences of defence practitioners.

Further information about the content and conduct of the survey, as well as an overview of the survey responses, can be found at Appendix 2 of this report. The full report is available at www.euromos.org.

A picture of fair trials rights violation findings against all 27 EU Member States

In conjunction with international law firm Clifford Chance, we have conducted an EU-wide study on the extent to which EU Member States are failing to comply with their fundamental rights obligations in the criminal justice context. The study details the number of cases in which the ECtHR has held each Member State to be in breach of either Article 5 or Article 6 of the ECHR in cases involving criminal charges.

This study also summarises published information from treaty-monitoring bodies, NGOs, and other respected organisations, showing the extent to which the relevant Member State has been criticised for violating or failing properly to safeguard rights under Articles 5 and 6 of the ECHR in the context of criminal proceedings.

A summary of this research in relation to each Member State is set out in Appendix 3.

A new interactive map showing the state of fair trial rights in Europe

Fair Trials International has used the information from the ECHR study and the EuroMoS survey, case studies of our clients, and the expertise of our LEAP members, to create a new, interactive, web-based map that provides an overview of the state of justice in Europe.

It is intended to inform practitioners and individuals facing charges in any EU country and to help policy makers identify priorities for reform to find the best methods to improve fair trial standards in the EU.

A snapshot of the map is at Appendix 1.

To see the full interactive map, go to: www.fairtrials.net/justice-in-Europe.
An “area of freedom, security and justice” - but defence rights inadequately respected

13. The entry into force of the Amsterdam Treaty\(^2\) in 1999 introduced a new era for EU criminal justice matters, one in which unprecedented emphasis would be placed on increasing and improving judicial, police and prosecutorial cooperation between Member States. The single market concept was borrowed in an effort to streamline procedure in the fight against cross-border crime through the creation of an “area of freedom, security and justice” within Europe. The extension of the free movement concept to judicial decisions led to the idea of mutual recognition; if one EU country makes a decision (for example that a person should be extradited to it to face prosecution), then that decision will be respected and applied by courts and authorities across the EU.

14. Mutual recognition relies on mutual trust - the idea that all Member States can trust each other’s criminal justice systems to respect fundamental rights and deliver justice, despite substantive and procedural differences in their national legal systems. However, mutual trust cannot be imposed. It can only exist if countries have mutual respect for each other’s legal systems and, crucially, their ability to respect fundamental rights. After Europe’s flagship “mutual recognition instrument”, the European Arrest Warrant (EAW), was rushed into law following the 9/11 attacks and evidence of its flawed operation began to stack up, it became increasingly clear that mutual trust did not yet exist, not least because basic fair trial rights were not adequately protected in many EU countries.

15. All EU Member States are signatories to the ECHR, which provides the formal legal basis for defence rights in Europe. Unfortunately, the fact that all states are subject to the standards set out in the ECHR has not proved to be an effective means of ensuring that signatory countries comply with the Convention’s standards, particularly in the area of defence rights. In 2011 cases involving Article 5 (right to liberty) and Article 6 (right to a fair trial) made up 62% of the total number of violations found by the ECtHR against EU Member States.\(^3\)

Violations of fair trial rights are increasing

16. Between 2007 and April 2012, Member States were found in violation of the rights to liberty and a fair trial in more than 500 criminal cases.\(^4\) Some Member States’ records at the ECtHR raise particular concerns about their ability to effectively protect fair trial rights. In 2011 alone, Bulgaria, Greece and Poland were found in breach of Articles 5 and 6 in over 50 cases, making up more than 40% of the total Articles 5 and 6 violations in that year.\(^5\)

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\(^2\) The Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, Amsterdam 2 October 1997

\(^3\) Source: European Court of Human Rights statistics 2011.

\(^4\) Cases involving criminal charges or proceedings and, (in the case of Article 5) relating to pre-charge, pre-trial, or pre-sentence detention.

\(^5\) Ibid.
17. Sadly, these statistics represent only the tip of the iceberg. A case cannot be brought before the Strasbourg Court unless all domestic remedies have been exhausted. This means that, because many people cannot afford to pay lawyers for several appeals, they are unable to take their cases to the ECtHR at all. The ECtHR’s current back-log of 150,000 cases means that even those who do make an application to Strasbourg often have to wait years to have their case heard. When a violation is found, the amount of time that has passed since it took place makes providing an effective remedy all but impossible. The damage is done when the person is denied access to a lawyer, or held in pre-trial detention for an excessive amount of time. The clock cannot be turned back to undo the miscarriage of justice or unlawful detention and their effects on suspects and their families. Having a potential remedy at the ECtHR, therefore, is nowhere near enough to ensure that suspects are treated fairly wherever they are arrested in the EU.

18. States themselves have a duty to safeguard the rights and freedoms protected in the ECHR domestically. People should not have to go to the ECtHR to enforce their right to liberty or to a fair trial, because these rights should be effectively guaranteed by the national law of all Member States. Unfortunately, the sheer number of violations indicates that countries are not fulfilling this duty and are not providing adequate protection of defence rights, despite the requirements of the ECHR.

**Improving mutual trust: the Roadmap**

19. Fair Trials International wants to see respect for fundamental rights at the heart of EU justice policy. Clearly, in an EU without borders, Member States must cooperate to combat crime, but this should not come at the expense of fundamental rights. The EU has a key role to play in making and enforcing laws to ensure that clearly defined fair trial standards are directly enforceable in courts across Europe. In the sixty years since the ECHR was signed, it has become clear that not all Member States are sufficiently committed to upholding fundamental fair trial rights. Binding minimum common standards that are enforceable in every Member State are needed to make sure that all EU countries guarantee fair treatment to those arrested and accused of criminal offences.

20. The EU began to address the need for action to raise defence rights standards in 2003, with the publication of a Commission Green Paper on procedural defence rights. The Green Paper highlighted the problems with achieving reciprocal trust between Member States and

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Our research with Clifford Chance shows that:

- One third of violations by the UK at the ECtHR relate to the right to a fair trial;
- Italy has been widely criticised for delays in bringing defendants to trial; and
- Romania has been found in violation of the right to liberty and the right to a fair trial in nearly 50 cases relating to criminal proceedings in the past five years.

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7 Article 1 ECHR.
made it clear that mutual recognition could only work effectively as the basis for an EU–wide criminal justice system once minimum safeguards for suspects and defendants were guaranteed in every Member State. The Commission followed up the Green Paper with a proposal for legislation: a draft Framework Decision laying down common minimum standards in criminal proceedings in the EU with the aim of ‘offering an equivalent level of protection to suspects and defendants throughout the Union’.9

21. This initial attempt to build a sound basis for mutual trust between Member States failed. Instead of recognising the need to ensure basic fair trial standards across the EU, some states argued that the common minimum standards guaranteed by the ECHR made further legislation unnecessary. Many MEPs recognised that action was needed, but, as they then lacked the status of co-legislators with the Council, they only had limited influence on new EU justice laws. Terrorist attacks in Madrid in 2004 and London in 2005 served to strengthen the prevailing policy of increasing security and cooperation levels in the fight against terrorism and serious crime. Sadly, the fundamental rights of citizens received less attention at EU policy level over the next few years.

22. When Sweden took over the Presidency of the Council of the European Union in 2009, it introduced a sea change in justice policy. Highlighting the need for Member States to improve the levels of trust in each other’s legal systems, Sweden prioritised the creation of ‘a more secure and open Europe where the rights of individuals are safeguarded’.10 This led to the adoption by the EU of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the Roadmap).11 The Roadmap proposes a set of laws to provide minimum procedural safeguards for accused persons, to ensure that their fair trial rights are protected across the EU. The Roadmap was formally adopted in the Council’s multiannual programme for 2010-2014 (the Stockholm Programme).

EU law-making on criminal matters

23. Member States have their own domestic legal system, and EU laws should not unnecessarily interfere with countries’ sovereign powers over their domestic criminal justice systems. However, all EU countries are bound to comply with the fundamental principles enshrined in the ECHR in the operation of their criminal justice systems. In reality, states are not fulfilling their obligations under the ECHR to the level necessary to engender the mutual trust and confidence required for effective cross-border cooperation. New procedural laws in the form of binding directives introduced under the Roadmap will provide effective safeguards for the basic rights enshrined in Articles 5 and 6. They will spell out how these rights should be safeguarded in practice - and the consequences of failing to do so.

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## The Roadmap's progress so far

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<tr>
<th>Defence right</th>
<th>Action so far</th>
<th>Still to come?</th>
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<tr>
<td>Legal advice must be available from the point of arrest or questioning by police, right through to the trial and any appeal.</td>
<td>June 2011: Commission published draft but UK, France, Netherlands, Belgium and Ireland have criticised it as going too far.</td>
<td>In negotiation. European Parliament and Commission demand strong protections.</td>
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<tr>
<td>Right to communicate on arrest. For those arrested overseas, the right to communicate with consular officials and to notify someone at home of the arrest can be a lifeline.</td>
<td>June 2011: draft law released.</td>
<td>In negotiation.</td>
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<tr>
<td>Legal aid. If people accused of a crime cannot afford to pay a lawyer, the state should provide free legal assistance.</td>
<td>Lawyers across the EU say legal aid systems are weak and standards low.</td>
<td>Draft law expected 2013.</td>
</tr>
<tr>
<td>Vulnerable suspects like children or those with disabilities need additional support to get a fair trial.</td>
<td>Fair Trials International will be working with experts towards an effective new law.</td>
<td>Draft law expected 2013.</td>
</tr>
<tr>
<td>Pre-trial detention. In November 2011, we reported on the widespread misuse of pre-trial detention across Europe, calling for:</td>
<td>June 2011: Commission consultation launched recognising the need for action.</td>
<td>A response from the Commission is awaited.</td>
</tr>
<tr>
<td>• EU laws regulating the use of pre-trial detention;</td>
<td>December 2011: FTI leads calls for effective EU action and the European Parliament calls on the Commission to propose a new law, backing many of our recommendations.</td>
<td></td>
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<tr>
<td>• Better use of alternatives to pre-trial detention; and</td>
<td></td>
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<td>• Deferred extradition under European Arrest Warrants, until the case is ready for trial.</td>
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24. By providing an opportunity to flesh out the guidance offered by the ECtHR and laying down clear rules for all EU countries about how to give effect in practice to the fundamental rights guaranteed by the ECHR, the Roadmap directives will help to ensure that the laws adopted pursuant to the Roadmap are applied consistently across the EU. This should raise standards in, and therefore improve mutual trust between, Member States. It should also reduce the enormous back-log of cases in the Strasbourg court. The Roadmap therefore represents an important step towards ensuring that the rights enshrined in the ECHR are respected in practice and in a consistent manner across Europe.

25. Procedural criminal law has taken a more central role in EU law-making following the Treaty of Lisbon12 (Lisbon Treaty). Prior to the Lisbon Treaty, EU crime and policing laws were covered by the so-called ‘third pillar’, which was an exceptional arrangement that allowed Member States to retain their national sovereignty over criminal justice matters and promoted intergovernmental cooperation to combat cross border crime. The Lisbon Treaty changed the method of adoption and enforcement of these laws, making them subject to the same supranational community method of law-making as other EU legislation, for example, on goods and services and agriculture.

26. Under the Lisbon Treaty,13 EU criminal procedural laws must be based on the principle of mutual recognition of judgments and judicial decisions and mutual cooperation between states. It provides that the European Parliament and Council may only adopt measures that:

- Lay down rules and procedures for ensuring recognition of judgments and judicial decisions;
- Facilitate cooperation between authorities of Member States in relation to criminal proceedings and enforcement of decisions;
- Address conflicts of jurisdiction between Member States; and
- Support judicial training.

27. Importantly, however, the Lisbon Treaty also enables laws establishing minimum rules for the rights of individuals in criminal proceedings to be made where these are necessary to facilitate police and judicial cooperation in cross-border criminal matters.14 This provision forms an independent and explicit legal basis for the Roadmap measures.

What is the role of the EU institutions in making laws to protect fair trial rights?

28. The Lisbon Treaty has also altered how the EU institutions work together to make these laws. Before the Lisbon Treaty, the EU used “framework decisions” to make crime and policing laws intended to have effect in all EU countries.15 After the Lisbon Treaty, laws are made in the form of “directives” decided by a qualified majority. Framework decisions could only be passed by the unanimous vote of all EU countries (meaning a single state could block new laws they did not want). Members of the European Parliament had no binding voting powers on framework decisions, but directives are passed using the ‘co-decision’

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12 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01. EU criminal procedural laws are made under Article 82 to 86.
13 Article 82 of the Lisbon Treaty.
14 Article 82(2) Lisbon Treaty. Laws concerning mutual admissibility of evidence between Member States and the rights of victims of crime can also be made under this provision, as well as any other specific area that the Council identifies in advance by way of an unanimous decision with the consent of the European Parliament.
15 There were also conventions – but these only operated when Member States accepted them.
process. This means that the elected Parliament (representing the people of the EU) and the Council (representing the governments of Member States) now act as co-legislators when passing EU criminal justice laws, including Roadmap measures. Neither can adopt legislation without the agreement of the other.

29. The European Commission is the body that normally produces the initial draft proposal for a directive. This draft is then considered by the Council and (separately) by the European Parliament. Once the Council has reached political agreement, it issues a revised draft text reflecting its “general approach”. The Parliament debates the proposal in committees, where amendments are tabled and voted on. Once the amendments are agreed, the Parliament begins negotiations with the Council; the Commission also participates, seeking to reconcile the two positions where they conflict (the so-called ‘trilogues’). The Parliament then votes on the legislation in a plenary sitting. Unless full agreement is reached at this stage, there will then be a second reading of the legislation, where the remaining differences between the Council and the Parliament positions are discussed. Once a final text is agreed, both the Council and Parliament will formally approve it in a vote. Then, following publication in the Official Journal of the European Union, the legislation becomes law. A fixed period is provided (often two years) for EU countries to transpose it into their domestic legal systems.

30. Framework decisions and directives both require Member States to achieve particular results without dictating the means of doing so. However, directives are binding on all EU countries and failure to comply with their terms and give full effect to them in national law can give rise to infringement proceedings against a Member State, which can be brought by the Commission at the EU’s Court of Justice in Luxembourg. This was not an option with pre-Lisbon Treaty framework decisions.

31. Significant progress has been made under the Roadmap since its adoption in 2009. Directives on the right to interpretation and translation and on the right to information in criminal proceedings have been adopted. It is important that this momentum is maintained if the whole Roadmap is to be delivered within the Stockholm Programme mandate.

32. FTI sees hundreds of cases each year where people have been denied access to an interpreter or have not been given information about their rights on arrest, or access to the case against them in time to prepare a defence. The new laws are a major step forward in addressing this. However, if they are to mean anything, they must be effectively implemented by states and applied and enforced by judges, police and prosecutors. The Commission has an important role to play in ensuring proper implementation, including by

**Directives are binding on all Member States. Unlike framework decisions, failure to comply with their terms and give full effect to them in national law can lead to infringement proceedings at the EU’s Court of Justice in Luxembourg.**

### Current status and challenges ahead

16 Comprised of the justice ministers from each Member State.

17 It should be noted that after a five year transitional period expires in December 2014, the infringement powers of the European Commission and the jurisdiction of the EU’s Court of Justice will apply to all unamended police and criminal justice instruments adopted under the pre-Lisbon ‘third pillar’ arrangements, including framework decisions. The court’s jurisdiction will also apply to all EU Member States uniformly. The only exception will be for the UK and Ireland, which have the possibility to opt out of pre-Lisbon crime and policing laws in December 2014.
effective monitoring, by raising awareness of the new laws in all the Member States and organising training of judges, lawyers and law enforcement officials to make sure that they are aware of the new laws and how they work. Infringement actions should also be considered by the Commission, in cases of serious or systemic failure to implement or apply the new directives.

33. It is also important that the Commission, Parliament and Council continue to work together to agree strong directives for the remaining Roadmap measures and to address the problem of excessive and unjustified pre-trial detention in the EU. Action is urgently required in these areas to safeguard the rights of the many thousands of people who are arrested in Europe each year, often in a country other than their own.

34. Unless further, sustained effort is made at EU level to ensure that there are enforceable minimum safeguards in place for those arrested or accused of criminal offences in Europe, then severe injustices will continue to arise. Mutual recognition instruments such as the European Arrest Warrant operate on an assumption that these safeguards exist, and without them confidence in EU criminal justice will erode and efforts to cooperate to fight crime will be undermined. The right to a fair trial is universal, and should be at the heart of the EU's criminal justice policy.

35. It is therefore crucially important that the EU meets the challenge of completing the work it has begun under the Roadmap. We recognise that ensuring effective defence rights in all cases has cost implications and that, in a time of economic crisis, all expenditure must be fully justified. However, effective defence rights are not a luxury we can cast aside when times are tough. It is a cornerstone of EU law that everyone is treated fairly in criminal investigations and proceedings.
B. The Roadmap, right by right

i. The right to interpretation and translation in criminal proceedings

36. The Roadmap’s first law guarantees the right to interpretation and translation in criminal proceedings. The Directive,\(^{18}\) which was adopted in October 2010, comes into force in October 2013 and must be transposed into the national law of every EU Member State by that time. The Directive will help ensure that nobody is denied a fair trial because they do not understand the language in the country in which they are arrested.

**Standards of interpretation and translation in the EU today**

37. According to defence practitioners who participated in the survey conducted by EuroMoS, the vast majority of Member States’ laws provide an interpreter where one is required, both pre-trial and during court proceedings. However, they reported numerous problems with the right to interpretation and translation in practice. There are concerns about the quality and independence of interpreters and many Member States do not provide adequate translations of essential documents.

38. The survey results indicate that recurring problems include:

- The quality of the services provided by interpreters varies considerably, a problem which is attributed to a lack of adequate remuneration and training;
- Effective monitoring of interpretation and translation standards is lacking in a number of Member States;
- Audio and video recording is rarely used during the police custody stage, making it difficult to check the accuracy of interpretation;
- In a few Member States, police officers act as interpreters and the standard in these cases is particularly low;
- Interpreters in some countries are not fully independent;

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• In the vast majority of Member States suspects have the right to receive a translation of any decision taken concerning the deprivation of their liberty, but in practice this rule is applied inconsistently and in many cases not at all; and
• The prosecution case file is rarely translated for those who do not understand the language of the proceedings.

**The key elements of the new right**

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**The Directive requires suspects who do not understand the language to be aided by an interpreter during:**

- police questioning
- court hearings
- investigative hearings
- extradition hearings

**Translations of key documents must also be provided.**

39. Suspects and accused persons who do not speak or understand the language of the proceedings (including for the execution of a European Arrest Warrant) will have a series of rights guaranteeing proper interpretation and translation facilities.

40. **Right to interpretation:** Interpretation must be provided free of charge for proceedings before investigative and judicial authorities, during police questioning and for all court hearings. It must also be available for communication between suspects and their lawyers, where related to any questioning or hearing. Countries must have a system in place to establish whether the suspect needs an interpreter.

41. **Translation of essential documents:** Written translations of documents essential to enable suspects to exercise their defence must be provided within a reasonable time and without charge. These include any order depriving someone of their liberty, any charge or indictment, and any judgment.

42. **Sufficient quality:** The interpretation and translations provided must be of sufficient quality to ensure that suspects have knowledge of the case against them and can exercise their right of defence. To promote good quality interpretation, countries should establish registers of qualified interpreters and translators, which will be made available to lawyers and authorities. If successful, this will raise standards, resulting in cost savings and fewer delays, appeals and quashed convictions.

43. Fair Trials International campaigned hard for the new law and met with LEAP members to discuss the draft law before publishing a communiqué\(^\text{19}\) to assist the Commission and European Parliament in further developing its content. If properly implemented, the Directive could make a huge difference to the fairness of criminal proceedings across Europe and improve the outcome in many of our clients’ cases.

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\(^{19}\) Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (11 September 2009), see Appendix 9.
Implementation

44. The challenge now is to ensure that the measure is properly transposed into the national law of each Member State and that sufficient training of judges, prosecutors, police, interpreters, translators and defence practitioners takes place, to ensure that the law is applied effectively and sufficiently high standards are maintained. The Directive guarantees rights that are vital to a fair trial, but if law enforcement officials and suspects are not aware of it then its provisions will not serve any useful purpose. EU institutions also need to prepare for their crucial role as enforcers and implementers of the new law.

ii. The right to information in criminal proceedings

45. A Directive\(^{20}\) guaranteeing the right to information in criminal proceedings, the second law under the Roadmap, was adopted in May 2012. It must be implemented in the domestic law of every EU country by June 2014. The Directive is a huge step forward in ensuring that people arrested in the EU are provided with key information about basic legal rights and the charges against them.

46. Fair Trials International’s casework shows the importance of giving suspects information about their legal and procedural rights and about the case against them. If people are not aware of their rights and the charges against them, they cannot prepare a defence and will not have a fair trial. We worked with our LEAP members to ensure that this law contained strong provisions, and published a communiqué with a recommended list of rights that should be provided to suspects on arrest.\(^{21}\) All of these went on to be included in the new Directive.

**What information are suspects given about their rights in the EU today?**

47. According to defence practitioners who participated in the survey conducted by EuroMoS, procedures do exist across all Member States to inform suspects of their rights. However, they reported numerous shortcomings regarding the practical communication of information in a way which enables suspects to understand and exercise their rights.

48. The survey results indicate that recurring problems include:

- In a number of Member States, there are concerns that police will defer a formal arrest in order to obtain statements without informing suspects of their rights;
- In some Member States, information about rights is not available until 24 hours after arrest and detention;
- In some Member States suspects are only told about their rights orally;


\(^{21}\) Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (5 February 2010), paragraph 20. See Appendix 9.
Where a letter of rights is provided, there is rarely any effort made to check that suspects have understood its contents, particularly if they are a non-national;

Information about the charge is not provided promptly in many cases, sometimes not for up to 72 hours;

Most Member States provide suspects with copies of decisions to remand in custody. However, there are concerns that limited reasons are given for these decisions;

Suspects often have little or no access to the case file during the police custody stage. Where access is available, it is provided late in proceedings and may remain restricted; and

Access to the case file is sometimes subject to a charge and the file is rarely translated free of charge.

The key elements of the new right

49. Letter of Rights on arrest: The Directive says all suspects must be given clear, simple written information on their rights (a “Letter of Rights”) as soon as they are arrested. It must be in a language they understand and include information on:

- The right to a lawyer;
- The right to remain silent (if applicable);
- Entitlement to medical assistance, if needed;
- The right to have consular authorities and one other person informed of the arrest;
- Any right to legal aid (and any conditions attached to it);
- The nature of the charge;
- Interpretation and translation facilities, if needed;
- The right to be brought promptly before a court following arrest and to information on the maximum period of detention beforehand; and
- The right to have access to the case file, free of charge.

Edmond Arapi

In 2009, Edmond Arapi, an Albanian national, was arrested on a European Arrest Warrant from Italy in relation to a murder in Genoa in 2004.

Edmond had not travelled abroad between 2000 and 2006 and had been living openly with his family in England. He was at work on the day of the murder and knew nothing of any proceedings against him. Yet an Italian court had already convicted him in absentia and sentenced him to 16 years.

On the day Edmond’s extradition appeal was to be heard, Italy announced it would withdraw the Arrest Warrant. This was a relief to Edmond, who had faced separation from his wife and three children, including a newborn son.

Edmond’s and his family’s anguish, as well as significant legal costs both in the UK and in Italy, would have been saved if he had been notified sooner that he was wanted in Italy and if, later, he had been allowed to examine the case file, which contained information sufficient to eliminate him.

In July 2012, an Italian court awarded Edmond approximately GBP 20,000 in compensation. This does not cover all his legal expenses and other losses but it should act as a warning for prosecutors not to issue EAWs without checking their facts first.
50. **Right to information about the charge:** Suspects must be promptly provided with information about the criminal act they are suspected of committing.

51. **Right of access to case file:** Authorities must make available to suspects or their lawyers any documents relating to the case that are necessary to challenge the lawfulness of an arrest or detention. They must also grant access, free of charge, to all material evidence, in sufficient time before the trial to enable the accused to prepare a defence effectively. Any refusal to do so must be reviewable by a judicial authority.

52. The new Directive could make a real difference to the numerous problems identified by defence practitioners, which show that many people arrested in the EU are not given adequate information about their rights or the charges against them. Without this information, it is extremely difficult for suspects to exercise their rights or prepare an effective defence.

**Implementation**

53. It is now important that the Directive is effectively implemented into the national law of Member states and that governments ensure that the necessary mechanisms are in place for authorities to provide the information and documents required in practice. Judges, prosecutors and police officers will also need to undergo training to ensure that the law is applied effectively as it will make little difference in practice if these officials do not know that they must inform suspects of their rights and of the case against them.

### iii. The right to access a lawyer

**Towards a new EU law**

54. Despite the fact that the right to access a lawyer is guaranteed by the ECHR, standards of access to legal advice at the early investigatory stages of criminal proceedings vary greatly across the EU. In 2008, the ECtHR ruled in the landmark case of *Salduz v Turkey*\(^{22}\) that access to legal representation must be given to suspected or accused persons as early as possible, but this often does not happen in practice.

55. The European Commission’s release in June 2011 of a draft Directive\(^ {23}\) on access to legal advice and the right to communicate upon arrest represented an important further stage in the Roadmap. Too often at FTI, we see the detrimental effect that failure to provide access to a lawyer can have on fair trial rights. 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.

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\(^{22}\) *Salduz v Turkey* [2008] ECHR 1542.

The Commission's proposed draft Directive

56. The European Commission published its draft Directive in June 2011. FTI welcomed the proposal, which contained a number of key protections of the right to legal representation including:

- Access to a lawyer ‘in person’ to ensure not only that suspects are aware of their rights but also that those rights are not infringed through ill-treatment or threatening behaviour by the police;
- Access to a lawyer must be provided as soon as possible and, at the very latest, on arrest;
- Confidential communication with a lawyer must be sufficiently safeguarded; and
- Legal representation must be provided in both the issuing and executing state for those wanted under a European Arrest Warrant.

57. In September 2011, the UK and Ireland chose not to opt into this Directive. France, Belgium and the Netherlands joined them in expressing strong reservations on the text. FTI and five other leading NGOs wrote an open letter24 to these states pointing out that the Commission’s proposal was firmly grounded in the jurisprudence of the European Court of Human Rights and stressing the importance of backing the new law.

Threats from Member States to weaken Commission proposal

58. In April 2012, the Council issued a revised text of the Directive, a “general approach” which watered down the Commission’s proposal in many respects. FTI, in conjunction with eight other leading NGOs, issued a joint statement25 setting out the group’s concerns with the revised text and making recommendations to ensure that the final text of the Directive will contain the key minimum standards necessary to ensure the protection of fair trial rights.

59. The most serious defects in the Council’s “general approach” are:

- There are insufficient safeguards for people who are questioned by police before being formally designated as suspects – a danger, given the risk of statements being obtained from people on the basis they are “just witnesses” or “helping police”, only for them to be charged after speaking to police without a lawyer present;
- It is too easy for Member States not to comply with the obligation to ensure legal advice and representation (or to “derogate”);
- The remedies for individuals denied access to a lawyer are inadequate;
- The wording suggests that the right to a lawyer only refers to “official interviews”, implying that a state could conduct “unofficial interviews” without a lawyer present;
- States can decide how long to wait for a lawyer before starting questioning;
- States can choose to restrict how a lawyer can participate in police interviews;

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24 The full letter is available in Appendix 5.
25 The full statement is available in Appendix 5.
Members of FTI’s Legal Experts Advisory Panel have indicated that dual representation in EAW cases frequently saves time and resources by avoiding the need for adjournments or appeals.
Alan Hickey

Alan, a lorry driver, was convicted in France of people-trafficking and sentenced to serve 18 months in prison in December 2009. While in prison in France, Alan found out that Belgium had issued a European Arrest Warrant against him. Alan was not given clear information about the Belgian charges and was concerned that they related to the same matter for which he had been sentenced in France. This should be a bar to extradition on “double jeopardy” grounds. However, Alan’s extradition was ordered before further information could be gathered from Belgium where he had no lawyer.

Once in Belgium, Alan’s concerns about double jeopardy were vindicated. The judge at Alan’s trial found that some of the Belgian charges arose from the same events for which he had been 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 the start.

64. The survey results indicate that recurring problems, in practice, include:

- In some Member States, police will assume that suspects have waived the right to a lawyer if they do not request access immediately or of their own accord;
- There is often a lack of information provided by police about the right to a lawyer, particularly during early stages of criminal proceedings;
- In some Member States police conduct preliminary questioning without a lawyer present;
- Police often prevent or delay access to a lawyer;
- In a few Member States lawyers are barred from attending and/or participating in police interviews; and
- In the majority of Member States lawyers are unable to inspect detention conditions during the pre-trial period.

65. For our clients, who are often arrested miles from home in a country where they may not understand the language or the local legal system, the ability to contact family, friends and consular authorities can be a lifeline. The risk of ill-treatment to suspects and harm to their defence is also increased when they are unable to access consular assistance or notify others of their arrest. While initially a separate Roadmap measure, this has been combined with the right to legal representation and is covered in the Commission’s proposal for a draft Directive on the right to access a lawyer and to communicate on arrest discussed above.

66. The Commission’s original proposal would guarantee suspects the right to communicate in person with consular officials on arrest and to communicate as soon as possible with a
person the suspect nominates (for example, a relative or employer), to inform them of the arrest. If enacted, these provisions will be of vital importance to the thousands of people who are arrested in the EU outside of their home country every year.

**Right to consular assistance and to notify a third person of arrest in the EU today**

67. According to defence practitioners who participated in the survey conducted by EuroMoS, most Member States allow suspects to communicate with a third party upon arrest. However, in a number of Member States this is restricted to a lawyer, relative or employer. In principle, most Member States allow foreign suspects to communicate with consular officials. In practice however, this can be unnecessarily difficult, because suspects are not given contact details or informed expressly of the right to consular help.

68. The survey results indicate that recurring problems, in practice, include:

- In a few Member States suspects (especially those suspected of serious offences) have no right to contact a third party on arrest;
- There are often delays in allowing a suspect to contact a third party;
- Police sometimes do not inform suspects that they have the right to contact a consular official;
- In some Member States, police do not provide non-national suspects with contact details for consular officials; and
- A number of Member States have restrictions on which third parties may be contacted by suspects.

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**Mohammed Abadi**

Mohammed (not his real name), an Iraqi national with refugee status, was arrested in Spain in 2005 for alleged terrorist activities. Mohammed has described being taken straight to a “medical facility”, where he was stripped naked and humiliated. He was then interrogated without a lawyer present, subjected to verbal abuse from police officers and threatened with a gun. Mohammed spent five days in appalling conditions and was not allowed access to a lawyer or any consular assistance.

He was then 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 moved to another prison where he was held until 2007, during which time he was again denied legal assistance. When Mohammed was finally brought to trial in the summer of 2010, he was acquitted of all charges, apparently on the basis that there was no evidence against him. Since returning home, Mohammed has been suffering from severe anxiety and depression as a result of his treatment in Spain.

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v. The right to legal aid

**Why is legal aid necessary?**

69. Justice systems that do not guarantee proper, timely access to legal advice and representation - funded where necessary by the state - frequently suffer unnecessary
waste and expense. Where suspects do not have a lawyer at the start of proceedings because they cannot afford one, then the case may take longer and be more complicated because of subsequent appeals and quashed convictions. As the majority of those arrested in the EU have insufficient means to pay for a lawyer, sufficient legal aid is a crucial part of the right to access legal advice and representation.

70. The right to legal aid is expressly guaranteed by the ECHR. Article 6(3)(c) ECHR states that everyone charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. States who fail to provide legal aid may therefore also face the costs of lengthy infringement litigation at the ECtHR resulting from the inadequate safeguarding of defence rights during the investigation or trial.

**Legal aid in the EU today**

**Deborah Dark**

In 1989, Deborah was arrested and later acquitted in France of drug related offences. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer and she was found guilty in her absence and sentenced to 6 years’ imprisonment. In April 2005, fifteen years after the conviction on appeal, an EAW was issued by the French authorities for Deborah to be returned to France to serve her sentence.

In 2008 Deborah travelled to Spain where she was arrested and taken into custody, and faced extradition to France. A court appointed legal aid lawyer visited her and advised her that she had no option but to consent to extradition. As a legally aided client, Deborah was told she was only entitled to receive €250 worth of legal advice, however complex the case. The lawyer’s advice was therefore not particularly surprising. Thankfully, however, a doctor who visited Deborah shortly afterwards advised her to resist extradition. Deborah took this advice and at the extradition hearing the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time. Deborah was released from prison and took a flight back to the UK. However, her ordeal was not over.

On arrival in the UK, Deborah was arrested again – this time by the British police at the airport. Deborah’s extradition was refused in April 2009. In May 2010, France finally agreed to remove the warrant, but only after Deborah had spent years as an effective prisoner in the UK.

71. According to defence practitioners who participated in the survey conducted by EuroMoS, the vast majority of Member States have some form of emergency duty lawyer scheme to ensure that people in custody have access to legal advice when they cannot afford it. However, they reported numerous problems with these schemes in practice.
72. The results of the survey indicate that recurring problems include:

- Duty lawyers (emergency lawyers paid by the state) are often poorly paid or have to wait a long time for payment to be processed. In some Member States legal aid lawyers are provided with a flat rate regardless of the amount of work done or the complexity of the case.
- The quality of duty lawyers in the majority of Member States can be low, meaning that the access to effective legal advice is limited.
- In a number of Member States, legal aid cannot be granted until suspects are brought before a judge, up to 48 hours after arrest, meaning that they may be without legal representation during the crucial phase of initial police questioning.
- In some Member States, while legal aid is available during criminal proceedings, defendants are required to repay their legal costs if found guilty leading to concerns that suspects will waive the right to avoid possible expense.
- In a few Member States, legal aid practitioners are appointed and funded by the police, leading to concerns that their advice may be prejudiced as they are unlikely to be instructed if they challenge the investigation.
- The extent to which the relevant competent authority helps suspects apply for legal aid if they are unable to pay for a lawyer varies considerably. In some Member States the application process is very bureaucratic, which is particularly problematic for nonnationals who may not understand or have access to the documentation required.

73. There are also some Member States where legal aid practices are better. Estonia has an internet based legal aid system managed and funded by the local bar association which is available to all suspects. If suspects do not have a specific lawyer that they wish to appoint, then the police submit a request online and any lawyer willing and able to take the case attends the police station to provide advice to the suspect. Practitioners tell us that it works well in practice and a number of other bar associations have expressed interest in adopting the system, although defendants must still repay costs if they are found guilty.

**The importance of an EU directive to guarantee the right to legal aid**

74. The results of the EU-wide survey of practitioners reveal that the availability and standard of legal aid varies across Europe. Where it is offered, defence practitioners indicate that limited funding for legal aid means that the advice provided is often of insufficient quality to protect the best interests of the suspect. Legal aid is also often not provided until well after the point of arrest and initial questioning, meaning that suspects are unrepresented during one of the most crucial stages of the process.

75. Despite the fact that the right to free legal advice for those who cannot afford it is enshrined in the ECHR, this is not respected in all EU countries. However, access to adequate legal aid at the earliest stages of criminal proceedings is essential to ensure that suspects both know about, and are fully able to exercise, their legal rights. If people are denied access to high quality legal advice due to an inability to pay, this can lead to a serious inequality of arms, undermining fair trial rights and the rule of law. We understand that resources are tight due to the current economic crisis, but solutions such as the internet based system in Estonia show that the right to legal aid can be achieved.
on a limited budget if the system is efficient and the rules are clear. Fair Trials International looks forward to working with the Commission to produce a strong proposal for this vitally important Roadmap measure.

vi. Special safeguards for vulnerable suspects

**Why do vulnerable suspects need special safeguards in criminal proceedings?**

76. Criminal proceedings are a daunting prospect for most people who face them. However, children and vulnerable adults are especially likely to be overwhelmed by the experience. They may be unable to understand or follow the content or the meaning of proceedings and this can seriously undermine their ability to participate effectively and to receive a fair trial. The Roadmap recognises this and the final measure envisages legislation to introduce special safeguards for vulnerable suspects or accused persons to ensure the fairness of proceedings against them.

77. The application of special safeguards to vulnerable suspects at the earliest stages of criminal proceedings is essential to ensure that these suspects understand what their rights are and how to exercise them. If people do not understand the proceedings because their vulnerability is not identified or because special safeguards are not in place, this leads to a serious inequality of arms, undermining the rule of law.

78. Our research suggests that in many countries, there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or those who are otherwise vulnerable, understand the proceedings in which they are involved and are treated fairly. If suspects cannot understand what is happening then they cannot exercise their rights effectively and cannot receive a fair trial.

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**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.

During police questioning, James was not told any details of the allegations or of any charges against him, or informed 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.

After further delay due to an appeal by the prosecutor, the case was eventually dropped and James’s passport was returned to him. He continues to suffer stress and depression following his ordeal.
Provisions for vulnerable suspects in the EU today

79. According to defence practitioners who participated in the survey conducted by EuroMoS, there are special procedures in place for vulnerable suspects in most Member States’ legal systems. However, their application varies from case to case, and suspects are often only considered vulnerable if they are minors or have an obvious and serious medical condition. Due to a lack of police awareness and training, vulnerabilities which are not immediately physically obvious, such as mental disabilities or addictions, are often not identified at the point of arrest and questioning.

80. The survey indicates that recurring problems, in practice, include the following:
   - The treatment of vulnerable suspects varies from case to case and from state to state;
   - Even where safeguards exist they are not always applied in practice;
   - Police often lack the awareness needed to identify vulnerabilities that are not immediately physically obvious, for example addiction and mental health problems. There is insufficient training of police in this area;
   - Police are often disrespectful towards vulnerable suspects;
   - The definition of ‘vulnerable’ varies widely: addicted persons, ethnic minorities and non-nationals in particular are often not covered by existing safeguards; and
   - Treatment of suspects with mental disabilities, mental health problems and addictions is particularly poor;

The importance of an EU directive to protect vulnerable suspects

81. There are real problems with the treatment of vulnerable suspects in many EU countries. Fair Trials International will be working with LEAP members and other experts in the coming months and hopes to inform and assist the Commission as it prepares its proposal in relation to this measure.
C. Pre-trial detention and the Commission’s Green Paper

82. Pre-trial detention offers important safeguards to ensure justice is served, evidence and witnesses are protected, and suspects do not escape prosecution. Yet depriving people of their liberty in the period before trial is supposed to be an exceptional measure, only to be used where absolutely necessary. Sadly, this is not the case in practice.

83. Inappropriate and excessive pre-trial detention clearly impacts on the right to liberty and the right to be presumed innocent unless and until proven guilty. It also has a detrimental effect on a suspect’s family members, particularly when detention is overseas, as visiting will be more costly and difficult. There is a wider socioeconomic cost as lengthy pre-trial detention will usually result in the suspect losing his or her job, which can have a severe financial impact on other family members. These knock-on effects further increase the costs of pre-trial detention to the state.

“\textit{It is surprising that governments have not done more to prevent these problems in spite of the fact that the prison system is both expensive and overburdened in many European countries. Too little use has been made of more humane and effective alternatives to pre-trial detention.}”

Thomas Hammarberg, former Council of Europe Commissioner for Human Rights

84. The reality of varying standards in pre-trial detention regimes across the EU is at odds with the idea that all Member States have criminal justice systems that respect fundamental rights and deliver justice. Inadequate systems for imposing and reviewing pre-trial detention and poor pre-trial detention conditions undermine the trust needed for mutual recognition instruments to work effectively.

\textit{Standards in theory}

85. The right to liberty and the importance of avoiding arbitrary and unnecessary detention is enshrined in a number of international instruments.\textsuperscript{26} Article 5 of the ECHR protects the right to liberty and sets out when detention is acceptable and the safeguards which must accompany it.

86. The ECtHR’s jurisprudence on Article 5 and pre-trial detention sets out general principles, which can be summarised as follows:\textsuperscript{27}

\begin{itemize}
  \item A person who is detained on the grounds that he is suspected of an offence must be brought promptly before a judicial authority;
  \item There must be a presumption in favour of release;
  \item The burden is on the state to show why release pending trial cannot be granted;
  \item Reasons must be given for refusing release and the judicial authority must consider alternatives to pre-trial detention which would deal with any concerns it had regarding the defendant’s release;
  \item Pre-trial detention cannot be imposed:
\end{itemize}

\textsuperscript{26} Article 11 Universal Declaration of Human Rights, Article 9 International Covenant on Civil and Political Rights, Articles 6 and 48 Charter of Fundamental Rights of the EU.

\textsuperscript{27} For more detail see pages 30-34 of our October 2011 report.
Pre-trial detention is being used when not strictly necessary, and often for too long, at huge cost to both individuals and the state.”

Fair Trials International Legal Experts Advisory Panel communiqué September 2011

The reality of pre-trial detention in the EU today

87. The European Commission published a Green Paper on detention in June 2011 and the consultation closed at the end of November 2011. FTI’s response to the Green Paper in October 2011 identified a stark contrast between law and practice in relation to pre-trial detention in the EU. Many Member States are not meeting basic standards laid down in the ECtHR case law on Article 5 of the ECHR.

88. Across the EU, people not convicted of any crime are being held for months or even years without good reason, in appalling conditions and with limited access to a lawyer. In particular:

- approximately 21% of the total EU prison population is in pre-trial detention; over a quarter of those detainees are foreign nationals;
- people are often detained in appalling conditions that make trial preparation impossible;
- some countries’ laws allow people to be detained for years before trial, others have no maximum period at all;
- few countries have an adequate system for the review of pre-trial detention;
- non-nationals are far more likely than nationals to suffer the injustice of arbitrary and/or excessive pre-trial detention;

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29 See page 24 of our October 2011 report.
Robert Hörchner

Robert, a 59 year old father of two from Holland, was arrested under an EAW issued by Poland in 2007. Robert resisted extradition to Poland, arguing that if he was surrendered he would be subjected to prison conditions which would breach his human rights and he would not receive a fair trial. Nevertheless a Dutch court ordered his extradition. Following his surrender to Poland, Robert was held on remand for 10 months, during which time he had to endure filthy, overcrowded conditions, sharing a tiny cell with up to nine other inmates.

While on remand, Robert was only allowed visits from a friend on two occasions, whereas Polish inmates were allowed visits every two weeks. Furthermore, Polish prisoners were allowed to receive packages of food from their families – something denied to Robert as the only non-national in the prison. Robert could not properly prepare for his trial. He was denied a Dutch-speaking interpreter though he spoke no Polish, and his choice of legal adviser was highly restricted, as were his contact with that adviser and his access to information about the case against him.

After enduring nightmarish conditions for several months, Robert attended a first hearing in his trial and came under pressure to confess in exchange for an early release, which he resisted. After a grossly unfair trial six months later, at which he was convicted, he was released and allowed to return to the Netherlands pending an appeal. He is still suffering the mental effects of his ordeal in pre-trial detention.

89. Our LEAP members have regularly confirmed to us that detention practices in their jurisdictions are not compliant with Article 5 ECHR and that lengthy periods of pre-trial detention are often permitted without the court providing any valid justification. Members have described how courts often accept at face value prosecution arguments that continued detention is necessary in the interests of a successful prosecution. Panel members have also reported that the problem of excessively long pre-trial detention is exacerbated in some jurisdictions where the defendant is acquitted, yet remains in custody pending appeal by the prosecution.32

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30 See page 6 of our October 2011 report.
31 See paragraph 110 below.
90. According to defence practitioners who participated in the survey conducted by EuroMoS, most Member States limit the maximum time a suspect can spend in pre-trial detention, particularly before being formally charged. In practice, however, time periods vary greatly across the EU, with some Member States keeping suspects in police custody for far longer than others. Police brutality and coercion are still a significant problem and reports say prisoners are being held in small, overcrowded cells, often in unsanitary conditions.

91. The survey indicates that recurring problems, in practice, include:
   - Almost all Member States are less likely to grant bail to non-national defendants and non-nationals and non-residents regularly experience discrimination at pre-trial hearings;
   - In a few Member States people held in pre-trial detention are either not permitted to attend pre-trial hearings or are not allowed to make representations;
   - In some Member States police exert undue pressure on suspects by threatening prolonged detention or intimate searches in the absence of a confession, or by placing suspects in holding cells with violent or drug-addicted inmates;
   - Non-national defendants are often not provided with a translation of decisions to remand in custody, which makes an appeal against the decision much more difficult; and
   - Many Member States have poor detention conditions at police stations - in particular, small cells with no natural air, a general lack of hygiene or too few toilets.

*Our proposed reforms of pre-trial detention in the EU*

In response to these problems, we are calling for four reforms.

92. **EU legislation on minimum standards:** EU legislation is needed to set minimum standards for the use of pre-trial detention in the EU and for regular and effective judicial review of decisions to remand in custody. The ECtHR jurisprudence on Article 5 and pre-trial detention sets out general principles which, as signatories to the ECHR, all Member States should observe. However, in practice they are failing to meet these obligations resulting in significant human and financial cost. Only clear, enforceable laws setting basic standards on when, and how, pre-trial detention can be used will force countries to stop imposing detention arbitrarily or for longer than necessary.

93. **Deferred surrender under the EAW:** Many people who approach FTI for assistance are facing extradition under the EAW. Deferred surrender should be used in these cases to avoid unnecessary pre-trial detention after extradition. Deferred issue of EAWs and negotiated surrender should also be used to ensure defendants are not surrendered speedily when there is no prospect of a speedy trial and defendants who are able to meet supervision conditions in their home country should be allowed to do so until the case is ready for trial.

“Fair Trials International's proposals in relation to pre-trial detention are good and will work to reduce discrimination against non-nationals.”

Judith Sargentini MEP
94. **EU research to establish the viability of a one year maximum pre-trial detention limit:** The EU should examine the viability of establishing a flexible one year maximum pre-trial detention limit. The ECHR guarantees anyone subject to a criminal charge the right to a fair and public hearing in a reasonable time.\(^{33}\) In FTI’s view, it is inherently unreasonable to imprison someone who has not been found guilty of any offence for more than a year, unless there are exceptional prevailing circumstances. Targeted research by the European Commission to help understand the underlying reasons for the wide disparity between EU countries’ use of pre-trial detention and its varying lengths is needed. This research could then be used to implement a programme of information-sharing and exchange of best practice between Member States with a view to introducing a one year cap on pre-trial detention in the EU.

95. **Effective implementation of the European Supervision Order:** The European Supervision Order (ESO)\(^ {34}\), which will come into force at the end of 2012, lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. The ESO is discussed further at paragraph 110 below.

**Towards action: European Parliament debate and resolution on detention**

“The conclusion, then, is that minimum standards for detention conditions [and] a greater use of alternatives are essential steps for us to take.”

Birgit Sippel MEP speaking in the European Parliament, December 2011

96. On 14 December 2011, the European Parliament held a debate on detention in the EU.\(^ {35}\) The debate demonstrated the high degree of cross-party recognition of the problems with pre-trial detention across the EU and support for reform. Following the debate, on 15 December 2011 the European Parliament passed a groundbreaking resolution which reaffirmed many of FTI’s concerns and called on the Commission and EU institutions to come forward with a legislative proposal on the rights of persons deprived of their liberty and to develop and implement minimum standards in the field of detention.\(^ {36}\) FTI is delighted to see the European Parliament taking a strong stand on the need to safeguard fundamental rights in the context of pre-trial detention in the EU.

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\(^{33}\) Article 6(1) ECHR.

\(^{34}\) Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009/829/JHA, 23 October 2009.


\(^{36}\) The resolution is available at Appendix 7.
Widespread recognition of the problems with pre-trial detention in the EU

International and non-governmental organisations’ position

97. More than fifty NGOs responded to the Green Paper. The United Nations and the Council of Europe also provided submissions. The vast majority of these responses echo FTI’s concerns and recommendations. The extraordinary level of response from civil society and beyond shows that the misuse of pre-trial detention raises serious concerns throughout the EU and that urgent action is needed to raise standards.

“Detention-related deficiencies should not be a “shame” to keep shrouded from public scrutiny but problems to be addressed transparently and with the support of civil society.”

UN response to the Green Paper

98. The UN and the Council of Europe both expressed concern about pre-trial detention in Europe, with the former reiterating that pre-trial detention should be a last resort in criminal proceedings and highlighting previous recommendations of the United Nations Human Rights Committee that states should increase the use of alternative measures and consider maximum non-extendable terms of pre-trial detention.

99. Numerous NGOs supported FTI’s call for EU legislation to introduce minimum standards for the use of pre-trial detention in criminal proceedings. Existing ECHR obligations as set out and interpreted by the ECtHR were seen as a good basis for this. Several responses identified the lack of minimum standards and the wide differences in pre-trial detention standards across the EU as a serious bar to mutual trust. NGOs generally agreed with FTI that urgent action needs to be taken at the EU level to reduce excessive pre-trial detention and to end the rights infringements that result from this.

100. There was strong support from civil society for an increased use of alternatives to pre-trial detention, which has a huge cost both financially for the state and for individuals whose lives and livelihoods can be destroyed if they are denied release pending trial. The discriminatory use of pre-trial detention against non-nationals has been corroborated in several of the NGO responses. There is broad support for FTI’s call for deferred surrender under EAWs and additional recommendations that the EU take steps to ensure that an EU national from a different Member State is treated no differently to a national of the prosecuting Member State.

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38 A joint response was provided by United Nations Office of the High Commissioner for Human Rights (OHCHR), the United Nations Office on Drugs and Crime (UNODC) and the United Nations Children’s Fund (UNICEF).

Member States' position

101. Twenty-one Member States responded to the Green Paper. The vast majority of these recognised that there are problems with pre-trial detention in the EU and that some form of action is needed.

102. Six Member States have called for EU legislation establishing minimum standards for the use of pre-trial detention, including a requirement to consider alternative measures and to ensure regular reviews of detention. Two Member States also advocated EU-wide maximum remand periods.

103. Several Member States suggested that EU-wide legislation is not appropriate in the area of pre-trial detention and that the issues raised can be adequately addressed through the sharing of best practice among Member States. Council of Europe recommendations and other mechanisms were suggested to assist in raising standards across the EU.

104. We welcome the recognition by many Member States that action at EU level is needed to end the excessive use of pre-trial detention. We are delighted that some Member States have called for legislation to be introduced at EU level but we are disappointed that a small minority appear unwilling to acknowledge that there is a problem with pre-trial detention regimes in the EU.

The need for action

105. There is substantial support for EU legislation to set minimum standards for the use of pre-trial detention in the EU and for regular and effective judicial review of decisions to remand in custody. The European Parliament has provided a clear mandate for reform by calling on the Commission and Council to make a legislative proposal. The responses of international and non-governmental organisations overwhelmingly support FTI’s recommendations for action to address excessive and arbitrary pre-trial detention in the EU. Many Member States have also acknowledged that there are problems with pre-trial detention in the EU.

106. As the Commission notes in its Green Paper, detention issues “come within the purview of the European Union as [...] they are a relevant aspect of the rights that must

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40 See http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm. Those who did not respond were: Cyprus, Greece, Hungary, Lithuania, Luxembourg and Slovakia.
41 Romania, Estonia, Bulgaria, Sweden, Finland, Portugal, Spain, Austria, Netherlands, UK, Italy, Czech Republic, Slovenia.
42 Romania, Estonia, Bulgaria, Sweden, Finland, Portugal.
43 Romania, Estonia.
44 UK, Netherlands, Slovenia, Italy, Czech Republic, Belgium.
45 Ireland, Poland, Germany, Denmark, Latvia, Malta, Belgium, France.
be safeguarded in order to promote mutual trust." There is a clear legal base for legislation in this area under Article 82(2)(b) of the Lisbon Treaty, as pre-trial detention engages with "the rights of individuals in criminal procedure".

107. In June 2012, FTI and more than twenty LEAP members wrote to members of the European Parliament calling for urgent EU action to tackle unnecessary pre-trial detention in the EU. The letter was sent six months to the day since the European Parliament passed its resolution demanding EU action to prevent excessive and unjustified pre-trial detention. FTI has also written a joint letter with 12 other organisations to Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship calling on the Commission to publish its plans on pre-trial detention as a matter of urgency.

"The pre-trial detention regime in EU Member States needs urgent reform, to ensure an end to the unnecessary and often arbitrary recourse to pre-trial detention and the severe rights violations that it causes."

Letter to Members of the European Parliament from FTI and 12 other leading NGOs,

108. Varying standards in the use and control of pre-trial detention across Europe not only weaken trust between Member States, they also undermine the EU’s justice and home affairs policy mandate. Legislation in the field of pre-trial detention is the natural continuation of the EU’s roadmap for strengthening procedural rights. Poor standards of protection for basic rights across the EU erode the trust necessary for mutual recognition and undermine confidence in existing and forthcoming mutual recognition measures.

109. The Commission’s Green Paper was an important first step in raising standards in the use of pre-trial detention. We look forward to the Commission’s response and to working with EU institutions to bring about concrete action to tackle this widely recognised and urgent problem, which represents a clear violation of the presumption of innocence and of Member States’ obligations under the ECHR.

**European Supervision Order**

110. A large proportion (26%) of the EU’s pre-trial prison population is made up of non-national defendants. Non-nationals are often at a disadvantage in obtaining release pending trial because they are seen as a greater flight risk than national defendants. This risk is often identified by courts despite factors indicating that the person will not abscond, such as stable employment and long-time residence in the country. The result is that non-national defendants are regularly denied release pending trial simply because they are foreigners.

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47 The full letter is available at Appendix 7.
48 The full letter and the Commission’s response are available at Appendix 6.
49 Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009
50 2009 Council of Europe Annual Penal Statistics – SPACE I, please note that this does not include figures for Austria, Finland, France, Greece, Malta, Portugal and Sweden
111. The problems non-nationals face when applying for release pending trial may be eased by the introduction of the European Supervision Order (ESO), which was adopted by the EU on 23 October 2009. The ESO lays down rules according to which one Member State must recognise a decision on non-custodial, pre-trial supervision measures issued by another Member State as an alternative to pre-trial detention. The Framework Decision must be implemented by all Member States by 1 December 2012.

**Effective implementation crucial**

112. Effective implementation of the ESO would help ensure the elimination of discrimination against non-nationals in decisions on release pending trial by allowing courts to rely on the authorities of other Member States to supervise the defendant and thus removing one of the main obstacles to temporary release of non-nationals. It would also save significant resources. Member States spend millions each year imprisoning foreign pre-trial detainees. The European Commission has estimated that up to 80% of the EU nationals in pre-trial detention in a Member State could be transferred to their home states prior to trial.\(^{51}\)

113. To be effective the ESO system must be seen by judges across the EU as a viable alternative to pre-trial detention. Mutual trust is central to the ESO’s successful operation. However, there is a danger that the instrument will not be used consistently across all Member States, but only between those countries where mutual trust already exists.

114. To ensure the proper functioning of the ESO, Member States, aided by the EU, must:

- Provide training for judges, prosecutors and lawyers on how the ESO can be used;
- Improve domestic mechanisms for monitoring conditional release if currently inadequate; and
- Facilitate easy access to details about other countries' arrangements for monitoring supervision measures so that judges can make informed decisions at review hearings about whether, and in what terms, to issue an ESO.

115. Action at EU level, coupled with effective implementation of the ESO and increased use of deferred surrender in EAW cases, would illustrate the EU's ability to add value to the ECHR and stop excessive periods of pre-trial detention in some Member States as well as help promote efficient trial processes, which will benefit the overall interests of justice. In a time of economic crisis, it is important to remember that significant financial savings could also be made.

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D. Mutual recognition and the European Arrest Warrant

116. FTI fully accepts the need for a fair and effective system of extradition within the European Union. In an EU without borders, effective justice policy depends on speedy and efficient cooperation in transnational cases. However, the serious violations of defence rights that continue to take place in the EU, mean that the EAW has resulted in injustice in a number of cases because of its over-rigid nature and its inability to safeguard fundamental rights and the proportionality principle.

117. The continued introduction of measures under the Roadmap is crucial in ensuring fundamental rights are respected across the EU. However, the Roadmap does not offer a total answer to concerns raised about the impact of the EAW on fundamental rights and about the EAW's over-use in cases involving minor offences, which has major human and financial consequences.

118. If we are to have an effective extradition system which operates efficiently and in the interests of justice, action must be taken to eradicate unfairness from the EAW system and ensure it is compatible with the rights enshrined in the ECHR. In 2010, FTI wrote a joint letter with 15 of our LEAP members to Viviane Reding, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, summarising key concerns and areas for reform. In her response, Vice-President Reding

Natalia Gorczowska

Natalia, a 23 year-old Polish national, was given a suspended sentence in Poland when she was 17 for possession of a small quantity of amphetamines for personal use. Soon after the sentence was passed, Natalia travelled to the UK, built a stable life, obtaining employment and kicking her drugs habit. In 2011 she gave birth to a son, of whom she is the sole carer. In December 2011, Natalia was arrested under an EAW seeking her return to Poland to serve her sentence, on the basis that she had breached the terms of her probation by leaving for the UK.

In February 2012, Natalia lost her appeal against extradition, with the court finding that the importance of ensuring extradition agreements are respected justified this serious interference with Natalia’s and her child’s family life. Natalia narrowly avoided being extradited on her son’s first birthday after her lawyers obtained a rule 39 indication from the ECtHR preventing her extradition. In April 2012, FTI received official confirmation that Polish prosecutors had agreed to withdraw the EAW after the sentence was re-suspended, meaning that Natalia is finally safe from extradition. She can now focus, once again, on her normal life and raising her son.
acknowledged that there is “considerable room for improvement in the operation of the EAW system.”

In May 2011 we launched a major new report on the case for reform of the EAW at the Brussels Parliament.

119. We have gained widespread support for a number of amendments that we have suggested to the Framework Decision. In summary, we recommend the following:

- **Proportionality:** A proportionality test should be introduced, both for the issuing state prior to the decision whether to seek extradition, and for the courts in the executing state when considering whether to extradite. FTI sees numerous cases of extradition requests for minor offences or where the suspect’s circumstances and that of their families make the effect of extradition disproportionate.

- **Protection of fundamental rights:** Courts in executing states should be given a greater opportunity, when alerted to a real risk of rights infringements, to seek further information and guarantees from the issuing state (and, ultimately, the power to refuse surrender if their concerns are not satisfactorily dealt with).

- **Removal of warrants:** The Framework Decision should be amended to require states to remove an EAW where this has been properly refused by an executing authority. The lack of remedies available to people in this position, who risk re-arrest and imprisonment each time they cross an EU border and are therefore virtual prisoners in their home state, is unacceptable.

- **Deferred surrender:** Deferred surrender should be permitted where a case is not “trial ready”. FTI sees numerous cases where people are extradited under an EAW before any decision has been made to prosecute and are then held for months in prison in extremely difficult conditions awaiting trial. FTI also hopes that greater use will be made of the ESO to address this problem.

120. Numbers of EAWs issued across Europe have increased, year on year, since the system’s introduction. Following our Brussels event in May 2011, MEPs held a plenary debate on EAW reform in the European Parliament on 8 June 2011. Action to address problems identified by FTI was supported by MEPs from a wide political base and demonstrated a growing consensus on key areas for reform. The Commission has also expressed its concerns over flaws in the system, indicating that Member States should “ensure that it is used correctly ... not issued mechanically for crimes that are not very serious such as bicycle theft”

Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship

"The European arrest warrant is an important tool to catch criminals, but Member States should ensure that it is used correctly ... not issued mechanically for crimes that are not very serious such as bicycle theft"

52 The letter and response are reproduced in full in Appendix 8.
54 See Section C above.
mechanically for crimes that are not very serious such as bicycle theft.\textsuperscript{55} Unless action is taken to amend the Framework Decision on all four points, many more EU citizens will suffer injustice, and more resources will be needlessly wasted.

E. Fair Trials International's “five point plan” for the next two years

121. This report has shown that, across the EU, Member States are failing to protect basic fair trial rights and to comply with their obligations under the ECHR. The ECtHR is overloaded with cases, and many thousands of people whose rights are violated are deprived of any meaningful remedy due the difficulties of bringing a case before the ECtHR and the delays involved. Some countries have a particularly bad record of violating fair trial rights, but our research has identified barriers to a fair trial in every Member State.

122. Fair Trials International has identified five priorities for EU action over the next two years to continue the EU's vital work to raise justice standards to an acceptable level.

1) \textbf{Completion of the Roadmap}: The momentum generated towards improving defence rights must be maintained, to deliver strong new laws on the remaining three Roadmap rights: legal advice and communication, legal aid; and protections for vulnerable suspects.

2) \textbf{Effective implementation}: The laws already passed under the Roadmap (on interpreting and translation; and information for accused persons) must be fully implemented and enforced by all EU countries. This must be monitored effectively by the European Commission, with enforcement action against Member States where necessary.

3) \textbf{Pre-trial detention}: Reform of pre-trial detention in the EU is needed to put an end to its excessive and unjustified use in many Member States. The EU should also facilitate work to prevent unnecessary and unjustified trial delays.

4) \textbf{European Arrest Warrant}: Vital safeguards must be introduced into the EAW Framework Decision, to address the injustices that continue to be suffered under this system. Future judicial cooperation measures must also contain effective safeguards for human rights and against overuse.

5) \textbf{Audio-recording of police interviews}: This offers an efficient, cost-effective method of ensuring that fundamental rights are protected in police stations and that accurate records of interviews are available (particularly where interpreters are used). We recommend work at EU level towards an EU-wide system introducing this practice.

\textsuperscript{55} European arrest warrant fights cross-border crime, but EU Member States can improve how it is used, Commission report says, press release 10 April 2011, available at \url{http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/454&type=HTML}
1) Maintaining momentum on the Roadmap

123. The progress that has been made under the Roadmap since its adoption in 2009 represents important first steps in improving defence rights protection across the EU. Directives on the right to interpretation and translation and on the right to information in criminal proceedings will help ensure that nobody is denied the right to a fair trial because they do not understand the language of the country in which they are arrested or are not informed of their rights or of details of the charges and the case against them.

124. However, with three measures under the Roadmap still to be adopted, and a Detention Green Paper consultation to which no official response has yet been made, it is vital that complacency does not set in. We must not lose the momentum built up around the need to improve defence rights protection in the EU, but instead renew the commitment to delivering all the Roadmap measures before the Stockholm Programme expires in late 2014. A Directive on the right to access a lawyer and to communicate on arrest is currently under negotiation and we urge the Parliament and the Council to work together to ensure that a strong measure is passed which gives suspects access to legal representation at the earliest stages in criminal proceedings. We also look forward to working with the Commission over the coming months to produce strong proposals for the final two Roadmap measures, on the right to legal aid and on special safeguards for vulnerable suspects.

2) Effective implementation of the Roadmap’s laws

125. Full implementation of the Roadmap would be a huge step towards an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants. This will only become a reality, however, if the new measures are properly implemented into national law. A wide programme of training for judges, prosecutors, police and defence practitioners must also be introduced to ensure that the new laws are applied effectively in all Member States. The Commission has a vital role to play in monitoring implementation and – where necessary – taking enforcement action for systemic or serious failures of implementation.

126. Work must also be done to make information about the new laws available to the people they are meant to benefit - people arrested or accused of a criminal offence in the EU. If citizens are not aware of their rights then they will not know to use and enforce them and the new laws will make little difference in practice.

3) Pre-trial detention

127. There is substantial support for EU legislation to set minimum standards for the use of pre-trial detention in the EU and for regular and effective judicial review of decisions to remand in custody. The European Parliament has provided a clear mandate for reform by calling on the Commission and Council to make a legislative proposal. The responses of international and non-governmental organisations to the Green Paper overwhelmingly support FTI’s recommendations for action to address excessive and arbitrary pre-trial detention in the EU. Many Member States have also acknowledged that there are problems with pre-trial detention in the EU.
128. Varying standards in pre-trial detention across Europe not only weaken trust between Member States; they also undermine the EU’s justice and home affairs policy mandate. Poor standards of protection for basic rights across the EU erode the trust necessary for mutual recognition and undermine confidence in existing and forthcoming mutual recognition measures.

129. We are concerned about the lack of action since the launch of the consultation and publication of the Green Paper over a year ago and urge the Commission to announce its intended response to address this widely recognised and urgent problem, which represents a clear violation of the presumption of innocence and of Member States’ obligations under the ECHR.

130. Our country reports (at Appendix 3) present a sobering picture of continuing violations by many Member States of the right to be tried within a reasonable time. Work is also needed to establish why some countries regularly permit defendants to spend excessively long periods awaiting trial in custody and what role the EU could play in establishing constraints, including potentially setting a reasonable EU-wide limit.

131. The Commission should undertake research to work out why some Member States can deal with complex cross-border cases in a matter of months while others take years. A programme of information-sharing and exchange of best practice between Member States’ judicial and prosecutorial authorities could then be implemented, taking into account the Commission’s research, with the aim of ensuring that every defendant’s right to a trial within a reasonable time is upheld.

132. This sharing of best practice should have the aim of ensuring that nobody who has not been found guilty of any offence is imprisoned for more than a year, unless there are exceptional prevailing circumstances (for example, the highly complex nature of the case or, in some cases, delays caused by defendants). A 12 month limit, containing the requisite flexibility, is an ideal for which all democratic societies should strive.

4) EAW reform

133. The Roadmap measures, once implemented, will help to improve the fairness of extradition proceedings and FTI is delighted that the new laws apply expressly to EAW cases. The Directive on the right to interpretation and translation applies to EAW cases, and an EAW-tailored Letter of Rights is included in the Directive on the right to information in criminal proceedings. A right to dual legal representation in EAW cases.

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“Defence rights organisations like Fair Trials International have pinpointed failings in the arrest warrant. Problems with it being used for minor offences, the lack of legal representation, long pre-trial detention periods, and bad detention conditions are all cited as reason.”

Baroness Sarah Ludford MEP
was guaranteed by the Commission’s proposal of a draft Directive to access a lawyer and to communicate on arrest,58 and we urge the European Parliament and Council to ensure that this vital protection is included in the final law.

134. However, the Roadmap does not offer a total answer to concerns raised about the impact of the EAW on fundamental rights, in particular in relation to pre-trial detention and prison conditions in the issuing state. It will also not assist those whose extradition has been properly refused by an executing state but who remain unable to travel due to the risk of re-arrest under the same EAW in another Member State.

135. Change is needed to incorporate four vital safeguards into the EAW system: a proportionality test in the issuing and executing State; a provision allowing executing States alerted to a real risk of rights infringements to seek further information and guarantees (and refuse surrender if not provided); a requirement on issuing States to remove EAWs where surrender has been refused by another State; and a provision allowing for deferred surrender where a case is not trial-ready. Unless action is taken on all of these fronts, hundreds of people each year will continue to suffer injustice as a result of Europe’s fast-track extradition system. The Commission and Council should also do more to collect good, reliable EAW data from Member States, without which it is very difficult to monitor how effectively and efficiently it is working.

5) Audio and video recording of police interviews

136. Audio and video recording of police interviews is a valuable tool, both for protecting basic fair trial rights and ensuring proper implementation of the new Roadmap directives. It provides a good way of checking that adequate standards are in place and provides an impartial and accurate record of the interview. This is vital in assessing any subsequent complaints of unfairness. It also offers a check against police brutality (or false allegations thereof by suspects) and increases the transparency of the police interviewing process. This in turn strengthens the confidence of citizens in the conduct of the police by preserving independent evidence of their actions, should it be needed.

137. Recording is particularly useful in cases involving interpreters. It reduces the risk of unfairness where suspects have not understood the interpreter or mistakes are made. If recordings are preserved throughout the proceedings then any subsequent doubts about content or accuracy can be easily clarified. Police also benefit from recording of interviews, as false accusations of threats or brutality can be easily disproved.

138. In the vast majority of Member States, police interviews with suspects are only recorded in writing, although audio recording does occur in some countries (but usually only where serious offences or minors are involved). A few Member States do have

58 Article 11 of the Commission proposal.
strong provisions in their laws relating to the recording of interviews in police stations and the benefits have been widely acknowledged, including by the police.

139. FTI suggests that the Commission carry out a review of best practice in this area in order to explore the possibility of extending to all EU countries this cost-effective method of ensuring that defence rights are adequately protected in police stations.

F. Conclusion

140. This report presents overwhelming evidence that basic fair trial rights are being violated in police stations, court rooms and prisons across Europe. In a European Union founded on commitment to the rule of law and respect for basic human rights, these abuses cannot be allowed to continue.

141. Considerable advances have been made in protecting defence rights across the EU since 2009, after years of disappointing deadlock. The adoption of the Roadmap and the new laws passed under it show the enormous amount the EU can achieve when the Parliament, Commission and Member States work together towards a common goal, particularly one founded on fundamental principles of fairness and justice.

142. However, despite the economic crisis now affecting many EU countries, this is no time for complacency or a change in direction. The momentum must not be lost: there is still much work to be done under the Roadmap and to increase the use of alternatives to pre-trial detention.

143. The Roadmap alone will not deliver fair and effective criminal justice systems across the EU. Effective implementation (backed up with the threat of enforcement action where this does not happen) is another key component of effective fair trial rights across Europe.

144. This will require continued commitment to better protection of defence rights from both the Member States and Commission. The Court of Justice of the EU will also play a key role in the years ahead to ensure the effective and consistent implementation of directives. The EU has a crucial role to play in raising standards of justice. Failure to do so will undermine Europe’s standing as an international beacon for human rights.
APPENDIX 1: Fair Trials International’s new interactive map

Fair Trials International’s innovative new web-based map provides an overview of how well (or badly) each EU Member State is respecting the right to liberty and to a fair trial in criminal cases. It provides a sobering picture of the practical barriers to a fair trial in each Member State and will help policy makers and legislators to identify the areas for reform and the best methods for improving fair trial standards in the EU.

You can click on any of the EU’s 27 member countries for:

- Information on that country’s record over the last five years in the European Court of Human Rights on fair trial rights and pre-trial detention in the context of criminal cases;
- Human stories from Fair Trials International’s clients in that country;
- Criticisms by international organisations, the local press and domestic NGOs;
- Practical guidance on the country’s criminal procedure and local sources of support; and
- Quotes by legal practitioners in each country who were asked how well they think fair trial rights are being respected in practice.

A sample snapshot of the map is set out on the following page. The full map is available on our website at www.fairtrials.net/justice-in-Europe.
Europe - a long way from being an area of justice, freedom and security

United Kingdom
The UK's extradition system has been heavily criticised.
Relatively few violations in the European Court of Human Rights, but one third of those relate to the right to a fair trial.
Pre-trial detention periods are short up to 6 months, but conditions have been criticised.

Bulgaria
In the last five years, Bulgaria has been held in violation of the right to liberty or a fair trial by the European Court of Human Rights in over 8% cases, mostly because of the excessive length of criminal proceedings.
The Council of Europe and the US State Department have reported judicial corruption and lack of independence.

Netherlands
Concerns about restrictions on accessing a lawyer in police custody.
Defence lawyer comment: "You cannot discuss the case with the suspect in private. The police remain in the room so that you cannot speak freely."

Malta
James Milton (not his real name) was just 16 when he was arrested in Malta.
James was questioned for several hours without a lawyer present.
His mother was refused entry to the interview room despite her frequent requests to see her son. During the interrogation, James was not even given a glass of water.

His passport was taken from him and for more than a year he was unable to visit family and friends in the UK. He was eventually cleared of any wrongdoing at trial.

With the support of the law firm Clifford Chance, we have reviewed European Court of Human Rights findings against every EU country on fair trial rights in criminal cases and pre-trial detention between April 2007 and June 2012.

CLIFFORD CHANCE

Sweden
Sweden has a good record of upholding the rights to liberty and a fair trial in criminal proceedings.
Concerns have been raised about the restrictive conditions in pre-trial detention.
Defence lawyer comment: "Sweden has no legal limit for pre-trial detention. This is a heavy burden, especially if the suspect is held in isolation, which is very common."

Greece
More European Court of Human Rights violations of fair trial rights than any other EU country, nearly all relating to trial delays.
Excessive pre-trial detention, often in horrendous conditions.
Andrew Symeou was just 20 when he was shipped off to a year-long nightmare, in one of Europe's worst jails.

Italy
Major delays in bringing defendants to trial with lengthy periods of pre-trial detention common.
UN Working Group on Arbitrary Detention: "The framework should, as a matter of priority, put in place legislative and other measures to decrease the duration of criminal trials with a view to ensuring better protection of the right to be tried without delay."

This is just a snapshot. A full, interactive map containing more information on defence rights in all of the EU’s 27 member countries is available at www.fairtrials.net/justice-in-Europe.

Data collected from local defence lawyers and NGOs, international courts and international organisations.
Advancing defence rights in the EU

An overview of responses to an EU-wide survey of defence practitioners on the barriers to a fair trial in their jurisdictions

October 2012

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EuroMoS and its EU-wide survey of defence lawyers

EuroMoS is a non-governmental human rights foundation, which was established at The Hague, the Netherlands in August, 2003, to establish whether fundamental human rights are safeguarded when individuals are to be extradited or surrendered to another state, either to face criminal proceedings or to serve a sentence already imposed. Aside from its empirical research, EuroMoS aims to build up a European monitoring system that can record and report on violations of fundamental rights in the administration of EU criminal justice. In November 2011, EuroMoS and Fair Trials International launched a joint project, funded by the European Commission: ‘Advancing EU Defence Rights’.

In collaboration with Fair Trials International, EuroMoS conducted a survey of defence practitioners from across the EU, including many members of Fair Trials International’s Legal Experts Advisory Panel and European Young Defenders Network. The EuroMoS project team was led by Jozef Rammelt, of Keizer Advocaten Amsterdam, with assistance being provided by Antoinette de Graaf and Frederique Lips. They worked in cooperation with a research team from the University of Leiden, led by Bas Leeuw, assistant professor at the Institute for Criminal Law & Criminology assisted by Jos van der Klein and Arnout Vogel. The survey sought information on the barriers to a fair trial, in practice, in the EU’s 27 member states, with a special focus on the early investigative stage.

Defence lawyers have important, first-hand experience of how justice systems in the EU operate in practice. 113 defence practitioners, drawn from every EU jurisdiction, have completed a survey on the extent to which basic defence rights are being respected in practice within their jurisdiction, producing an average of four questionnaires per jurisdiction. The survey consisted of a series of questions about defence rights and practitioners were not asked to set out legal rules, but to concentrate on what happens in practice in their countries.

The information gathered by the research team offers a new and unique angle to an area traditionally dominated by judges, prosecutors and politicians. It suggests that violations of fair trial rights are a real problem in many EU countries. This document highlights responses provided by lawyers on many key elements of the right to a fair trial, providing a selection of quotations from lawyers in almost every EU member state. The full EuroMoS report can be found on the EuroMoS website, along with the questionnaire submitted to survey participants and a spreadsheet containing their (anonymised) responses.

Areas covered by the questionnaire

Respondents were asked to describe what they perceived as the main barriers to a fair trial in their jurisdiction. They were not asked to say what the law or procedure required, but what happens in practice according to their own experience. Specific questions were asked on the following topics:

- Interpreting and translation including questions of quality, independence, tape-recording, and any charges levied
- Information on rights (including which rights are explained, when and how), and information on the criminal charge and the reason for detention
- Access to the case file including translations where needed; charges (if any) for this
- The right to silence/privilege against self-incrimination
- Tape- or video-recording of police questioning
- Access to lawyer (when, how, confidentiality, extent of role permitted, waiver)
• Legal aid and duty/emergency lawyer scheme
• Ability to contact consular staff and third parties if arrested/in custody
• Pre-charge and pre-trial detention and its review by court
• Conditions in police custody/pre-trial detention
• Vulnerable suspects and any safeguards for their protection
• Nature of court hearings and whether these allow effective defence

Highlights of survey results – right by right

1 The right to interpretation and translation

The results suggest that the vast majority of Member States’ laws provide an interpreter where one is required, both pre-trial and during court proceedings. However, they reported numerous problems with the right to interpretation and translation in practice. There are concerns about the quality and independence of interpreters. Many Member States do not provide adequate translations of essential documents. Recurring problems with interpretation and translation include:

• The quality of the services provided by interpreters varies considerably, a problem which is attributed to a lack of adequate remuneration and training;
• Effective monitoring of interpretation and translation standards is lacking in a number of Member States;
• Audio and video recording is rarely used during the police custody stage, making it difficult to check the accuracy of interpretation;
• In a few Member States, police officers act as interpreters and the standard in these cases is particularly low;
• Interpreters in some countries are not fully independent;
• In the vast majority of Member States the suspect has the right to receive a translation of any decision taken concerning the deprivation of their liberty, but in practice this rule is applied inconsistently and in many cases not at all; and
• The case file is rarely translated for those who do not understand the language in which it is written.

Spain: “I have NEVER seen a judicial document translated and handed to a subject.”

Sweden: “I am disturbed by the fact that we don’t provide translations during investigations. This puts the defendant at a disadvantage and provides no equality of arms.”

2 The right to information in criminal proceedings

The results suggest that all Member States make some provision to inform suspects of their rights. However, in practice there are numerous shortcomings regarding the practical communication of information in a way that enables suspects to understand and exercise their rights. Recurring problems include:

• In a number of Member States, there are concerns that police will defer a formal arrest in order to obtain statements without informing suspects of their rights;
• In some Member States, information about rights is not available until 24 hours after arrest and detention;
• In some Member States subjects are only told about their rights orally;
• Where a letter of rights is provided, there is rarely any effort made to check that the subject has understood its contents, particularly if they are a non-national;
• Information about the charge is not provided promptly in many cases, sometimes not for up to 72 hours;
• Most Member States provide suspects with copies of decisions to remand in custody. However, limited reasons are often given for these decisions;
• Suspects often have little or no access to the case file during the police custody stage. Where access is available, it is provided late in proceedings and may remain restricted; and
• Access to the case file is sometimes subject to a charge and the file is rarely translated free of charge.

United Kingdom: “The process in relation to disclosure is one of the most common barriers to a fair trial. Prosecution lawyers regularly refuse to disclose material which could have assisted the defence. As a result, defence lawyers can miss key pieces of evidence which could have turned the case in their client’s favour.”

Ireland: “There is no sufficient legal obligation on the police to provide information about the charges to the subject or his lawyer. This lacuna can be exploited, and is, by some policemen.”

3 The right to access a lawyer

The results suggest that while all Member States grant access to a lawyer at some point during criminal proceedings, there is wide disparity between the times at which access is provided. In some Member States police intentionally delay access to legal advice so that they can question suspects without a lawyer present. In others, lawyers are not permitted to advise their clients until after police interviews. By contrast, most Member States allow lawyers to assist and advise their clients at pre-trial hearings. Confidentiality between suspects and their lawyers is generally respected. Recurring problems include:

• In some Member States, police will assume that suspects have waived the right to a lawyer if they do not request access immediately or of their own accord;
• There is often a lack of information provided by police about the right to a lawyer, particularly during early stages of criminal proceedings;
• In some Member States police conduct preliminary questioning without a lawyer present;
• Police often prevent or delay access to a lawyer;
• In a few Member States lawyers are barred from attending and/or participating in police interviews; and
• In a majority of Member States lawyers are unable to inspect detention conditions during the pre-trial period.

Malta: “Defence lawyers are granted 1 hour to consult with their client before the interrogation by the police. This is done without knowing what the investigation is about, without knowing what evidence is in hand by the police. Advice is to be given in a vacuum!”

Luxembourg: “Too many subjects are being convinced by the police that they do not need a lawyer at the custody stage, that it would only cost time and money, and that the lawyer cannot assist during the process anyway.”

Hungary: “It happens quite often that the police will interview a suspect without a lawyer, convincing him that he does not need one if he is innocent.”
4 The right to communicate on arrest

The results suggest that most Member States allow suspects to communicate with a third party upon arrest. However, in a number of Member States this is restricted to a lawyer, relative or employer. In principle, most Member States allow foreign suspects to communicate with consular officials. In practice however, this can be unnecessarily difficult because suspects are not given contact details, or informed expressly of the right to consular help. Recurring problems include:

- A number of Member States have restrictions on which third parties may be contacted by suspects;
- Police sometimes do not inform suspects that they have the right to contact a consular official;
- In some Member States, police do not provide non-national suspects with contact details for consular officials;
- There are often delays in allowing a suspect to contact a third party; and
- In a few Member States suspects (especially those suspected of serious offences) have no right to contact a third party on arrest.

5 The right to legal aid

The results suggest that the vast majority of Member States have some form of emergency or “duty” lawyer scheme to ensure that people in custody have access to legal advice if they cannot afford it. However, lawyers reported numerous problems with these schemes in practice, including the following:

- Duty lawyers are often poorly paid or have to wait a long time for payment to be processed. In some Member States legal aid lawyers are provided with a flat rate regardless of the amount of work done or the complexity of the case;
- The quality of duty lawyers in the majority of Member States can be low, meaning that the access to effective legal advice is limited;
- In a number of Member States, legal aid cannot be granted until suspects are brought before a judge, up to 48 hours after arrest, meaning that they may be without legal representation during the crucial time of initial police questioning;
- In some Member States, while legal aid is available during criminal proceedings, defendants are required to repay their legal costs if found guilty;
- In a few Member States, legal aid practitioners are appointed and funded by the police, leading to concerns that their advice may be prejudiced as they are unlikely to be instructed if they challenge the investigation; and
- The extent to which the relevant competent authority helps suspects apply for legal aid if they are unable to pay for a lawyer varies considerably. In some Member States the application process is very bureaucratic, which is particularly problematic for non-nationals who may not understand or have access to the documentation required.

United Kingdom: “Many individuals find themselves before the court with no prospect of receiving legal aid. They can find themselves convicted of offences which they did not commit, because they did not have proper legal representation. Without proper legal aid and access to lawyers, the right to a fair trial cannot be ensured.”

Finland: “Lawyers are badly paid for legal aid, which means that most poor people have a very poor defence.”

Hungary: “Emergency lawyer access does not always result in an effective defence. The actual presence of the lawyer is not required during police custody and interrogations can be held at times as unreasonable as 3am. Sometimes the lawyer is notified by phone 15 minutes before the interrogation.”
Slovenia: “It is possible to go for quite a long period without a lawyer if you do not have any money.”

6 Special provision for vulnerable suspects

The results suggest that most Member States’ systems contain some safeguards specifically applicable to vulnerable suspects. However, their application varies from case to case, and suspects are often only considered vulnerable if they are minors or have an obvious and serious medical condition. Provision for vulnerable suspects is in most countries better at court hearings than in pre-trial detention or in the police station. Recurring problems include these:

- The treatment of vulnerable suspects varies from case to case and from state to state;
- Even where safeguards exist they are not always applied in practice;
- Police often lack awareness to identify and training to deal with vulnerabilities that are not immediately physically obvious, for example addiction and mental health problems;
- Police are often disrespectful towards vulnerable suspects;
- The definition of ‘vulnerable’ varies widely: drug addicts, ethnic minorities and non-nationals in particular are often not covered by existing safeguards; and
- Treatment of suspects with mental disabilities, mental health problems and addictions is particularly poor.

Bulgaria: “Illiterates and addicts are often humiliated because of their issues. There are no special conditions for the handicapped or pregnant females. Non-nationals are not given access to an interpreter when needed. Minors are not treated any better than fully-aged subjects. The police do not care. A pregnant woman was once made to wait on a chair for 24 hours before her interrogation began.”

Greece: “Most of the time, there is no special treatment for vulnerable subjects. As there is no space, they are detained and stay in the same cells as the others.”

Hungary: “A minor once killed himself in police custody with his own shoe lace. Non-nationals often cannot fully understand their situation. Addicts suffer in custody. Deprivation is always used as a means of coercion”.

Italy: “A pregnant woman was held for 5 days in rooms with other people (one of them was HIV positive).”

7 Pre-trial detention

Most Member States limit the maximum time a suspect can spend in pre-trial detention, particularly before being formally charged. In practice, however, time periods vary across the EU with some Member States keeping suspects in police custody for far longer than others. Police brutality and coercion are still a significant problem and prisoners and reports say prisoners are being held in small, overcrowded cells, often in unsanitary conditions.

- Almost all Member States are less likely to grant bail to non-national defendants and non-nationals and non-residents regularly experience discrimination at pre-trial hearings;
- In a few Member States defendants are either not permitted to attend pre-trial hearings or are not allowed to make representations;
- In some Member States police exert undue pressure on suspects, for example by threatening prolonged detention or intimate searches in the absence of a confession, or by placing suspects in holding cells with violent or drug addicted inmates;
- Non-national defendants are often not provided with a translation of decisions to remand in custody, which makes an appeal against the decision much more difficult; and
• Many Member States have poor detention conditions at police stations, in particular, small cells with no natural air, a general lack of hygiene or too few toilets.

**Sweden:** “Non-nationals are kept in custody to prevent them from returning home. I believe these form a large portion of our ‘inmates’ in pre-trial custody. It often stands out as non-proportional to the crime that they are accused of. Some suspects spend a very long time in custody. Sweden has no real limit for pre-trial detention. This is a heavy burden, especially if the subject is isolated, which is very common.”

8 Other points of importance emerging from the survey

8.1 Excessively high conviction rates and lack of equality of arms

These are troubling features in some EU countries. For example, a Latvian lawyer reports that 97% of all criminal verdicts in Latvia are “guilty verdicts” and that the Chairman of the Supreme Court of Latvia has pointed out that this is a very good statistic that proves a high quality of work done by prosecutor’s office. A Hungarian lawyer comments: “In general I would say that the efficiency of the prosecution, which is above 90% - and if the suspect is in pre-trial detention, more than 95% - shows that equality of arms is not respected enough.”

**Belgium:** “Equality of arms exists on paper, but the prosecution has more means. The inquisitorial system means the investigation is secret to all parties but the prosecution. The whole preliminary investigation is led by an “investigating judge” or by the prosecution, but it is kept secret to the defence (and victims). In Bulgaria one of the main barriers to justice is “the impunity of judges.”

**Denmark:** “Courts and judges – generally speaking - feel their most important task is to protect the state and not to ensure that justice is done. There is a lack of respect for the principle of equality of arms.”

**Italy:** “Judgements are unbalanced. During the trial many judges intervene to prevent defence lawyers from cross examining the prosecution witness. The trial is often a charade.”

**Slovakia:** “Police officers, prosecutors and courts often ignore the main principles of criminal procedure and the suspect’s rights. Their decisions are often unfounded and without any logical basis. Often it is not possible to anticipate judicial decisions. Courts often ignore case law and evidence.”

8.2 Breach of presumption of innocence

Several lawyers have expressed concerns in this area.

**Luxembourg:** “The right of silence should especially and expressly be recognized by our law and the presumption of innocence be more efficiently applied and respected.”

**Latvia:** “Judges often openly express their attitude to the Defendant in public, before the judgment”.

**Finland:** “If the case is brought by Customs for the state, the starting point seems to be more like presumption of guilt than of innocence”.

**Spain:** “The main barriers to a fair trial are the absence of a real presumption of innocence and the breach of procedural safeguards.”
8.3 Police brutality during early investigative stage – and impunity for misconduct

The survey suggests this is a problem in many countries and one that lawyers identify as a major barrier to the fairness of criminal proceedings. Brutality or the use of psychological pressure has been reported as often taking place in the hours before the legal representative is allowed to be present.

**Bulgaria:** “Access to a lawyer is usually not provided during the first 24 hours after arrest, and is only available once charges have been brought. By that point the subject will have made written confessions which may become the legal ground for his accusation. Clients often complain of physical or psychological police brutality during the process of questioning.”

**Cyprus:** “Police sometimes exhibit brutal behaviour and cause psychological stress to suspects.”

**France:** “Inhumane treatment can occur in police custody before a lawyer is present.”

**Germany:** “Sometimes subjects are hit or put under pressure ("You will be in jail for a long time if you don’t speak with us").”

**Latvia:** “Quite often police orally encourage subjects NOT to use the assistance of a lawyer. They even offer certain deals as well as threaten subjects in this respect.”

**Greece:** “There are problems with police brutality. The subject is often forced to confess to a crime that he has never committed.”

**Italy:** “Inhumane treatment occurs very often in order to obtain a confession.”

**Poland:** “Suspects in police custody are left for over 20 hours with no food or drink. Cell conditions are terrible. Lawyers have no right to inspect the detention conditions.”

**Portugal:** “Sometimes police officers threaten or beat people, but this is becoming less common. More common is pressure for the subject to make an ‘off the record’ confession and not to exercise their right to access a lawyer.”

**Romania:** “Often the subjects claim that they have been brutalized mentally or physically. The police custody is overcrowded, the conditions are poor and in some cases the subjects are sent to state prison during police custody. The major problem I believe to be the ignorance about fundamental rights on the part of police officers.”

**The UK:** “Occasionally some officers resort to brutality or coercion, particularly at large gatherings of people during protest marches.”

8.4 Audio and video recording

The survey indicates this is not done except in a small number of countries, even for court proceedings, or for interrogations or evidence sessions where an interpreter’s services are used. It is not normal practice to record the way suspects have their rights, or the charges against them, explained to them. Lawyers have commented that it should be done.

“I think that everything should be audio- or video-taped – interrogations, court hearings – automatically.” (A Hungarian lawyer.)
A Greek lawyer commented: “Sometimes the police fabricate answers during questioning or change the content of the confession. As there is no audio recording, lawyers have no way of proving that this goes on.”

Conclusion

Defence lawyers have traditionally had little input into the formulation of policy at EU level for the protection of fundamental fair trial rights. This is a mistake and a missed opportunity: one which we hope this study will help to remedy. Lawyers have a unique insight into the practical steps needed to protect and safeguard basic fair trial rights.

The results of this survey provide concrete evidence that serious violations of fair trial rights are a reality in many EU countries. They also give valuable direction and guidance for EU policy makers as to what their priorities should be in terms of putting an end to these violations and ensuring that, where violations do occur, enforceable remedies are available to prevent miscarriages of justice.

Acknowledgment and thanks

Fair Trials International and EuroMoS are extremely grateful to all the lawyers who gave their valuable time to completing the lengthy questionnaire and supplying us with follow-up information to help deal with our questions as we completed our respective reports. To preserve their anonymity, we have not published their names in our reports, but their responses are summarised on a country-by-country basis in the full EuroMoS report and their comments can be viewed on a spreadsheet prepared by EuroMoS, containing all responses to each question posed by the survey questionnaire.
APPENDIX 3: A country-by-country review of fair trial rights violations

Set out below is a summary of the results of an EU-wide study conducted by Fair Trials International and international law firm Clifford Chance on the extent to which EU Member States are being found in violation of their fundamental rights obligations in the criminal justice context. For more detailed information, including a list of ECtHR cases and sources, go to our interactive web-based map at www.fairtrials.net/justice-in-Europe.

The following information is provided for each of the 27 Member States, covering the period from April 2007 to June 2012.

- The number of cases in which the ECtHR has held the relevant country to be in breach of Article 5 (liberty and security) of the ECHR in cases involving criminal charges or proceedings and relating to pre-charge, pre-trial, or pre-sentence detention. These do not include immigration related cases which are outside the scope of FTI’s work.

- The number of times that the ECtHR has held the relevant country to be in breach of Article 6 (fair trial) of the ECHR in cases involving criminal charges or proceedings.

- A summary of published information showing the extent to which the relevant Member State has been criticised for violating or failing properly to safeguard rights under Articles 5 and 6 of the ECHR in the context of criminal proceedings. Sources include domestic bodies, domestic and international NGOs, international organisations, and domestic and international media.

**AUSTRIA**

The Right to Liberty in Austria

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Austria was not held in violation of Article 5 in any decided cases.

NGO and other reports

The most common criticism made by domestic and international bodies was of racial discrimination within the pre-trial detention system. Problems with overcrowding are linked to disproportionate numbers of non-nationals being detained for excessively long periods of time. There is some concern that ethnic profiling and discrimination against non-nationals is posing a threat to the presumption of innocence. In particular, foreign nationals are reported to be subject to arbitrary arrest and assumptions by police officers of aggression and guilt.

A number of reports criticised procedural errors within the prison system, citing cases in which people have been detained for too long and on erroneous facts due to administrative mistakes.

The Right to a Fair Trial in Austria
Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Austria was held in violation of Article 6 in ten decided cases. All of the cases found a violation under Article 6 (1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

The general length of trial proceedings has been criticised. There are concerns that fees required by the courts for copies of case documents are restricting access to justice for those who cannot afford to pay. Reports indicate that interpretation services are not sufficiently available for non-German speakers and that access to a lawyer is sometimes subject to police discretion.

Racial discrimination by the police continues to cause problems at trials; reports indicate that the system is inefficient at disciplining officers and fails to secure prosecutions against them, despite compelling evidence. An article in the Austrian domestic media highlighted a violation of fair trial rights in a case where audio and visual evidence was withheld during a prosecution.

BELGIUM

The Right to Liberty in Belgium

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Belgium was held in violation of Article 5 in one decided case. This case found a violation of Article 5(3), the detained person’s right to trial within a reasonable time or to release pending trial.

NGO and other reports

Severe problems with prison overcrowding in Belgium were the most common cause for concern. Shared use of Tilburg prison in the Netherlands has helped, but there is still not enough space available to cope with demand. A number of reports raised concerns that overcrowding is causing a deterioration of detention conditions.

There were general indications that monitoring services for prisons are lacking, with calls for an independent body to take on this role. Electronic tagging has been suggested as an alternative to remand as a way to tackle prison overcrowding. Problems were also reported with pre-trial access to translation facilities.

The Right to a Fair Trial in Belgium

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Belgium was held in violation of Article 6 in eleven decided cases. Ten of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.
NGO and other reports

The most common criticism was of lengthy delays to the trial process, with some cases lasting for up to twenty years. This was linked to shortfalls in judicial and operational resources and an accumulated backlog of cases. There has been wide criticism of the lack of access to a lawyer. This situation has recently been partly remedied with the introduction of the Salduz Act, which provides for legal assistance within two hours of detention. However, a group of NGOs has criticised Belgium for its opposition to an EU-wide law guaranteeing suspects access to a lawyer on arrest. Problems have been reported with the legal aid system. The combined effect of poor, delayed remuneration and inadequate quality control has resulted in an ineffective system.

Police complaints procedures have been criticised, with reports expressing doubt about the independence of complaints committee members who are themselves members of the police. There has been criticism of judicial lenience towards officers. A UN report raised concerns that defendants under the age of 18 can be tried as adults in Belgium.

BULGARIA

The Right to Liberty in Bulgaria

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Bulgaria was held in violation of Article 5 in thirty-seven decided cases involving virtually all aspects of Article 5. In particular, twenty-eight of the cases found violations of Article 5(4), the right to challenge the lawfulness of detention and to have this decided speedily by the court. Sixteen of the cases found violations of Article 5(3), the detainee’s right to trial within a reasonable time or to release pending trial.

NGO and other reports

NGOs have reported that pre-trial detainees have very little access to their lawyers, family members and essential services including medical support. Concerns have been raised about police brutality during interviews. Reports suggest that people are illegally detained, subjected to physical violence and forced to go without food or medication. There are concerns about police corruption.

The US State Department raised concerns that the large backlog of outstanding investigations means that prosecutors often bring charges without sufficient evidence which judges have to return for additional investigation, further extending the trial process. The Human Rights Commissioner at the Council of Europe has raised serious concerns about the state of the juvenile justice system.

The Right to a Fair Trial in Bulgaria

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Bulgaria was held in violation of Article 6 in fifty-five decided cases. Almost all of the cases found a violation of Article 6(1), the right to a fair
public hearing within a reasonable time by an independent and impartial tribunal. Other cases relate to different elements of Article 6 and concern different circumstances.

**NGO and other reports**

Serious concerns have been raised by a number of bodies about the lack of independence within the judiciary, which has been described as inefficient, non-transparent and corrupt. There has also been criticism of illegal court fees and the inordinate length of proceedings.

The Bulgarian Helsinki Committee has suggested that the Bulgarian criminal justice system fails to address the racist nature of certain crimes by treating them as ordinary offences.

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**CYPRUS**

**The Right to Liberty in Cyprus**

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Cyprus was not held in violation of Article 5 in any decided cases.

**NGO and other reports**

Violations of Article 5 in Cyprus have all pertained to immigration and asylum cases. With regard to criminal matters, commentary by international organisations has generally been positive, noting that pre-trial detention is kept to a minimum and does not generally exceed 10 days. Reports indicate that a good system of bail exists in Cyprus.

**The Right to a Fair Trial in Cyprus**

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Cyprus was held in violation of Article 6 in three decided cases. All of the cases found a violation of Article 6 (1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

**NGO reports and media coverage**

There has been some criticism of the length of trial proceedings in Cyprus. A number of reports raised concerns about police brutality during arrest, questioning and detention. These cited evidence that individuals are subjected to ill treatment with a view to obtaining confessions through coercion, a practice which violates the right against self-incrimination.

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**CZECH REPUBLIC**

**The Right to Liberty in the Czech Republic**

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, the Czech Republic was held in violation of Article 5 in
six decided cases. Four of the cases found a violation of Article 5(4), the right to challenge the lawfulness of detention and to have this decided speedily by a court.

**NGO and other reports**

There has been widespread criticism of unlawful and excessively long pre-trial detention. Fair Trials International has reported that overcrowding is a major problem in the Czech Republic, with prisons operating at 113% capacity in 2011. This has a severe effect on conditions. Particular concerns have been raised regarding the detention of juveniles, following reports that they are frequently detained in unacceptably poor conditions without proper segregation. Alternatives to deprivation of liberty are not sufficiently used.

Concerns have also been raised about the lack of access to a lawyer or to information about rights prior to police questioning. Domestic and international NGOs have highlighted allegations of discriminatory treatment by police officers against both juveniles and members of the Roma community.

**The Right to a Fair Trial in the Czech Republic**

**Violation findings by the ECtHR of Article 6 (criminal cases only)**

Between April 2007 and June 2012, the Czech Republic was held in violation of Article 6 in four decided cases. All of the cases found violations of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

**NGO and other reports**

Several reports from both NGOs and Czech domestic media have called attention to cases where the right to a fair trial has been violated due to lengthy delays in bringing defendants to trial.

Reports have also identified issues regarding procedural deficiencies and judicial misconduct. In particular, concerns have been raised about high levels of political interference in sensitive public corruption cases.

**DENMARK**

**The Right to Liberty in Denmark**

**Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)**

Between April 2007 and June 2012, Denmark was not held in violation of Article 5 in any decided cases.

**NGO and other reports**

The most common criticism was raised in relation to Danish legislation which enables authorities to detain individuals for up to 12 hours without the need for them to be suspected of, or charged with, any offence. There was widespread coverage of preventative arrests during the Copenhagen Climate Summit in 2009, during which over 900 people were
detained in freezing temperatures with no access to vital amenities. Concerns have also been raised in relation to the use of solitary confinement during pre-trial detention.

There are reports that complaints against the police are not sufficiently handled by the relevant authorities. These include cases of firearm incidents and deaths of prisoners during police custody.

**The Right to a Fair Trial in Denmark**

**Violation findings by the ECtHR of Article 6 (criminal cases only)**

Between April 2007 and June 2012, Denmark was held in violation of Article 6 in two decided cases. Both of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

**NGO and other reports**

A number of reports have highlighted problems with the right to prepare a defence, noting that access to case files is often restricted, especially in terrorism cases. Concerns have also been raised about the lowering of the age of criminal responsibility in Denmark to 14. The domestic media have reported that adequate safeguards have not been imposed to ensure that minors receive a fair trial.

A provision of the Danish Criminal Code which allows for certain prisoners to be given indeterminate prison sentences has been criticised. Reports have also raised concerns about the fact that there is no requirement for police officers to have identification on display when carrying out public duties, making it difficult to file a complaint against a specific officer.

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**ESTONIA**

**The Right to Liberty in Estonia**

**Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)**

Between April 2007 and June 2012, Estonia was held in violation of article 5 in three decided cases.

**NGO and other reports**

A number of reports raised concerns that conditions in pre-trial detention in Estonia are of an extremely low standard. Prisons have been criticised for their lack of space and ventilation, with detainees being held inside cells 24 hours a day. Organisations also discussed the lack of provision for vulnerable groups, including women and the mentally disabled. The lack of segregation between pre-trial detainees and sentenced prisoners was also criticised.

There are concerns that detainees are denied access to documents necessary to understand their rights and contest their arrest. Reports have also indicated that defendants and their lawyers are not present at hearings when evidence is submitted to enable the court to decide on bail, meaning that decisions to continue pre-trial detention can be almost
The Right to a Fair Trial in Estonia

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Estonia was held in violation of Article 6 in five decided cases. Four of the cases found a violation under Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

There are concerns about legal aid provision in Estonia, with reports stating that the application system is flawed and that the low rates paid to lawyers result in low quality legal advice. The excessive length of court proceedings has also been criticised.

FINLAND

The Right to Liberty in Finland

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Finland was not held in violation of Article 5 in any decided cases.

NGO and other reports

The main criticism raised related to Finland’s alleged complicity in CIA renditions and the concealment of secret detention facilities. There were concerns that the Finnish government has failed to conduct investigations into these matters, particularly in relation to non-disclosure of rendition data.

While the length of pre-trial detention in Finland is fairly short, there are concerns that release pending trial is very rarely granted.

The Right to a Fair Trial in Finland

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Finland was held in violation of Article 6 in eight decided cases. All of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. Two of the cases found a violation of Article 6(3)(d), the right to examine prosecution witnesses.

NGO and other reports

There are concerns that suspects are not sufficiently informed of their rights during criminal proceedings. Authorities have been criticised for not doing enough to provide access to legal advice and representation during the early trial stages. There are indications that lawyers are reluctant to participate in initial proceedings and that suspects are pressured to waive their right to legal representation. The absence of procedures guaranteeing lawyer competence
has also been criticised; there is no requirement that defence lawyers be trained in criminal law.

Reports have indicated that trials *in absentia* are common in Finland, and that these can be conducted without the permission of the accused.

**FRANCE**

The Right to Liberty in France

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, France was held in violation of Article 5 in ten decided cases. Four of the cases found a violation of Article 5(1), the right not to be deprived of liberty. Seven of the cases found a violation of Article 5(3), the detainee’s right to trial within a reasonable time or to release pending trial.

NGO and other reports

French domestic media have highlighted a disturbingly high level of prison suicides in France. Two common criticisms of the French system were of lengthy pre-trial detention and overcrowded prison conditions. Both of these issues are related to increasing abuse of pre-emptive terrorism measures, which have caused a disproportionately high volume of suspects to be detained on minimal evidence.

A Fair Trials International report highlights the fact that French law allows considerations of “ordre public” (the concept of “offence to public opinion”) to be taken into account in decisions imposing pre-trial detention, which may contravene Article 5. Several reports have expressed concerns that prisoners are subjected to physical abuse by officers who are afforded unregulated powers and are often granted immunity. This is highlighted particularly in the case of foreign nationals. A UN report expressed concern over special surveillance of people in police custody.

The Right to a Fair Trial in France

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, France was held in violation of Article 6 in four decided cases. Three of the cases found a violation of Article 6 (1) of the right to a fair public hearing within a reasonable time.

NGO and other reports

International organisations and NGOs have identified problems with delays in bringing cases to trial. These reports also noted a significant rise in the length of pre-trial detention over recent years. Concerns were also raised regarding barriers to accessing a lawyer. Access can be severely delayed and time restrictions are applied to meetings, interfering with the right to have adequate time and facilities to prepare a defence. A group of NGOs has criticised France for its opposition to an EU-wide law guaranteeing suspects access to a
lawyer on arrest.

A Human Rights Watch report highlighted the fact that even after recent reform proposals had taken effect, French procedural rules would continue to severely restrict the role of lawyers during police questioning.

GERMANY

The Right to Liberty in Germany

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Germany was held in violation of Article 5 in two decided cases.

NGO and other reports

Some NGOs have criticised detention conditions in Germany. A Fair Trials International report highlighted concerns that pre-trial detention is often used as a measure to motivate detainees to confess and speed up the investigation process.

The involvement of the authorities in the death of Mr Oury Jalloh, a Sierra Leonian who burned to death while tied up in a police cell, has been covered extensively both by NGOs and the media. This case led to reports of possible racism within the German prison and police systems. NGOs have also expressed concern about Germany’s involvement in CIA renditions and secret detentions.

The Right to a Fair Trial in Germany

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Germany was held in violation of Article 6 in four decided cases. All of the cases found violations of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

There has been criticism of the pressure placed on suspects by the police in Germany to negotiate a plea bargain, which can violate the presumption of innocence. Several reports have called for the establishment of an independent police commission to investigate misconduct, especially inappropriate use of force against citizens and racism within the police.

There has been sustained criticism of the practice of handing over individuals to foreign jurisdictions when the likelihood of their receiving a fair trial is contested or there is a possibility of torture.
GREECE

The Right to Liberty in Greece

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Greece was held in violation of Article 5 in fifteen decided cases. Eight of the cases found a violation of Article 5(1), the right not to be deprived of liberty. Nine of the cases found a violation of Article 5 (4), the right to challenge the lawfulness of detention and have this decided speedily by a court.

NGO and other reports

There are concerns about lengthy pre-trial detention in Greece. Reports have criticised the over-use of pre-trial detention. 30% of those incarcerated are pre-trial detainees, which has contributed to problems with prison overcrowding. There are also shortcomings in the procedure for challenging the lawfulness of detention, which has been described as a non-public and non-adversarial process. Application of the right to notify a third party of detention has been criticised as inconsistent and dependent on financial means.

A Fair Trials International report raised concerns that interpreters and legal advice are often not available during pre-trial detention. There were numerous allegations of ill-treatment and coercion of detainees by police officers, and reported evidence that these incidents are not adequately investigated by the authorities.

The Right to a Fair Trial in Greece

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Greece was held in violation of Article 6 in ninety-three decided cases. Eighty-four of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. Seven of the cases found a violation of Article 6(2), the right to be presumed innocent until proven guilty

NGO and other reports

Reports by domestic and international organisations raised a wide range of serious concerns about the state of the judicial system in Greece. The area of greatest concern related to chronic delays in the length of criminal proceedings; there have been proposals to address this issue via a reform bill. A number of reports drew attention to problems with judicial independence, raising concerns that judges are subject to corruption and racial prejudice. Access to legal representation is poor and is dependent on financial means.

A report by the US Department of State criticised expedited proceedings for minor criminal offences, which make it difficult for individuals to prepare a defence within a short time.
The Right to Liberty in Hungary

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Hungary was held in violation of Article 5 in two decided cases.

NGO and other reports

There is widespread criticism of pre-trial detention conditions in Hungary, which are often worse than those for convicted prisoners. There are also major problems with overcrowding.

A number of organisations raised concerns about the difficulty of accessing a lawyer during pre-trial detention. Reports highlighted concerns about the effect of recent legislation which prevents access to counsel during the first 48 hours of arrest. The Open Society Justice Initiative has also criticised changes in legislation which allows suspects in ‘priority’ cases to be detained for 5 days before being brought before a judge. Where access to a lawyer is granted, assistance is restricted due to further problems with prison overcrowding. There are concerns that conditions in pre-trial detention are poor. Racial discrimination appears to be a widespread problem, particularly against members of the Roma community.

A US State Department Report raised concerns about juvenile detention in Hungary. This criticised the fact that minors are detained on suspicion of having committed minor offences as there are no alternative measures available. There have been some reports about police brutality.

The Right to a Fair Trial in Hungary

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Hungary was held in violation of Article 6 in seven decided cases. All of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

A number of reports raised concerns about lengthy delays to the trial process in Hungary. These particularly called into question the extent and legitimacy of arrests following the 2006 riots. Racial discrimination has been reported at every stage of the judicial system and there are allegations that judges hand down disproportionate judgements to Roma people. International organisations criticised recent changes to legislation which are seen to enable this discrimination and threaten the right to a fair public trial.

A number of reports expressed concern about the independence of the judiciary, warning that new laws leave open the possibility for political intervention.
The Right to Liberty in Ireland

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Ireland was not held in violation of Article 5 in any decided cases.

NGO and other reports

Several domestic and international NGOs have expressed concern about the extension of the allowed period of pre-trial detention for terrorism cases to 7 days without charge in the Criminal Justice Act (CJA) 2007. The conditions and overcrowding of pre-trial prisons have been widely criticised, with calls for reductions in the number of people who are on remand in custody and for segregation between convicted and remand prisoners.

The Irish Human Rights Commission criticised the lack of access to legal advice during pre-trial detention. A UN report expressed a general concern about the proportionality of pre-trial detention for terrorists suspects, and highlighted the fact that there is no protected right to a lawyer during police custody in Ireland.

The Right to a Fair Trial in Ireland

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Ireland was held in violation of Article 6 in four decided cases. All of the cases found a violation under Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

There are concerns that access to a lawyer during interrogation at Garda stations is not prescribed by law. A group of NGOs has criticised Ireland for its opposition to an EU-wide law guaranteeing suspects access to a lawyer. Reports have also criticised excessive lengths of trial proceedings. There are concerns that some policies of the Irish Government will have a detrimental impact on the presumption of innocence, including preconditions to bail in the Criminal Justice Act 2007 and the practice of drawing adverse inferences from silence.

The Irish Council for Civil Liberties has criticised proposals to allow Ireland’s Special Criminal Court to attempt to convict organised crime suspects without a jury as breaching the legal certainty principle in Article 6. New amendments to the rules on double jeopardy were also widely criticised.

The Irish Human Rights Commission highlighted the possible implications which proposed changes to the LSRA (Legal Services Regulation Authority) may have, warning against a blurring of the separation between the government and an independent legal profession.
ITALY

The Right to Liberty in Italy

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Italy has been held in violation of Article 5 ECHR in four decided cases. Three of the cases found violations of Article 5(1), the right not to be deprived of liberty save in specific circumstances.

NGO and other reports

There are concerns about the excessive length and over use of pre-trial detention. Several organisations have criticised the indefensible delays in progressing trials with release pending trial very rarely granted. Fair Trials International has reported that defendants are not able to take part in decisions to order detention which are not made in public.

The Italian government has also faced major criticism about provisions which make illegal entry and stay a criminal offence in Italy.

The right to a Fair Trial in Italy

Violation findings by the ECtHR (criminal cases only)

Between April 2007 and June 2012, Italy has been held in violation of Article 6 ECHR in fifteen decided cases. All of the cases found violations of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports

The major and continuing criticism of the Italian legal system is that trials take an unaccountably long time. The Report of the Working Group on Arbitrary Detention states that 'the Government should, as a matter of priority, put in place legislative and other measures to decrease the duration of criminal trials with a view to ensuring better protection of the right to be tried without delay'. This sentiment is echoed in numerous NGO reports. The absence of effective limits on the length of pre-trial investigations, the large number of minor offences covered by Italian law, unclear and contradictory legal provisions, insufficient resources, including an inadequate number of judges, and strikes by judges and lawyers have all been raised as key factors in accounting for the current delays.

The US State Department highlighted the police practice of engaging detained persons in 'informal chats' before making a formal arrest. This practice essentially denies suspects the right of consulting a lawyer as this right may only be invoked at the time of arrest.

LATVIA

The Right to Liberty in Latvia

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Latvia has been held in violation of Article 5 ECHR in
seven decided cases. Four of the cases found violations of Article 5(3), the right of detainee
to be tried within a reasonable time or to release pending trial. Five of the cases found
violations of Article 5(4), the right to take proceedings to challenge the lawfulness of
detention, for this to be decided speedily by a court and to release if the detention is not
lawful.

**NGO and other reports**

Most of the criticism has centred on the length of pre-trial detention and the inadequacy of
the procedure for reviewing its lawfulness in specific cases. NGOs have pointed out that the
maximum length of 18 months of pre-trial detention in Latvia is not observed in practice.
Other reports have criticised the lack of alternatives to pre-trial detention.

A 2007 Council of Europe Committee for the Prevention of Torture Report states that under
the Latvian criminal code, the maximum period for which criminal suspects may be held in
police custody before being seen by a judge is now 48 hours.

**The Right to a Fair Trial in Latvia**

**Violation findings by the ECtHR of Article 6 (criminal cases only)**

Between April 2007 and June 2012, Latvia has been held in violation of Article 6 ECHR in
two decided cases. Both cases found a violation of Article 6(1), the right to a fair public
hearing within a reasonable time by an independent and impartial tribunal.

**NGO and other reports**

Concerns have been raised about violations of the right to trial within a reasonable time.
There are reports that access to lawyer is limited and that the courts often refuse to provide
copies of case materials. Long judicial delays contribute to making the justice system
inaccessible.

Both the 2007 Council of Europe Committee for the Prevention of Torture Report and the
2010 US State Department Report highlighted credible evidence relating to the ill-treatment
of suspects whilst in police custody. The former did however note that there had been some
improvement since previous visits.

**LITHUANIA**

**The Right to Liberty in Lithuania**

**Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)**

Between April 2007 and June 2012, Lithuania has been held in violation of Article 5 ECHR in
one decided case.

**NGO and other reports**

The most common criticisms were of the overuse of pre-trial detention. Reports commented
that detention is unduly prolonged, and that legislation designed to allow extensions in
exceptional cases is abused. There are widespread concerns about secret CIA detention facilities existing on Lithuanian soil. Reports have called for investigations into the extent of any human rights abuses which have taken place at these locations.

The Open Society Justice Initiative has praised Lithuania’s increased use of alternatives to pre-trial detention. However, there are concerns that courts do not assess the individual circumstances of the defendant when deciding on pre-trial detention and instead rely on the seriousness of the offence and possible sentence if convicted.

**The Right to Fair Trial in Lithuania**

**Violation findings by the ECtHR of Article 6 (criminal cases only)**

Between April 2007 and June 2012, Lithuania has been held in violation of Article 6 ECHR in twelve decided cases. All of the cases found a violation under Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

**NGO and other reports**

Domestic and international NGOs have raised a number of issues with fair trial rights in Lithuania, including the lack of access to a lawyer, the excessive length of judicial proceedings, and a failure to respect presumption of innocence problems. Concerns have also been raised about Lithuania’s very low acquittal rate. A number of reports raised concerns about ill-treatment in police custody, particularly as a means of obtaining evidence which is later treated as admissible in court. Entrapment by police has also been reported.

The Open Society Justice Initiative highlighted the lack of guarantee of lawyer competence available as part of the legal aid system. The Human Rights Monitoring Institute has stated that the competence of the judicial, law enforcement and security services is an issue which requires urgent attention.

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**LUXEMBOURG**

**The Right to Liberty in Luxembourg**

**Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)**

Between April 2007 and June 2012, Luxembourg was not held in violation of Article 5 in any cases.

**NGO and other reports**

There has been criticism of the excessive use of pre-trial detention in Luxembourg, which is heavily used in comparison to other EU Member States – in 2010 47% of Luxembourg’s prison population was made up of pre-trial detainees. There are concerns that the length of detention is not limited by domestic law and only by the safeguards of Article 5(3) ECHR. Concerns have also been raised over the defects of recent reforms in this area.

A Fair Trials International report raised concerns that female pre-trial detainees are held in prison with their young children in overcrowded cells. It also criticised prison authorities in
Luxembourg for using solitary confinement as a disciplinary measure.

**The Right to Fair Trial in Luxembourg**

Violation findings by the ECtHR of Article 6 (criminal cases only)

During the 5 year period, Luxembourg has been held in violation of Article 6 ECHR in six decided cases. All of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

**NGO and other reports**

The historical lack of an appeal procedure in Luxembourg has been widely criticised by international and domestic bodies as being incompatible with Article 6. Although domestic reports drew attention to a proposed new bill in January 2012, which aims at greater compliance with the ECHR, many are concerned that these reforms have not gone far enough.

The Council of Europe Anti-Torture Committee has issued a report highlighting problems with access to legal advice and representation.

**MALTA**

**The Right to Liberty in Malta**

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Malta was held in violation of Article 5 in three decided cases. All of the cases found a violation of Article 5(1), the right not to be deprived of liberty save in specific circumstances.

**NGO and other reports**

The length of pre-trial detention in Malta has been widely criticised. Concerns have also been raised about the high volume of pre-trial detainees in relation to the overall numbers of inmates in prisons. Several reports highlighted the discriminatory treatment of foreign nationals, who are rarely granted release pending trial.

Malta’s arrest procedures have been criticised by international organisations and by domestic media. In particular, suspects are frequently denied legal representation. Even where a lawyer is permitted, the law prevents them from assisting during police interrogation.

Domestic media has reported criticisms among practitioners of Malta’s recent proposal to restrict the granting of bail where “hardened criminals” are concerned.

**The Right to a Fair Trial in Malta**

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Malta has not been held in violation of Article 6 ECHR in
any decided cases.

NGO and other reports

There are concerns that lengthy delays to the trial process in Malta are diminishing individual access to due process. A US State Department report noted that foreign nationals can be subject to discrimination. It also cited several cases where defendants insisting on their right to a trial by jury have been detained for over two years before trial. Domestic media have criticised attempts by Maltese authorities to block the right to an interpreter.

NETHERLANDS

The Right to Liberty in the Netherlands

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, the Netherlands was been held in violation of Article 5 ECHR in five decided cases. Two of the cases found a violation of Article 5(1), the right not to be deprived of liberty save in specific circumstances. Two of the cases found a violation of Article 5(4), the right to take proceedings to challenge the lawfulness of detention.

NGO and other reports

Anti-terrorism measures in the Netherlands (in particular the Anti-terrorism Act 2006) have come under widespread criticism from international and domestic organisations. There are concerns that these lack legal precision and risk contravening the ECHR. Particular risks highlighted included lengthy pre-trial detention and non-disclosure of case files. The length of pre-trial detention was a cause of widespread concern with many reporting that this could last for up to two years.

A number of NGOs have voiced concerns about increasing levels of severity within the juvenile justice system. A report by the Council of Europe’s Commissioner for Human Rights criticised long delays in providing appropriate facilities for minors and the increasing length of juvenile detention. A report by Fair Trials International raised concerns about provisions of Netherlands’ law which allow non-resident non-nationals to be held in detention pending trial in more circumstances than nationals.

The Right to a Fair Trial in the Netherlands

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, the Netherlands has been held in violation of Article 6 ECHR in three decided cases.

NGO and other reports

There has been widespread criticism about the lack of a right to a lawyer during police questioning and the Salduz decision was extensively covered in the media. Following this, a new law was implemented in 2010, although a group of NGOs has criticised the Netherlands for its opposition to an EU-wide law guaranteeing suspects access to a lawyer on arrest. The
Witness Identity Protection Act has been criticised, as this allows for the exclusion of the
defence from the examination of witnesses who are protected for ‘national security’ reasons.

A number of reports revealed concerns about the ability of the public prosecutor to withhold
case documents from suspects. A report from the Council of Europe’s Commissioner for
Human Rights raised concerns about whether current juvenile justice procedures in the
Netherlands adequately protect the presumption of innocence.

POLAND

The Right to Liberty in Poland

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Poland has been held in violation of Article 5 ECHR in
twenty-seven decided cases. Seven of the cases found a violation of Article 5(1), the right
not to be deprived of liberty save in specific circumstances. Sixteen of the cases found a
violation of Article 5(3), a detainee’s right to trial within a reasonable time or to release
pending trial.

NGO and other reports

Domestic and international NGOs have criticised the excessive length of pre-trial detention
in Poland. Ministry of Justice guidelines issued in 2006 have, however, instructed
prosecutors to restrict their applications for pre-trial detention in cases of petty crime. The
result has been a systematic fall in numbers of people in pre-trial detention, which is now at
its lowest level for over twenty years.

A report by Fair Trials International has raised concerns that prosecutors and courts impose
pre-trial detention automatically in Poland, without providing adequate justification and that
access to a lawyer or to the case file while in detention are very limited.

The Right to a fair trial in Poland

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Poland has been held in violation of Article 6 ECHR in
forty decided cases. Thirty-six of the cases found a violation of Article 6(1), the right to a fair
public hearing within a reasonable time by an independent and impartial tribunal. Ten of the
cases found a violation of Article 6(3)(c), the right to defend yourself through legal assistance
of your own choosing.

NGO and other reports

It has been reported that some defendants are being denied access to court files during
investigations, and the ombudsman has issued motions against the Polish Ministry of Justice
on this point. There have also been criticisms of recent cuts to legal aid which are likely to
have a negative impact on the criminal justice system and the right to a fair trial.

Polish domestic media focused on violations of the right to a fair public hearing within a
The Right to Liberty in Portugal

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Portugal has not been held in violation of Article 5 ECHR in any decided cases.

NGO and other reports

Domestic and international NGOs have raised concerns about the physical mistreatment by police and prison guards of detainees during their initial arrest and detention. Both the US State Department, the UN and NGOs noted that there are a number of credible reports of abuse. Another common criticism was the excessive length of pre-trial detention.

Concerns have been raised about prison conditions, including overcrowding, inadequate facilities, poor health conditions and violence among inmates. The Director-General of Prison Services highlighted the fact that in 2010 there were 64 deaths in custody, 45 of which were caused by illness (most commonly drug related).

The Right to a Fair Trial in Portugal

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Portugal has been held in violation of Article 6 ECHR in six decided cases. Five of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. Three of the cases found a violation of Article 6(3)(c), the right to defend yourself through legal assistance of your own choosing.

NGO and other reports

There has been widespread criticism of the legal profession, particularly in relation to accountability and training of lawyers. Several reports also highlighted problems concerning access to lawyers, with the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment noting that few detained persons have an effective right of access to a lawyer whilst in police custody. There were serious concerns about the endemic delays in the Portuguese criminal justice system.

The President of the Portuguese Bar Association has raised concerns about the inexperience of Portuguese judges and the ensuing adverse effect on the Portuguese justice system.
The Right to Liberty in Romania

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Romania was held in violation of Article 5 in sixteen decided cases. Five of the cases found a violation of Article 5(1), the right not to be deprived of liberty save in specific circumstances. Eight of the cases found a violation of Article 5(3), the detainee’s right to trial within a reasonable time or to release pending trial. Five of the cases found a violation of Article 5(4), the right to challenge the lawfulness of detention.

NGO and other reports

There has been widespread criticism of the length of pre-trial detention in Romania, with recommendations to end the practice of detaining large numbers of people for extended periods of time. A report by Fair Trials International raised concerns about ill-treatment of pre-trial detainees and the use of mistreatment to extract evidence which has later been treated as admissible in court.

There were concerns that the practice of returning case files to prosecutors for additional investigation contributes to frequent delays in proceedings and extended periods in pre-trial detention. NGOs have criticised provisions of Romania law which allow police to take suspects into custody for public order offences. This is often used to hold persons for up to 24 hours, and as the suspects are not formally detained, their right to legal advice and representation is not observed.

The Right to a Fair Trial in Romania

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Romania was held in violation of Article 6 in thirty-three decided cases. Twenty-nine of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. Four of the cases found a violation of Article 6(2), the right to presumed innocent until proven guilty. Four of the cases found a violation of Article 6(3)(d), the right to examine witnesses against you.

NGO and other reports

There has been criticism of incorrect practice by the Romanian courts with regard to Article 6(3)(d), the right to examine witnesses against you.

The efficiency of the judicial process and the consistency of judicial decisions have been criticised, with the European Commission noting in 2011 that only limited progress had been achieved in this area. There have been reports that defendants found not guilty have still been required to pay administrative fines.
SLOVAKIA

The Right to Liberty in Slovakia

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Slovakia has been held in violation of Article 5 in twenty-four decided cases. Eleven of the cases found a violation of Article 5(4), the right to challenge the lawfulness of detention and for this to be speedily decided by a court. Five of the cases found a violation of Article 5(1), the right not to be deprived of liberty save in specific circumstances.

NGO and other reports and media coverage

Domestic and international NGOs have criticised the continuing trend of mistreatment of suspects during police detention. There are specific concerns about allegations of racial discrimination directed at members of the Roma community. Although there have been improvements in this area, reports make reference to several recent cases involving racially motivated physical abuse.

A Fair Trials International report raised concerns about courts imposing pre-trial detention in Slovakia without providing sufficient reasons. Concerns have also been raised about excessive lengths of pre-trial detention. The Slovak domestic media have focused on a series of high-profile cases concerning the detention of former politicians.

The Right to a Fair Trial in Slovakia

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Slovakia has been held in violation of Article 6 ECHR in five decided cases. Four of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO and other reports and media coverage

The key concern raised is the continuing trend of delays to court proceedings. Organisations state that the right to a fair hearing within a reasonable time is the most violated fundamental right in Slovakia.

SLOVENIA

The Right to Liberty in Slovenia

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Slovenia has not been held in violation of Article 5 ECHR in any decided cases.

NGO reports and media coverage

There has been limited public criticism of Slovenia in relation to Article 5 over the past five
years. Improvements have been reported in the areas of police custody, imprisonment and involuntary placement of detainees into psychiatric establishments.

The Right to a Fair Trial in Slovenia

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, Slovenia has been held in violation of Article 6 ECHR in three decided cases. All of the cases found a violation of Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal.

NGO reports and media coverage

The main criticism made by domestic and international organisations and domestic media has been of lengthy delays to trial proceedings. This issue was the subject of half of the violation judgements issued by the ECtHR against Slovenia between 1994 and 2010. It is reported that on average it can take between two and five years to bring a defendant to trial. This problem is partially attributed to a lack of administrative support staff within the court system.

An annual report by the Human Rights Ombudsman commented on administrative deficiencies in the trial process. However, it was noted that there have been recent legislative changes which have improved this situation, particularly with regard to access to justice for those who struggle to afford their costs.

SPAIN

The Right to Liberty in Spain

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, Spain has not been held in violation of Article 5 ECHR in any decided cases.

NGO and other reports

Domestic and international NGOs have criticised the system of *incommunicado* detention in Spain which is used for serious crimes, and particularly for terrorism-related offences. Suspects lose the right to notify a contact of their detention, to appoint a defence lawyer and to meet privately with their appointed duty lawyer. This is viewed as a procedure which enables authorities to violate suspects’ fundamental rights.

An Amnesty international report highlighted the fact that for the first five days of *incommunicado* detention, police authorities are not subject to any judicial control. A Fair Trials International report criticised the system of *secreto de sumario* used in Spanish pre-trial detention, which severely restricts defendants’ access to the details of the case.

The Right to a Fair Trial in Spain

Violation findings by the ECtHR of Article 6 (criminal cases only)
Between April 2007 and June 2012, Spain has been held in violation of Article 6 ECHR in sixteen decided cases. Fifteen of the cases found a violation of Article 6 (1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. Two of the cases found a violation of Article 6 (2), the right to be presumed innocent until proven guilty.

**NGO and other reports**

The main concern raised related to undue delays to the administration of justice in Spain. There have been particular problems as a result of changes to legislation and judicial strikes. There are concerns that excessive delays to criminal proceedings have an adverse effect on the presumption of innocence.

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**SWEDEN**

**The Right to Liberty in Sweden**

**Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)**

Between April 2007 and June 2010, Sweden was not held in violation of Article 5 ECHR in any decided cases.

**NGO and other reports**

Restrictive conditions for prisoners held in pre-trial detention have been criticised, with detainees subject to extended isolation and a lack of adequate toilets and sanitation facilities. A Fair Trials International report highlighted the lack of appeal available against specific restrictions imposed, such as isolation from family members.

Concerns have also been raised about the length of pre-trial detention in Sweden in some cases. Release pending trial is very rare in Sweden.

**The Right to a Fair Trial in Sweden**

**Violation findings by the ECtHR of Article 6 (pre-trial, criminal cases only)**

Between April 2007 and June 2010, Sweden was held to be in violation of Article 6 ECHR in one decided case.

**NGO and other reports**

Concerns have been raised that suspects and defendants are not always notified of their right to a lawyer and that medical attention for detainees is not always available when necessary. The Committee for the Prevention of Torture identified some isolated incidents of police ill-treatment. The Swedish government provided statistics demonstrating what appears to be conscientious investigation of such allegations.

In October 2011, Human Rights Watch named Sweden as a state engaging in “torture by proxy” by consenting to the extradition of terror suspects to countries where they would face a real risk of torture.
The Right to Liberty in the United Kingdom

Violation findings by the ECtHR of Article 5 (pre-trial, criminal cases only)

Between April 2007 and June 2012, the United Kingdom was held in violation of Article 5 in four decided cases. These cases all dealt with different elements of the right to liberty, and no common themes emerge from them.

NGO and other reports

The UK’s terrorism laws have been widely criticised by NGOs and the domestic media as breaching Article 5. The most common criticisms were of the use of control orders (an order placing restrictions on a terrorist suspect without the need for the suspect to be formally charged). There was also criticism of the proposed maximum pre-charge detention period of 42 days (since dropped).

Fair Trials International has highlighted criticisms of UK legislation that limits the possibility of release for defendants convicted of certain serious offences. A UN report criticised the amount of time minors spend in pre-trial detention in the UK and the large number of children from social care who are involved in the criminal justice system. The Chief Inspector of Prisons has reported that the UK treats remand prisoners worse than convicted inmates.

The Right to a Fair Trial in the United Kingdom

Violation findings by the ECtHR of Article 6 (criminal cases only)

Between April 2007 and June 2012, the United Kingdom was held in violation of Article 6 in seven decided cases. All of the cases found a violation under Article 6(1), the right to a fair public hearing within a reasonable time by an independent and impartial tribunal. In three of the cases, the Court also found violations of Article 6(3)(c), the right to defend yourself through legal assistance of your own choosing.

NGO and other reports

The most common issue raised was that proposed cuts to legal aid provision could compromise the right to a fair trial. There was also concern about anti-terrorism laws and practices, including the use of closed material (evidence submitted in secret and not disclosed to the defence) at trials. Several media outlets commented on the Al Qatada ECtHR ruling, which held that deporting someone where evidence obtained by torture would be adduced at his trial would breach his Article 6 rights.

Reports also recommended that the age of criminal responsibility for the UK should be raised to either 14 or 15, in line with the majority of European countries. There was also criticism that the UK system does not have adequate safeguards for minors who have learning or communication difficulties, or to protect juveniles who are tried in adult courts for the most serious crimes. A group of NGOs has criticised the UK for its opposition to an EU-wide law guaranteeing suspects access to a lawyer on arrest.
APPENDIX 4: ECtHR violation findings of Articles 5 and 6 by Member States in 2011

Articles 5 and 6 violation findings as a % of population 2011
APPENDIX 5: Joint letters on the draft Directive to access a lawyer and communicate on arrest

29 September 2011

Open letter regarding the Proposal for a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings

Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice (England and Wales)

J.W. Opstelten, Minister of Security and Justice (The Netherlands)

Alan Shatter TD, Minister for Justice, Equality and Defence (Ireland)

Stefaan De Clerck, Ministre de la Justice (Belgium)

Michel Mercier, Garde des Sceaux, Ministre de la Justice et des Libertés (France)

Dear Ministers, When the Swedish Presidency Roadmap on procedural rights (“the Roadmap”) was approved by the European Council in December 2010, our organisations welcomed it as a means by which enforceable Europe-wide defence standards could be improved. We did so based on our collective expertise and experience in providing legal services to and advocating on behalf of people across Europe who experience the effects of the current arrangements under which legal rights vary across borders and information on rights can be difficult to access.

The stated intention of the Roadmap is “to expand existing standards” including those to be found in the European Convention on Human Rights (ECHR) and other relevant regional and global instruments and “to make their application more uniform”.

The action subsequently taken by the European Commission to translate the Roadmap into practice has a double purpose, both to create confidence in the common European justice space in the interests of combating criminality and to protect citizens of one Member State who find themselves facing criminal proceedings in another.
The enactment of a standardised set of defence rights that meet or exceed international human rights standards is a necessary precondition to mutual recognition amongst Member States in the criminal justice area.

The rights of access to a lawyer in criminal proceedings and to communicate upon arrest are essential elements of any ECHR-compliant system of defence rights. Consequently, our organisations welcome your recognition of the importance of these rights in principle; however, we have serious reservations about the validity of the proposition (set out in your joint note to the Council of the European Union dated 21 September 2011, document 14495/11) that the Commission’s proposals on this subject “would present substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities”.

Having carefully considered the content of your joint note, we wish to make the following observations regarding the validity of the objections that it contains.

I. The Directive would not hamper the effective conduct of criminal investigations and proceedings

Our organisations do not accept the proposition that the draft Directive should be revised to “strike the right balance between on the one hand the right of access to lawyer and on the other hand the need to ensure the effectiveness of Member State justice systems”.

This is a false dichotomy.

Far from being a matter to be weighed in the balance with the effectiveness of the Member State justice systems, the right of access to a lawyer, if protected in an effective manner, is an additional means to ensure the effectiveness of such systems. In jurisdictions where the right to access to a lawyer is fully respected in practice, the integrity of the criminal justice system is protected and the costs associated with mistrials, retrials and miscarriages of justice are reduced. Indeed, as the introduction of the Police and Criminal Evidence Act 1984 in England and Wales has shown, access to a lawyer provides a safeguard to both suspects and police officers by introducing an objective arbiter.

Of course, we agree that “any legislation in this field must enable criminal proceedings to be conducted effectively and efficiently”. But this does not imply, as your joint note appears to suggest, that recognising in the Directive an effective right of access to a lawyer is an impediment to the effective investigation and prosecution of offenders.

ECHR jurisprudence makes no distinction between the types of offences which attract safeguards and therefore the European Union member states already have an obligation to ensure all suspects can access sufficient procedural safeguards to comply with their obligations under the Article 6 right to a fair trial. Furthermore, ECHR jurisprudence already contemplates the possibility that some limitation of the right to access to a lawyer of choice may be justified in exceptional circumstances, a fact that has been reflected in articles 3(1)(b) and 8 of the draft Directive (though some of our organisations have already indicated our concerns about these provisions as presently worded).

1 See Öztürk v. Germany and Zaichenko v. Russia (where the right against self incrimination was breached by questioning the suspect at the roadside without prior notification to the suspect of their rights in what initially appeared to be a traffic violation but as a result of his answers became much more serious).
Another crucial dimension of this issue, to which your joint note does not allude, is that both the right of access to a lawyer and the right to communicate upon arrest provide formal safeguards against ill-treatment (a right protected by Article 3 ECHR and by other regional and global standards). In many jurisdictions, people who are subsequently charged with very serious offences may initially be held “for identification purposes”, summoned for “informative talks” or questioned as witnesses. Even if they are not subsequently charged, the experience of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has shown that it is during such initial periods in the hands of law enforcement officials that the risk of ill-treatment may be most acute.

II. Clarity on the Directive's relationship to the requirements of the European Convention on Human Rights

In their Joint Declaration issued in Interlaken following the High Level Conference on the Future of the European Court of Human Rights in 2010, representatives of the 47 Member States of the Council of Europe clarified that the obligations of a State extend beyond executing a judgment “directed at one country, in one concrete case, with all its specificities”. A Member State is also obliged to take account of relevant jurisprudence of the European Court of Human Rights related to other States, where it has implications for its own domestic law and practice.

According to section B.4 of the Interlaken Declaration:

4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:

[...]

b) fully executing the Court’s judgments, ensuring that the necessary measures are taken to prevent further similar violations;

(c) taking into account the Court’s developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system [...]

The Commission’s proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest very clearly sets out (at paragraph 13 of the Explanatory Memorandum) the recent rulings of the European Court of Human Rights that clarify the scope of the right of access to a lawyer.

Our organisations consider that the Commission’s proposal is firmly grounded in the jurisprudence of the European Court of Human Rights and we do not agree with your suggestion that it “goes beyond the current requirements of the ECHR”. Moreover (and without prejudice to the foregoing remarks), as the European Court of Human Rights has repeatedly stressed, the European Convention on Human Rights is a “living instrument” to be interpreted in the light of present-day circumstances. As the “direction of travel” in the jurisprudence of the European Court of Human Rights in relation to procedural rights is abundantly clear, it would not only be legitimate, but also forward-looking and prudent if the Commission were to seek to “future proof” the content of the Directive against entirely foreseeable developments in the future case law of the Court. Certain of our organisations have already made practical suggestions to the Commission regarding the manner in which this might be done.
We accept that it may be correct to assert that obligations “such as the right to have a lawyer inspect the place of detention and the right to communicate with a third party of one’s choice” may not be “based on established case law of the European Court of Human Rights concerning Article 6 of the ECHR”. However, such obligations have a clear and direct connection to the obligation upon States to have in place effective safeguards to ensure that Article 3 of the ECHR is respected in practice. By inspecting the place in which his/her client is being held, a lawyer can reassure him/her that poor detention conditions are not being used to assist in procuring a confession through coercive means. In a similar vein, the right to communicate with a third party ensures that persons cannot be held incommunicado, a situation known to facilitate ill-treatment.

Finally, whilst recital 13 of the Roadmap confirms that EU legislative acts should be consistent with minimum standards set out in the ECHR jurisprudence; this does not mean it should be limited to the ECHR. The EU carries its own obligations to procedural rights in the Charter on Fundamental Rights and has the jurisdiction to facilitate mutual recognition by the establishment of minimum rules pursuant to Article 82(2) of the TFEU. As such there is no need to provide a clear basis in ECHR jurisprudence. The Commission Explanatory Memorandum provides a sound empirical basis for all the articles contained in the Directive.

III. Taking account of the different ways in which Member State systems secure the right to a fair trial.

Where the fundamental rights to freedom from ill-treatment and to a fair trial are concerned, our organisations do not accept the contention in your joint note that “different rights will be applicable to different stages of criminal proceedings”.

Article 3 of the European Convention on Human Rights is non-derogable and expressed in absolute terms. Everyone who is obliged to remain with law enforcement officials has the right to benefit from safeguards against ill-treatment, including the right to have access to a lawyer from the very outset of their time in custody, and the right not to be held incommunicado.

As regards Article 6 of the ECHR, the case law of the European Court of Human Rights is clear that prompt access to legal advice is crucial to ensure that fair trial protections are fully effective in practice and that any period in custody is lawful. In many jurisdictions, persons eventually charged with serious offences make a “procedural journey” through various legal stages of “holding” by the police before they are formally arrested or charged. In the interests of justice, it is particularly crucial that access to a lawyer be granted before any form of police questioning occurs.

In practice, as Commissioner Reding has recently noted « nous avons d’ailleurs constaté que dans les États membres, où ce droit est déjà en pratique depuis plusieurs années, comme par exemple en Allemagne ou en Pologne, la justice arrive à concilier les impératifs de sécurité et de liberté. »

\[2\] Tribune par Viviane Reding. Commissaire à la justice et Vice-présidente de la Commission européenne. Le droit d’accès à un avocat, un élément essentiel à un procès équitable. Unofficial translation: “In addition, we have noted that in those Member States where this right [of access to a lawyer] has already been in place for several years, for example in Germany and Poland, the justice system still manages to reconcile the imperatives of security with those of freedom.”
It should also be noted that, in recent times, there has been a proliferation of mutual recognition instruments at EU level (European Arrest Warrant, European Investigation Order, European Supervision Order etc.). In this respect, our organisations consider that the proposed Directive is necessary to ensure equality of arms between prosecution and defence.

Our organisations consider that the Commission’s proposals are pitched at a sufficiently high level of principle to permit their application in the diverse range of systems through which Member State systems seek to secure the right to a fair trial.

IV. Impact assessment and legal aid

Your joint note expresses reservations regarding the delineation between legal aid and access to a lawyer. Our organisations agree that adequate legal aid provision is a precondition to rendering the right of access to a lawyer effective in practice. We specifically welcome the reference to the importance of free legal aid in the Explanatory Memorandum issued by the Commission. The European Court of Human Rights has found that the right of access to a lawyer from the very first moment of interrogation must be protected, and that legal aid must also be adequately resourced to ensure the effectiveness of this fundamental safeguard for those who do not have the means to pay for the services of a lawyer.

As such, our organisations do not agree that “the relationship between rules on access to a lawyer and rules on legal aid needs thorough political discussion” before the rules on access to a lawyer can be settled. Given the diversity of legal aid systems operated in Member States, if this approach were to be adopted, it could cause intractable delays in the adoption of the Directive.

The Commission has adopted the pragmatic approach of seeking to settle the framework of principles within which the right of access to a lawyer should apply before considering the issue of legal aid. Once the framework of principles surrounding that right of access to a lawyer has been settled, it will be far more straightforward for Member States to determine the likely consequential costs and implications for their legal aid systems of carrying those principles into practice.

In conclusion, our organisations consider that the enactment of a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings represents an important step towards full mutual recognition within the common European justice space. It is also an opportunity for your Governments to demonstrate their genuine commitment to the more effective protection of these key procedural rights.

The case law of the European Court of Human Rights and other relevant regional and global instruments provide a starting point from which the co-legislators can develop the highest possible standards in this area; they should be seen as a floor on which to build, not a ceiling beyond which we cannot pass.
Mark Kelly  
Director  
Irish Council for Civil Liberties

Roger Smith  
Director  
JUSTICE

Jago Russell  
Chief Executive  
Fair Trials International

James A. Goldston  
Executive Director  
Open Society Justice Initiative

Dr. Nicolas J. Beger  
Director  
Amnesty International  
European Institutions Office

Professor Holger Matt  
Chair  
European Criminal Bar Association

Jonathan S. Mitchell  
Advisory Board Member  
European Criminal Bar Association
Joint Statement on the Directive on the Right of Access to a Lawyer and to Communicate Upon Arrest

7 MAY 2012

This joint statement makes comprehensive recommendations for amendments to the European Union Council’s revised text of the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Measure C1) to ensure that the Directive upholds the minimum human rights standards for fair trials.
Introduction

On 9 March 2012, the Council of the European Union Presidency published a revised text of the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. On 11 April 2012, the Presidency published a further draft of the Directive. In this position paper, our organisations will make nine recommendations about how this draft Directive should be amended to meet the human rights standards for fair trials.

Our organisations reaffirm our support for the European Union’s work to develop common minimum safeguards for people who are accused or suspected of crimes. The Swedish Roadmap on Procedural Rights, of which the draft Directive is a component, has the stated intention “to expand existing standards” including those found in the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (CFR) and other relevant regional and global instruments and “to make their application more uniform”. Recital 39 to the draft Directive reiterates that “the level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted by the European Court of Human Rights”.

Although the Commission’s original proposals were solidly grounded in the jurisprudence of the European Court of Human Rights (ECtHR), subsequent amendments by the Council appear to include some significant departures from existing ECHR protections. Some of the new amendments potentially undermine the purpose of the Directive, and some appear to contravene the ECHR. Were these amendments to be retained in the adopted text of the Directive, the level of protection provided by the Directive would fall significantly below the minimum standard enunciated in Recital 39.

Considering that the Directive is intended to provide practical and effective protection of procedural safeguards in criminal proceedings and to contribute to the prevention of ill-treatment, we are particularly concerned about:

1. the removal of safeguards for people who are not formally designated as suspects or accused persons;
2. the wide permissions for derogations;
3. the inadequate provisions for remedies;
4. the introduction of the concept of “official” interviews;
5. the fact that police no longer have to wait for a lawyer to arrive before they commence questioning;
6. the limitations on the participation of lawyers in interviews;
7. the weakening of the confidentiality principles;
8. the removal of safeguards for people accused of minor offences during the pretrial period; and
9. the removal of dual representation for people requested to surrender to a European arrest warrant.

We will address each of these issues in order, referring to jurisprudence of the ECtHR where available and appropriate. All references in this letter to provisions of the draft Directive are references to the latest EU Council draft dated 11 April 2012, unless specifically noted.
(1) People who are not formally designated as suspects or accused persons

[Recitals 12, 13]

In previous drafts of the Directive, there was explicit protection of the rights of people other than suspects and accused. This protection has now been deleted from the body of the Directive and partially placed into the recitals. Recital 13 reads:

“Any person other than a suspect or accused person, such as a witness, who is officially interviewed by the police or other enforcement authority in the context of a criminal procedure, should be granted the rights provided under this Directive for suspects and accused persons if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence”.

This should be reinstated into the Directive. It is essential that all people who are in fact accused or suspected of a criminal offence be provided the rights in this Directive, regardless of their formal designation. From the standpoint of a person deprived of their liberty, questioning during custody is experienced as a continuum and it is crucial that any statements made by a person before he has been made aware that he is a suspect or an accused person may not be used against him.

The Open Society Justice Initiative, JUSTICE and other organisations have been involved in extensive comparative research on this issue across Europe and have found that calling a suspect by another name, such as ‘witness’ or ‘person of interest’ is a common tactic used by police in many Member States to avoid providing suspects with their due fair trial rights. It is common for police to use their power to either classify persons as non-suspects, or to delay officially charging them. This can have an enormous impact on the ability of the person to understand their situation and rights, as they are not provided with the same information, assistance and rights as formal suspects.

Furthermore, reinstating this recital into the Directive will simply uphold the current state of the law as set down by the ECtHR. In Shabelnik v Ukraine, the ECtHR held that the right to legal assistance does not depend on the formal designation of the person. Article 6 is applicable from the point that the person’s position is significantly affected, even if they are not formally placed into custody as a suspect or accused person. A person’s position is significantly affected when they are charged, which for the purposes of Article 6(1) of the ECtHR, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”. The Court in Zaichenko v Russia held that the right to legal assistance arises once freedom of action has been curtailed. The ECtHR similarly found violations in Bruso v France, in which a person who was interviewed as a witness but was clearly a suspect confessed to a crime without the presence of a lawyer. Whether a breach of Article 6 of the ECtHR has occurred currently depends upon the facts of each case; however the EU is in a position to make clear when the right applies.

Recommendation: Recital 13 should be reinstated into the body of the Directive. In addition, the article should include the following sentence: “Member States shall ensure that any statement made by such a person before he is made aware that he is a suspect or an accused person but has in fact been treated as one may not be used against him”.

(2) Derogations

[Recitals 22, 25 and 27 / Articles 3(5), 4(2), 5(3) and 7]

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J O I N T S T A T E M E N T O F:
OPEN SOCIETY JUSTICE INITIATIVE, FAIR TRIALS INTERNATIONAL, JUSTICE, EUROPEAN CRIMINAL BAR ASSOCIATION,
GREEK HELSINKI MONITOR, HUNGARIAN HELSINKI COMMITTEE, IRISH COUNCIL FOR CIVIL LIBERTIES,
POLISH HELSINKI FOUNDATION, HUMAN RIGHTS MONITORING INSTITUTE

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Recitals 22 and 25 contain phrasing allowing a very broad permission for States to derogate from the Directive and refuse to allow a person their right to a lawyer and/or to have a third person informed of their deprivation of liberty.

By laying down examples of what are acceptable reasons for derogations, the new draft potentially undermines the purpose of the Directive by suggesting that States should enjoy a broad discretion to temporarily derogate if one of these reasons can be cited.

For example, Recital 22 states:

"Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial stage in exceptional circumstances only where there are compelling reasons in light of the particular circumstances of the case. Such temporary derogations could in particular be justified when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, to prevent a substantial jeopardy to ongoing criminal proceedings, or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect or accused person, e.g. in overseas territories. During such temporary derogation, the competent authorities may interview a suspect or accused person without the lawyer being present, if being understood that the suspect or accused person may avail himself of his right to remain silent, and may also carry out, without the presence of a lawyer, any investigative or other evidence gathering act."

It is understandable that Member States want to include a provision for derogations. However, these provisions as currently drafted go too far in allowing Member States to take away the fundamental rights of suspects and accused persons. In particular, the inclusion of examples that police may refuse a lawyer due to “geographic remoteness” or “substantial jeopardy to ongoing criminal proceedings” are perplexing.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which operates in all EU Member States, has made clear that any possibilities offered to the authorities to delay the exercise of the right to a lawyer and/or to delay notification of detention to a third party “should be clearly defined and their application strictly limited in time”. As regards, more specifically access to a lawyer, the CPT also suggests that systems whereby lawyers “can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights”.

The ECtHR has theoretically allowed for the possibility that early access to legal assistance could be denied in exceptional circumstances. However, the ECtHR has not yet found exceptional circumstances in any of the numerous cases that have been brought before it in which a suspect has been denied access to a lawyer. Given the lack of guidance or elucidation from the ECtHR, the Directive – even in the recitals – should not attempt to specify examples of what will meet the threshold of exceptional circumstances.

In addition, the final portion of Recital 22 setting out that during a temporary derogation, the competent authorities may interview the suspect without a lawyer being present, is misleading. It appears to suggest that the results of an interview conducted without a lawyer being present, such as statements or confessions from the suspect, can be used as evidence. The ECtHR is very clear that potentially incriminating statements made during police interrogation without access to a lawyer cannot be used for a conviction without irretrievably prejudicing the rights of the defence and breaching Article 6 of the ECtHR. This point is explained in more detail under the Remedies section below.

Recommendation: The bulk of Recital 22 should be deleted. Recital 22 should only read “Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial stage in exceptional circumstances only where there are compelling reasons in light of the particular
circumstances of the case. Any such temporary derogation is subject to the general conditions for applying derogations set out in Article 7.”

(3) Remedies

[Article 11 / Recital 37]

Article 11 is currently inadequate to satisfy the minimum standards of fair trial rights. It reads:

“Member States shall ensure that a suspected or accused person has an effective remedy in instances where his right of access to a lawyer has been breached.”

Furthermore, Recital 37 gives Member States the right to determine what value to give to a statement obtained in the absence of a lawyer, which directly contravenes the standards of the ECHR and Article 47 of the CFR. It states:

“Once a case has been referred to a court having jurisdiction in criminal matters, Member States should ensure that the question of which value to be given to statements obtained from a suspect or accused person in breach of his right to access to a lawyer, or in cases where a temporary postponement or derogation of this right was authorized in accordance with this Directive, should be determined by that court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures”.

Recital 37 suggests that Member States have some flexibility in deciding how to use statements obtained from a person in the absence of a lawyer. This is in breach of the principles set down by the ECtHR in the case of Salduc v Turkey. In this case, the ECtHR held that if incriminating statements made during police interrogation without access to a lawyer are used for a conviction this will always irretrievably prejudice the rights of the defence. It is irrelevant that those statements may have been obtained in exceptional circumstances that justified the refusal of a lawyer, and it is irrelevant that the suspect might have the opportunity to challenge the evidence against him at the trial and subsequently on appeal. Statements made in breach of a person’s right to a lawyer should, as a rule, be struck from the case-file and not used in any stage of the proceedings. We do, however, recognize that this is complex and that in some very limited circumstances, where the evidence can be adduced without any material effect on the overall fairness of the proceedings, the interests of justice may require that it be admitted to proceedings.

On the issue of remedies, the ECtHR has held that, where a conviction has been based on statements made without the assistance of a lawyer, the applicant must, as far as possible, be put in the position in which he would have been had Article 6 of the ECHR not been disregarded. A retrial should be made available if the person requests it, and monetary compensation may also be appropriate.

Recommendation: Recital 37 should be deleted. Article 12 should be amended to add in two new subsections, reading as follows: Article 12(2): “The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.” Article 12(3): “Member States shall ensure that statements made by the suspect or accused person, or evidence obtained, in breach of his right to a lawyer or in cases where a derogation to this right was authorized by this Directive, may not be used at any stage of the procedure as evidence against him”.

(4) “Official” interviews and Preliminary Questioning

[Recital 14 / Articles 3(2)(a), 3(3)(a), 3(3)(b)]

The revised text introduces the new phrase “official interviews” into the Directive, a development that is of great concern from a human rights perspective.

Recital 14 now states:
“An official interview means the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the place where it is conducted or the stage of the proceedings when it takes place. This notion should not encompass preliminary questioning by the police or other law enforcement authorities […] such as when a person has been caught red-handed, and whose primary purpose is the identification of the person concerned or the verification of the possession of weapons or other similar safety issues”.

This is a hazardous use of wording, suggesting that it may be acceptable to conduct unofficial interviews, at which the suspect does not have access to the rights in the Directive.

Our research has revealed that it is a common practice for some police to question suspects informally in order to deprive them of their rights. Examples include conducting informal questioning of suspects under a national framework of “informational questioning”, “short-term arrest”, or “oral interviews”, or informing the suspect that he has the opportunity to make a written “explanation” before formally taking him in to custody. We have found that police officers can try to have a “chat” before the lawyer arrives, trying to make the suspect trust them, or depending on the crime, intimidate or patronize them. Moreover, in jurisdictions where inferences from silence can be used at trial as evidence against a person, the preliminary questioning of suspects without affording them the right of access to a lawyer can have serious detrimental effects on their ability to mount a defence at a later stage.

We understand that during preliminary questioning for the purposes of identification or immediate safety issues – such as when a police officer asks a motorist his or her name or stops a person on the street who is carrying a gun – that it is impracticable to expect a lawyer to attend. However, the best way to ensure this Directive excludes these particular circumstances is to draft a clear and precise exception clause to cover them. It is disproportionate and potentially dangerous to instead introduce the idea of official interviews, making the provision of fair trial rights to persons in this situation the exception, rather than the rule.

Recommendation: Delete Recital 14. Replace all references to “official interviews” throughout the text of the Directive with the word “questioning” or “questioned”. Include an exception clause into the body of the Directive that reads:

“Preliminary questioning by law enforcement authorities of people who have not been deprived of their liberty, which seeks only to identify the person or to deal with immediate safety issues, is not considered to be covered by this Directive.”

(5) Waiting for a lawyer to arrive

[Recital 20]

Recital 20 of the Directive allows Member States to determine whether, and if so, for how long the authorities should wait for a lawyer to arrive before starting an interview or an investigative or other evidence-gathering act. Recital 20 states:

“The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting an interview or an investigative or other evidence-gathering act”.

This article potentially undermines the right to access a lawyer to such a degree that it could render it null and void. It creates a loophole for authorities to deny the basic rights of fair trial; police can inform a person of their right to a lawyer but then proceed with questioning them without a lawyer present. In
order for the right to a lawyer to be fully meaningful in practice, it is essential that authorities must wait for that lawyer to arrive before commencing questioning or an investigative or evidence-gathering act.

The ECHR has also emphasized the importance of respecting a person’s right to counsel and waiting for the lawyer to arrive. In *Pshchalinov v Russia*, the ECHR stated that an accused who has requested legal assistance should not be subject to any further interrogation by the authorities until he receives legal assistance, unless the accused himself initiates further communication or conversations with the police or prosecution.⁴

Recital 20 should be deleted in its entirety. Any extraordinary situation in which Member States are concerned that they will be required to wait for an unreasonable amount of time, can be adequately dealt with under the separate derogations clause (Article 7) which strictly circumscribes the general conditions under which derogations are permissible.

**Recommendation:** Delete Recital 20.

(6) Participation of the lawyer

*Article 3(3)(b) / Recitals 20, 21*

Article 3(3)(b) contains a significant new restriction on the ability of people to access practical and effective legal assistance, by allowing the Member States to regulate how the lawyer can and cannot participate during the interview:

“Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when he is officially interviewed.”

Recital 20 provides further that:

“The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States.”

Recital 21 contains guidance about what participation should be permitted by a lawyer in an interrogation, but it is undermined by the fact that this is explicitly limited to those regulations determined by the Member States. Recital 21 states that the lawyer should be able to:

“in accordance with procedures in national law, ask questions, request clarification and make statements”.

These provisions open the door for Member States to limit the activities a lawyer can undertake. In order for the right to a lawyer to be practical and effective, it is essential that lawyers are not limited or hampered in their provision of legal assistance. They must be able to ask questions, request clarification, make statements, and provide advice to their client during the interview. The mere presence of a lawyer during an interrogation is of limited value to a suspect or accused person and may actually disadvantage them. Indeed, some Member States have experimented with systems in which the lawyer is permitted to attend the interrogation, but must sit in the back of the room and cannot communicate with their client. This is wholly unsatisfactory, and can place the suspect in an even worse position than they would have been in with no lawyer.

Furthermore, the wording of Article 3(3)(b) and Recitals 20 and 21 appears to overlook the fact that clear standards have been set down by the ECHR on this issue. The ECHR has stated that suspects should be able to access the whole range of services and activities specifically associated with legal assistance. In *Dayanan v Turkey*, the ECHR clarified the reasons behind early access to legal assistance and the scope of activities that must be permitted during the pretrial stage:

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**JORT Statement of**

OPEN SOCIETY JUSTICE INITIATIVE, FAIR TRIALS INTERNATIONAL, JUSTICE, EUROPEAN CRIMINAL BAR ASSOCIATION,

GREEK HELSINKI MONITOR, HUNGARIAN HELSINKI COMMITTEE, IRISH COUNCIL FOR CIVIL LIBERTIES,

POLISH HELSINKI FOUNDATION, HUMAN RIGHTS MONITORING INSTITUTE

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"Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention". 17

The ECtHR also recognized in Ocalan v Turkey that early access to legal assistance, and the ability to meet with and give instructions to a lawyer, are necessary to allow detainees to challenge the lawfulness and length of their detention. 18 The range and objective of legal assistance which the ECtHR recognised in these cases essentially reflect the duties set out in the UN Basic Principles on the Role of Lawyers, which include:

"Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients" and "Assisting clients in every appropriate way, and taking legal action to protect their interests". 19

Recommendation: Delete Recital 20. Delete the phrase “in accordance with procedures in national law” in Article 21. Amend Article 3(3)(b) to incorporate the wording of Recital 21 to read:

“Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and participate fully to protect the rights of the accused person, for example by asking questions, requesting clarification, providing advice and making statements, when he is interviewed”.

(7) Confidentiality

[Article 4(2) / Recitals 23-24]

Article 4(2) represents a striking departure from the fundamental rule that communications between suspects and lawyers should be confidential. It states:

“In exceptional circumstances only Member States may derogate from paragraph 1, when, in the light of the particular circumstances, this is justified by one of the following compelling reasons:

(a) there is an urgent need to prevent a serious crime; or

(b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person”.

This exception disregards the strong legal standards of confidentiality, which have been emphasized by the ECtHR and other international standard-setting bodies for many years. The ECtHR has stated that “an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial”. 20 In the case of Brennan v UK, the ECtHR held that the presence of a police officer within hearing during the applicant’s first consultation with his solicitor infringed his right to an effective exercise of his defence rights. The ECtHR explained that “If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness”. 21

The principles of confidentiality and adequate time have been verified by various organs of the United Nations. In rule 93 of the Standard Minimum Rules for the Treatment of Prisoners, the UN stressed that a person accused of a crime should have access to counsel and that their communications should be held out of hearing range from the authorities:

“For the purposes of his defense, an untried prisoner shall be allowed to ... receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential
instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official”.

The UN Basic Principles on the Role of Lawyers also reiterate the right to adequate time with a lawyer and confidential communications. Principles 8 and 22 state:

“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials”.

Furthermore, Article 4(2) runs counter to the overall thrust of the Directive. Article 7 provides clear rules for postponements and derogations from the Directive. Any intrusion into the confidentiality of communications should be judged in accordance with the rules of Article 7. In particular, Article 4(2)(b) is not a reason to prevent legal advice entirely, rather a genuine suspicion can be met by replacing the lawyer.

Recommendation: Article 4(2) should be deleted.

(8) Safeguards for people accused of minor offences during the pretrial period

[Article 2(4) / Recital 9-10]

The current wording of Article 2(4), restricting access to a lawyer for people accused of minor offences during the pretrial period, appears to contravene the ECHR and CFR. It reads:

“In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters”.

Recitals 9 and 10 provide examples of what are minor offences, including:

“traffic offences which are committed on a large scale and which might be established following a traffic control … minor offences which are committed in a prison context … minor offences committed in a military context and dealt with in first instance by a commanding officer”.

These amendments appear to extend the exception for minor offences that were agreed in Measures A and B. The exclusions in Measures A and B are intended to apply in relation to minor offences imposed by an authority other than a criminal court, not only in the pretrial period but which never have a criminal process through the courts unless an appeal is made, as in Article 2(3) of the Directive. On-the-spot or through-the-post fines – which do not require attendance at the police station, interrogation or attendance at court all – should be what is envisaged by this amendment. The justification for this exclusion, which we can accept, is that if someone is accused in these circumstances they would be able to seek legal advice before accepting the conviction or fine because an administrative authority could not detain and interrogate them. If this is what is intended, there is no need to specify anything further than Article 2(3) because the circumstances are outside the scope of this Directive.

In addition, Article 2(4) currently denies a person accused of a minor offence access to a lawyer until the matter is before a court, in contravention of the principles set down by the ECtHR. The ECtHR has held that the concept of a criminal charge has an autonomous meaning, independent of the categorizations employed by the national legal systems of the Member States. One aspect of this definition is that a
“charge” under the Convention arises against a person suspected of a minor offence as soon as the situation of the suspect has been substantially affected. This means the right to counsel arises at the very beginning of the investigation period, as this is the point at which the person is seriously investigated for the offence, the prosecution case is compiled and the person may be informed that they are suspected of having committed an offence.

Furthermore, the Directive’s current explanation and examples of what are “minor offences” are also at odds with the ECHR’s definition of “criminal”. The ECHR has held that offences classified as minor, petty, regulatory, or administrative may still be considered to be criminal under the Convention if they meet one of three criteria, namely (a) the classification of the offence in domestic law; (b) the nature of the offence; and (c) the severity of the potential penalty which the person concerned risks incurring. Any one of these criteria may make the charge criminal; it does not need to satisfy all of them.

Applying these three criteria in Östörk v. Germany, the ECHR found that although a traffic offence was described by the state as being a mere “regulatory offence” and the penalty was a fine, the Court held that it was a criminal charge for the purposes of Article 6. The Court took note of the fact that this offence was still considered a crime in most Member States and that the penalty for the office had a punitive and deterrence effect, thus giving it a criminal character. In other cases, the ECHR has found a range of road traffic offences to fall within the ambit of criminal matters, including those punishable by fines or restrictions concerning the driving license such as penalty points or disqualifications. It has also held a minor offence of causing a nuisance to be a criminal matter.

The ECHR has clear rules about what matters are considered to be criminal, and when exactly people charged with criminal offences can access their right to counsel. Article 2(4) of the Directive, as it is currently drafted, appears to be at odds with the minimum standards set down by the ECHR.

In addition, in some Member States these provisions will be unworkable since it may not be known whether the offence can be dealt with or a sanction imposed by a competent authority other than a court unless and until the suspect has been interviewed by the authority.

Recommendation: Article 2(4) should be removed as either its intended meaning is not communicated by the current draft and is not necessary at all, or its exclusion of pretrial advice is unlawful. The Directive should make it clear that all people accused or suspected of any criminal matter – no matter how minor – can exercise their full and unrestricted fair trial rights, including the right to a lawyer during the pretrial stages of proceedings.

(9) **Dual representation for people requested to surrender to a European arrest warrant (EAW)**

[Recitals 31 to 34, Article 9]

Whilst we welcome the recognition in the current draft of the need for legal advice in EAW cases, the Commission’s proposal for the Directive included the right of access to a lawyer in the issuing state in order to assist the lawyer in the executing state (known as “dual representation”). The right extended to carrying out activities limited to what is needed to assist the lawyer in the executing state with a view to ensuring the effective exercise of the person’s rights under Articles 3 and 4 of Council Framework Decision 2002/584/JHA.

Our extensive experience in relation to cross border cases has demonstrated that the EAW can only function properly and in the interests of justice with the assistance of expert legal advice in both the issuing and executing state. JUSTICE and the ECBA are conducting a research project entitled **Best Evidence in EAW Cases**, observing how EAW cases are managed by defence lawyers and the role of dual representation. Every lawyer involved has explained that it is impossible to represent clients effectively
without having access to legal advice in the issuing state. FTI regularly assists requested persons who have a genuine reason for surrender to be refused, but who cannot demonstrate that reason because the evidence is in the issuing state.

**Current Recital 33** refers to the need to respect time limits in the Framework Decision; lawyers in the issuing state are in the best position to ensure that this is done. Dual representation enables genuine reasons for refusal to be properly argued and spurious ones to be discontinued. In many cases where evidence is presented to the issuing state authority, a warrant will be withdrawn, or a voluntary arrangement taking into account those genuine concerns agreed. This always leads to a speedier conclusion of the proceedings and saves resources which may have been wasted on hearings and surrender proceedings. For example, where breach of a fine payment results in a custodial sentence and an EAW is issued, a lawyer in the issuing state can help with payment of the fine and the warrant is no longer necessary.

Currently whether a requested person receives dual representation is entirely dependent upon whether the executing state lawyer knows anyone in the issuing state. This is not a fair and effective system. In any event, speed should not be at the expense of protecting the rights of requested persons. In many cases (for example, threats to their life, prison conditions and requirements for medical treatment) it is not possible to properly assess the impact of surrender in the executing state alone.

**Recommendation** : Article 9 should have the following provisions inserted:

"**Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decisions 2002/584/JHA; upon arrest, also has 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. This person shall be informed of that right.**

Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer in the issuing Member State"."
Conclusion

Our organisations consider that the enactment of a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings represents an important step towards full mutual recognition within the common European justice space. The case law of the ECHR and other relevant regional and global instruments provide a starting point from which the co-legislators can develop the highest possible standards in this area; they should be seen as a floor on which to build, not a ceiling beyond which we cannot pass.

In order to be fully protected the right of access to a lawyer protected in the Directive must be built upon, at a minimum, the following principles:

- Except in wholly exceptional, clearly-circumscribed and fully-documented circumstances, access must be provided to all persons suspected or accused of a crime, whether ‘formally’ designated as suspects or not and regardless of a crime’s apparent minor nature.

- Access to a lawyer must be full, meaningful, and provided as a pre-requisite to any questioning by police authorities.

- Lawyers should be in a position to provide the necessary legal advice unencumbered, confidentially, and subject to the codes of their profession.

- If the right of access to a lawyer is not respected, the suspected or accused person should be put in the same position in which he or she would have been had the right of access to a lawyer not been disregarded.

- To ensure efficient and effective operational policing, derogations to the right of access to a lawyer may be necessary in exceptional circumstances. However, in the absence of any guidance from the ECHR, the Directive should not attempt to provide examples of what may meet the threshold of exceptional circumstances for derogations.

- No statement made or evidence obtained in the absence of a lawyer – even in exceptional circumstances leading to an authorized derogation – can be used at any stage of the proceedings against the accused or suspected person.
7 Zaichenko v Russia, ECHR, Judgment of 28 June 2010, at para. 41.
8 Zaichenko v Russia, ECHR, Judgment of 28 June 2010, at para. 41.
9 Brasco v France, ECHR, Judgment of 14 October 2010 at 44-45.
11 Saldaz v Turkey, ECHR, Grand Chamber Judgment of 27 November 2008, para. 54-55.
12 Saldaz v Turkey, ECHR, Grand Chamber Judgment of 27 November 2008, para. 54-55.
13 Ibid.
16 Pischchalinov v Russia, ECHR, Judgment of 24 September 2009, at para. 79.
17 Dayan v Turkey, ECHR, Judgment of 13 October 2009, para. 32.
18 Ocatal v Turkey, ECHR, Judgment of 12 May 2005, paras. 66, 70.
21 Brennan v the United Kingdom, ECHR, Judgment of 16 October 2001, at para. 58.
22 See http://www2.echr.org/english/law/pdf/treatmentprisoners.pdf. The Rules were Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXLI) of 13 May 1977. Pursuant to rule 95, these rules apply not only to prisoners but also to those on remand and other untried detainees.
24 See, for example, Deweer v Belgium, ECHR, Judgment of 27 February 1980 at paras. 42 and 46; and Eckle v Germany, ECHR, Judgment of 15 July 1982 at para. 73.
26 Engel and Others v. the Netherlands, ECHR, Judgment of 8 June 1976 at para. 82, 83. These principles were subsequently upheld by a number of Grand Chamber judgments, such as: Ezh and Connors v. the United Kingdom, ECHR, Grand Chamber Judgment of 9 October 2003 at para. 82.

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32 For example, in the Best Evidence in EAW Cases project we found that in requests from Poland to the Netherlands, with the assistance of Polish lawyers who liaised with the prosecuting or judicial authorities, in one case where the requested person was elderly and suffered poor health, a speedy initial hearing was arranged in Poland and the person allowed to return to the Netherlands pending trial; in a second case the Polish lawyers arranged for service of sentence in the executing state where concerns about prison conditions were raised; in a third case where work and family life would be affected, prosecutors agreed to withdraw the EAW in exchange for a guilty plea and suspended sentence.
APPENDIX 6: Joint letter to the Commission on pre-trial detention and Commission’s response

Open letter regarding pre-trial detention

Viviane Reding, European Commission Vice-President in charge of Justice

Dear Vice-President Reding

We are writing to you to express our concern about the lack of concrete action towards reform of Europe’s pre-trial detention regime since the November 2011 consultation deadline to the European Commission’s Green Paper on Detention. We urge the European Commission to take action, publish its analysis of the consultation’s findings and announce the next steps, which should include a timeframe for tabling a legislative proposal setting common minimum standards for the use of pretrial detention.

As you are aware, this consultation was requested by the European Council, in recognition that “excessively long periods of pre-trial detention are detrimental to the individual, can prejudice cooperation between the Member States, and do not represent the values for which the European Union stands”.

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The pre-trial detention regime in EU member states needs urgent reform, to ensure an end to the unnecessary and often arbitrary recourse to pre-trial detention and the severe rights violations that it causes, especially when it affects juveniles, non-nationals and vulnerable groups.

The Commission’s consultation has attracted widespread support for change. Over fifty non-governmental organizations and six member states agree that new EU laws are needed to end the excessive and unjustified use of pre-trial detention in the EU. Several other member states accept there are severe problems with pre-trial detention and see its misuse as a threat to mutual trust and continued judicial cooperation across EU borders.

In December 2011, Members of the European Parliament overwhelmingly supported a resolution on detention conditions in the European Union, which called for a legislative proposal on the rights of persons deprived of their liberty. The resolution called on Member States to ensure that pre-trial detention remains an exceptional measure, to be used only under strict conditions of necessity and proportionality and for a limited period of time, in compliance with the presumption of innocence and the right to liberty. It recalled that pre-trial detention must be reviewed periodically by a judicial authority and that alternatives must be used in transnational cases. This letter is copied to the MEPs who proposed the resolution, which carried cross-party support.

The case for reform is clear and the political mandate exists. In addition, Commission figures indicate that pre-trial detention costs EU countries around €5 billion each year, not including the wider costs to welfare systems when individuals cannot work or support their families due to lengthy periods in custody awaiting trial.

The outcome of the Commission’s consultation shows that there is a pressing need for reform and there is a clear call on the Commission to come forward with a legislative proposal setting common minimum standards for the use of pre-trial detention. As a year has now passed since the Green Paper was published in June 2011 we await a prompt announcement of the next steps.

Yours sincerely

Dr. Nicolas J. Beger
Director
Amnesty International European Institutions Office

Serge Kollwelter
President
Association Européenne pour la Défense des Droits de l'Homme
Mark Thomson  
Secretary General  
Association for the Prevention of Torture

Benoit Van Keirsbilck  
President International Executive Committee  
Defence for Children International

Professor Holger Matt  
Chairman  
European Criminal Bar Association

Jago Russell  
Chief Executive  
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Rick Lines  
Executive Director  
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Henrikas Mickevičius  
Executive Director  
Human Rights Monitoring Institute Lithuania

Liam Herrick  
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Irish Penal Reform Trust

Roger Smith  
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JUSTICE
James A. Goldston  
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Verts/ALE Group  
Judith Sargentini, Jan Philipp Albrecht, Tatjana Ždanoka, Rui Tavares, Raúl Romeva i Rueda

ECR Group  
Timothy Kirkhope

GUE/NGL Group  
Kyriacos Triantaphyllides, Cornelis de Jong, Cornelia Ernst, Miguel Portas, Nikolaos Chountis, Marisa Matias
Dear Ms Heard,

Thank you for your email dated 26 June 2012 and for the copy of the open letter addressed to Vice-President Viviane Reding regarding EU action on pre-trial detention in Europe.

The European Commission is fully aware of the issues relating to pre-trial detention and remains committed to improving the situation. While the area of detention, in principle, comes under the purview of Member States, it is important that the minimum level of protection of fundamental rights is respected in order to strengthen mutual trust and the efficient functioning of mutual recognition instruments in the area of detention, in accordance with and within the limits of the EU’s competence.

This is why last year the European Commission published a Green Paper entitled "Strengthening mutual trust in the European judicial area – A Green Paper on the application of European Union criminal justice legislation in the field of detention" (COM (2011) 327). In reply to the Council’s request, the Green Paper, which is part of the European Commission’s procedural rights package, primarily focuses on pre-trial detention.

The European Commission received a total of 81 replies from Member States, practitioners, international organisations, NGOs and academics, the last of which was received in March 2012. Directorate-General Justice has been analysing these replies and is currently assessing, on this basis, what appropriate action can and should be taken at European level.

Yours sincerely,

[Signature]

Martin SELMAYR

Catherine Heard
Head of Policy
Fair Trials International

e-mail: Catherine.Heard@fairtrials.net
Dear MEPs

Pre-trial detention in today's EU

Six months ago today, the European Parliament overwhelmingly supported a resolution to raise standards on the use of pre-trial detention in the European Union. We are writing to you as a group of cross-border criminal defence specialists, to express our concern over the lack of concrete action since.

The cross-party resolution called on the Commission to make a legislative proposal aimed at raising standards in this area, recognising that pre-trial detention should be an exceptional measure, to be used only where necessary and proportionate, in compliance with the presumption of innocence and the right to liberty. As legal practitioners, we see unnecessary and unjustified pre-trial detention across the EU on a daily basis. People are locked up for months or even years awaiting trial. Many of us work in countries with no legal maximum period of pre-trial detention and no proper process to test whether detention is even necessary.

The effects of lengthy pre-trial detention are most severe when the suspect is detained in another country. Preparing for trial far from home, in a different legal system and in a foreign language, presents huge difficulties for most suspects. More and more of our clients are facing these difficulties after being extradited under the European Arrest Warrant system. People are often denied bail on arrival in the requesting state, just because they are non-nationals and automatically considered a “flight risk”.

15 June 2012
The pre-trial detention regime in the EU needs urgent reform, to ensure an end to the current abuse of pre-trial detention and the injustices it causes. Based on our shared experience of recurring defects in the system, we advocate the following:

- **EU legislation:** the EU should legislate to set minimum standards for the use of pre-trial detention;
- **Proper implementation of the European Supervision Order:** Member States should implement the European Supervision Order in a way that ensures it represents a real alternative to pre-trial detention;
- **Deferred issue of European Arrest Warrants** and negotiated deferred surrender should be used to avoid unnecessary pre-trial detention post-extradition; and
- **A maximum pre-trial detention limit:** the EU should take steps towards establishing a one year maximum pre-trial detention limit, starting with targeted research by the European Commission to establish why practices differ so widely across Member States.

We are not alone in calling for action. In response to the European Commission Green Paper on detention of June 2011, over fifty non-governmental organisations and six Member States agree that legislative action at EU level is needed to end the excessive and unjustified use of pre-trial detention in the EU. Numerous other Member States accept there are severe problems in the over-use pre-trial detention and see this as a threat to continued judicial cooperation and mutual recognition. The responses to the Green Paper are summarised in Fair Trials International’s update report, *Pre-trial detention: the case for urgent EU action*, attached to this letter.

Despite the clear mandate issued by the European Parliament and the strong support of civil society and Member States, the Commission has not yet stated what action it will take in relation to pre-trial detention. We believe no further time should be lost: the case for reform is clear and there is also a clear economic justification: based on Commission figures, it is estimated that pre-trial detention costs EU countries almost €5 billion each year.

We hope you will join us in calling on the Commission to announce its intended action now that a year has passed since its consultation was launched and given the clear and urgent need for action.

Yours faithfully

---

**Jago Russell and Catherine Heard**  
Chief Executive and Head of Policy,  

**Vania Costa Ramos**  
Lawyer at Carlos Pinto de Abreu’s law firm  
Lisbon, Portugal
Bugnariu Dănuţ-loan,
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Anand Doobay,

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Markku Fredman,
Partner at Fredman and Mansson law firm, Helsinki, Finland.

Hans Gaasbeek,
Part of the Lawyers without Borders international network, the Netherlands.

Dr. Cliff Gatzweiler,
Lawyer and Co-Counsel at the ICC, Aachen, Germany.

Edward Grange,

Johanna Wöran,
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Netherlands.

CC Vice-President Viviane Reding, Commissioner for Fundamental Rights and Citizenship
MOTION FOR A RESOLUTION


pursuant to Rule 115(5) of the Rules of Procedure

on detention conditions in the EU (2011/2897(RSP))

Salvatore Iacolino, Manfred Weber, Simon Busuttil, Carlos Coelho, Elena Oana Antonescu, Georgios Papanikolaou, Roberta Angelilli, Mario Mauro, Erminia Mazzoni
on behalf of the PPE Group

Birgit Sippel, Claude Moraes, Sylvie Guillaume, Rita Borsellino, Emine Bozkurt, Roberto Gualtieri, Tanja Fajon, Carmen Romero López, Silvia Costa
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Timothy Kirkhope
on behalf of the ECR Group

Kyriacos Triantaphyllides, Cornelis de Jong, Cornelia Ernst, Miguel Portas, Nikolaos Chountis, Marisa Matias
on behalf of the GUE/NGL Group

B7-0687/2011

European Parliament resolution on detention conditions in the EU (2011/2897(RSP))

The European Parliament,

– having regard to the European Union instruments dealing with the protection of human rights, in particular Articles 2, 6 and 7 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union (CFR), in particular Articles 4, 19, 47, 48 and 49 thereof,

– having regard to the international instruments dealing with human rights and banning torture and inhuman or degrading treatment or punishment, in particular the Universal Declaration of Human Rights (Article 5), the International Pact on Civil and Political Rights (Article 7), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to that Convention on the establishment of a system of regular visits by international and national bodies to places of detention,

– having regard to the Council of Europe instruments dealing with human rights and the prevention of torture and inhuman or degrading treatment or punishment, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 3), the protocols to the ECHR and the case law of the European Court of Human Rights (ECtHR), the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which established the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and the CPT's reports,

– having regard to the instruments which deal more specifically with the rights of persons who have been deprived of their liberty, in particular: at United Nations level, the standard minimum rules on the treatment of prisoners and the declarations and principles adopted by the General Assembly; at Council of Europe level, the Committee of Ministers recommendations, namely Recommendation (2006)2 on European Prison Rules, Recommendation (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Recommendation (2008)11 on the European rules for juvenile offenders subject to sanctions or measures, Recommendation (2010)1 on the Council of Europe Probation Rules and the recommendations adopted by the Parliamentary Assembly,

59 For an exhaustive list of the Council of Europe's recommendations and resolutions in the penal sphere: http://www.coe.int/prison.
having regard to its resolutions of 18 January 1996 on poor conditions in prisons in the European Union 60 and of 17 December 1998 on prison conditions in the European Union: improvements and alternative penalties 61, and to its repeated calls to the Commission and Council to propose a framework decision on the rights of prisoners, as contained in its resolution of 6 November 2003 on the proposal for a European Parliament recommendation to the Council on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union 62, in its recommendation of 9 March 2004 to the Council on the rights of prisoners in the European Union 63 and in its resolution of 25 November 2009 on the multi-annual programme 2010-2014 regarding the area of freedom, security and justice (Stockholm Programme) 64,

– having regard to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States 65,

– having regard to Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union 66,


– having regard to the Commission proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011)326),

– having regard to the Commission Green Paper on the application of EU criminal justice legislation in the field of detention - Strengthening mutual trust in the European judicial area - of 14 June 2011 (COM(2011) 327 final),

– having regard to the Oral Questions on detention conditions in the EU tabled by the

60 OJ C 32, 5.2.1996, p. 75.
62 OJ C 83E, 2.4.2004, p. 180. Paragraph 23: 'Encourages the Council and Commission to speed up the investigation n the condition of prisoners and of prisons in the EU, with a view to adopting a framework directive on prisoners' rights and common minimum standards to guarantee such rights on the basis of Article 6 [TEU]. See also Parliament’s resolution of 4 September 2003 on the situation as regards fundamental rights in the European Union (2002), paragraph 22: 'Considers, at a general level, that efforts must also be made in a European area of freedom, security and justice to mobilise European capacities to improve the operation of the police and prison system, for example ... by drawing up a framework decision on minimum standards to protect the rights of prisoners in the EU'.
64 P7_TA(2009)0090: in paragraph 112 Parliament 'calls for the construction of an EU criminal justice area based on respect for fundamental rights, the principle of mutual recognition, and the need to maintain the coherence of national systems of criminal law, to be developed through...minimum standards for prison and detention conditions and a common set of prisoners’ rights in the EU...'.
ALDE, GUE/NGL, PPE, Verts/ALE and S&D groups,

– having regard to Rules 115(5) and 110(2) of its Rules of Procedure,

A. whereas the European Union has set itself the task of developing an area of freedom, security and justice, and whereas, pursuant to Article 6 of the Treaty on European Union, it respects human rights and fundamental freedoms, thereby taking on positive obligations which it must meet in order to honour that commitment;

B. whereas detention conditions and prison management are primarily the responsibility of Member States, but whereas shortcomings, such as prison overcrowding and allegations of poor treatment of detainees, may undermine the trust which must underpin judicial cooperation in criminal matters based on the principle of mutual recognition of judgments and judicial decisions by EU Member States;

C. whereas judicial cooperation in criminal matters needs to be based on respect for standards in the area of fundamental rights standards and the necessary approximation of the rights of suspects and accused persons and of procedural rights in criminal proceedings, which is crucial to ensuring mutual confidence among Member States in the area of freedom, security and justice, in particular given that the number of Member State nationals held in another Member State may rise as a result of such cooperation;

D. whereas the total prison population of the EU in 2009-2010 was estimated to be 633 909; whereas the Commission Green Paper which contains that figure paints an alarming picture of:

- prison overcrowding;
- an increase in the prison population;
- a rise in the number of foreign nationals being held;
- large numbers of pre-trial detainees;
- detainees with mental and psychological disorders;
- numerous cases of death and suicide;

E. whereas Article 3 of the ECHR and the case law of the ECtHR impose on the Member States not only negative obligations, by banning them from subjecting prisoners to inhuman and degrading treatment, but also positive obligations, by requiring them to ensure that prison conditions are consistent with human dignity and that thorough

68 In the EU the average is 107.3; overcrowding concerns 13 MSs, as well as in England and Wales and Scotland, with the highest overcrowding in Bulgaria (155.6), Italy (153), Cyprus (150.5), Spain (136.3) and Greece (129.6).
69 EU average is 21.7, with the highest percentages in Luxembourg (69.5), Cyprus (59.6), Austria (45.8), Greece (43.9) and Belgium (41.1).
70 EU average is 24.7, with the highest percentages in Luxembourg (47.2), Italy (43.6) and Cyprus (38.4).
71 CPT reports draw attention to the persistence of certain serious problems, such as ill-treatment and the unsuitability of prison facilities, activities and health care.
effective investigations are carried out if such rights are violated;

F. whereas in some Member States a large part of the prison population is composed of persons in pre-trial detention; whereas pre-trial detention is an exceptional measure and excessively long periods of pre-trial detention have a detrimental effect on the individual, can prejudice judicial cooperation between Member States and run counter to EU values; whereas a considerable number of Member States have repeatedly been condemned by the ECHR for violations of the ECHR in relation to pre-trial detention;

G. whereas one of the problems to which Member States frequently draw attention is the lack of resources available to improve prisons conditions, and whereas it may be necessary to create a new budget heading with a view to encouraging them to comply with high standards;

H. whereas providing decent conditions for prisoners and granting them access to schemes designed to prepare them for a return to society help to reduce the likelihood that they will re-offend;

I. whereas the Council has adopted resolutions and recommendations (which are not always implemented by the Member States) concerning the specific problem of drug dependence and the reduction of the related risks and dealing in particular with the treatment of drug dependence in prison and outside;

J. whereas only 16 Member States have ratified the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, while seven have signed, but not yet ratified, it; whereas some Member States grant national MPs and MEPs the right to visit prisons, and whereas the EP has called for that right to be granted to MEPs throughout the territory of the EU;

K. whereas children are in a particularly vulnerable position in relation to detention, in particular pre-trial detention;

M. whereas on 30 November 2009, the Council adopted a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings, which is part of the Stockholm Programme and sets out vital safeguards that will help ensure that fundamental rights are respected in the push for increased cooperation between Member States in the area of criminal justice;

N. whereas the Commission has issued a communication – further to an explicit request by

73 Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Luxembourg, Malta, Netherlands, Poland, Romania, Slovenia, Spain, Sweden and the United Kingdom have ratified; Austria, Belgium, Greece, Finland, Ireland, Italy, Portugal have signed but not ratified it; source: http://www.apt.ch/npm/OPCAT0911.pdf.
74 See, for example, Parliament's resolution on prison conditions in the European Union: improvements and alternative penalties, paragraph 41: 'Calls for Members of the European Parliament to have the right to visit and inspect prisons and detention centres for refugees on the territory of the European Union'.
the Council and as provided for in the Stockholm Programme and repeatedly called for by Parliament – entitled ‘Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention’\(^\text{75}\), which launches an open consultation exercise for stakeholders on EU action to improve detention conditions so as to ensure mutual trust in judicial cooperation, highlights the links between detention conditions and various EU instruments, such as the European Arrest Warrant and the European Supervision Order, and makes it clear that detention conditions, pre-trial detention and the situation of children in detention are issues on which the EU could take initiatives;

1. Welcomes the Commission Green Paper; is concerned by the alarming situation as regards detention conditions in the EU and calls on Member States to take urgent measures to ensure that the fundamental rights of prisoners, in particular the rights of vulnerable persons, are respected and protected, and considers that minimum common standards of detention should be applied in all Member States\(^\text{76}\);

2. Reaffirms that detention conditions are of central importance for the application of the principle of mutual recognition of judicial decisions in the area of freedom, security and justice, and considers a common basis of trust between judicial authorities, as well as a better knowledge of national criminal justice systems, to be of critical importance in this respect;

3. Calls on the Commission and the Fundamental Rights Agency to monitor the situation as regards detention conditions in the EU, and support the Member States in their efforts to ensure that their laws and policies are consistent with the highest standards in the field\(^\text{77}\);

4. Calls on the Commission and EU institutions to come forward with a legislative proposal on the rights of persons deprived of their liberty, including those identified by the EP in its reports and recommendations\(^\text{78}\), and to develop and implement minimum standards for prison and detention conditions, as well as uniform standards for compensation for persons unjustly detained or convicted; calls on the Commission and Member States to keep the issue high on their political agenda and to devote appropriate human and financial resources to addressing the situation;

5. Stresses the importance of ensuring that fundamental rights are respected, notably the rights of the defence and of access to a lawyer, and that the rights of suspects or accused persons are guaranteed, including the right not to be subjected to inhuman or degrading treatment; recalls, in this connection, the importance of the Commission proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest;


\(^{76}\) Such as the European Prison Rules adopted by the Council of Europe.

\(^{77}\) Such as the standards established by the Council of Europe, the CPT, the European Court of Human Rights and its relevant case law, and the observations of the UN Human Rights Committee, Committee against Torture and Special Rapporteur on Torture.

6. Stresses that detention conditions that are perceived as poor, or conditions that risk falling below the standards required by the Council of Europe’s European Prison Rules, could be an impediment to the transfer of prisoners;

7. Calls on the Member States to earmark appropriate resources for the restructuring and modernisation of prisons, to protect detainees’ rights, to successfully rehabilitate and prepare detainees for their release and social integration, to provide the police and prison staff with training based on contemporary prison management practices and European human rights standards, to monitor prisoners suffering from mental and psychological disorders, and to create a specific EU budget heading with a view to encouraging such projects;

8. Reaffirms the need to promote the improvement of prison facilities in Member States, in order to provide them with appropriate technical equipment and expand the space available, and to make them functionally suitable to improving the living conditions of detainees, while ensuring a high level of security;

9. Calls on the Member States to ensure that pre-trial detention remains an exceptional measure to be used under strict conditions of necessity and proportionality and for a limited period of time, in compliance with the fundamental principle of presumption of innocence and of the right not to be deprived of liberty; recalls that pre-trial detention must be reviewed periodically by a judicial authority and that alternatives such as the European Supervision Order must be used in transnational cases; calls on the Commission to come up with a legislative proposal on minimum standards in this field based on Article 82(2) (b) of the Treaty on the Functioning of the European Union (TFEU), on the CFR, on the ECHR and on ECtHR case law;

10. Reaffirms the need for Member States to honour the commitments made in international and European fora to making greater use of probation measures and sanctions which offer an alternative to imprisonment, including decisions taken within the Council of Europe;

11. Urges the Member States to take action to prevent suicides in prison and to carry out in-depth and impartial investigations in all cases where a prisoner dies in prison;

12. Calls on the Member States and the accession countries to sign and ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Punishment, which establishes a system of regular visits by international and national bodies to places of detention and confers on those bodies the task of visiting and inspecting prisons and hearing appeals by prisoners, as well as drawing up a public annual report for the relevant parliaments; encourages the European Union to make a call to sign and ratify the Optional Protocol part of its policy vis-à-vis third countries;

79 Such as Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules.
calls on the EU and its Member States to fully collaborate with and support these bodies, including with appropriate resources and funds;

13. Believes that measures should be taken at EU level so that national MPs are guaranteed the right to visit prisons and that this right is likewise granted to MEPs within the territory of the EU;

14. Calls on the Commission to examine the impact of differences in criminal law and procedural law on detention conditions in the EU Member States and to make recommendations on these issues, notably in relation to recourse to alternative measures, criminalisation and decriminalisation policies, pre-trial detention, amnesty and reprieve, notably in the fields of migration, drugs use and juvenile offenders;

15. Reaffirms the importance of ensuring that children are treated in a manner that takes into account their best interests, including being kept separate from adults and having the right to maintain contact with their families;

16. Considers that every child deprived of his or her liberty should have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent authority;

17. Believes that Member States should implement effective and independent national supervision mechanisms for prisons and detention centres;

18. Supports the CPT’s and the Council of Europe Commissioner for Human Rights’ continued work in and visits to Member State detention centres;

19. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the Council of Europe, the Council of Europe Parliamentary Assembly, the Council of Europe Commissioner for Human Rights, the European Committee for the Prevention of Torture, the European Court of Human Rights, the UN Committee on Human Rights, the UN Committee against Torture, the UN Special Rapporteur on Torture and the UN High Commissioner for Human Rights.
Mrs Viviane Reding  
European Commission Vice-President in charge of Justice,  
Fundamental Rights and Citizenship  
BE-1049 Brussels  
Belgium  
20 October 2010  

Dear Commissioner Reding  

**European Arrest Warrant**  

We are writing to you as a group of legal defence practitioners with extensive experience of cross-border criminal cases throughout the European Union.  

First, we would like to congratulate you on the important work being done by the Commission towards making fundamental fair trial rights a reality in Europe. After years of political deadlock, we are delighted that the European Union is now taking the steps necessary to make these rights a reality. As you have so clearly explained, respect for these rights is a hallmark of any civilised democracy and no European citizen should be denied them, wherever in the Union they live, work or travel.  

There is, however, a separate but related matter needing urgent attention, one that poses a serious threat to fundamental rights in Europe if not addressed now.  

As lawyers, we have all seen ever greater numbers of clients facing the prospect of extradition to another EU country under the fast-track European Arrest Warrant system. This system was implemented over seven years ago, long enough to enable an informed reflection on how this flagship European justice measure has been operating in practice. In our view, an urgent review of the legislation (taking into account the views of practitioners) is needed. Key points, all of which come from our shared experience of recurring and systemic defects in the system, include the following:  

- **Proportionality tests** are needed so that people are not extradited where this is disproportionate given the nature of the allegations and the likely effects and costs of extradition.  
- **Legal representation** (with legal aid for those who cannot pay) is needed, both in the country where the person is arrested under a Warrant and the country seeking extradition.
• **Flexibility to refuse extradition** must exist in cases of serious fundamental rights infringements. People should not be extradited, for example, on the strength of evidence obtained by torture or police brutality, or where there are *prima facie* indications that the requested person is the victim of identity theft.

• **Recognition of refusal** to extradite by one EU country’s court: we have seen people who have successfully challenged extradition being re-arrested every time they travel, because the requesting country refuses to remove the Warrant.

We all believe that Europe needs an effective extradition system to ensure serious cross-border crime is prosecuted and punished with minimum delay. None of us wants criminals to be able to exploit open borders to escape justice. However, if the EU is to win its citizens’ support for the ambitious goal of a system based on the mutual recognition of 27 different countries’ judicial decisions, urgent safeguards must be built into the EAW system.

Alongside this, it is also crucial, if the EAW system is to avoid further discredit, that the EU continues to adopt legislation to protect basic defence rights, such as access to legal advice. It must also act urgently to end unacceptable detention conditions, such as prison overcrowding and the use of *incommunicado* detention, as well as excessive periods spent in custody awaiting trial once the person has been extradited.

We will continue fully to support the European Union’s work to improve defence safeguards and would be glad to work with the Commission in bringing about the necessary reform to the extradition laws. Without these changes, we fear a steady erosion of public trust in European justice initiatives.

Yours sincerely,

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Partner at Keizer Advocaten, Amsterdam, Netherlands

Dara Robinson
Solicitor, Garrett Sheehan & Co, Dublin, Ireland

Jago Russell and Catherine Heard
Chief Executive and Policy Officer (respectively), Fair Trials International, London, England

Dominique Tricaud
Partner, Tricaud-Traynard Avocats Associés Paris, France

Oliver Wallasch
Defence lawyer, Wallasch & Koch
Frankfurt, Germany
Dear Members of the Fair Trials International Legal Experts Advisory Panel,

Thank you for your letter dated 20 October 2010.

I welcome and appreciate your support for the Commission’s important work on procedural rights for suspects and accused persons, which I have made a priority of my tenure. I am also grateful to receive a clear statement of your concerns in relation to the operation of the European Arrest Warrant (EAW). I agree that while we need the efficient and effective extradition system provided by the EAW in a Europe of open borders, there is considerable room for improvement in the operation of the EAW system.

The Commission is currently preparing its third report on the implementation of the EAW, which will address ongoing issues with a view to improving the operation of the EAW. A particular priority is reaching agreement among Member States on incorporating a consistent proportionality check before an EAW is issued and ensuring all alternative options have been considered.

I am of the view that the introduction of minimum standards for procedural safeguards is indispensable to the improvement of the operation of the EAW. There are specific provisions relating to the EAW in both the Directive on the right to interpretation and translation, approved by the European Parliament and Council this October, and the draft Directive on the right of defendants to be given information on their procedural rights (a “Letter of rights”), which is currently at an advanced stage of negotiations. Research for the third measure in the procedural rights road map on the right to legal representation is currently underway and will examine the issue of legal representation in both issuing and executing state in EAW cases. The procedural rights roadmap also envisages legislating for a right to communicate with family, employer and consular authorities and for protection for vulnerable suspects; measures that are designed to obviate the possibility of evidence (upon which an EAW request could be based) being obtained in circumstances that breach the fundamental rights of suspects.

Members of the Fair Trials International
Legal Experts Advisory Panel
c/o Ms Catherine Heard
Policy Officer
Fair Trials International

e-mail: Catherine.Heard@fairtrials.net
Poor detention conditions in many prisons in the European Union, which to a large extent is due to prison over-crowding, may and do constitute an obstacle to the implementation of mutual recognition based instruments, such as the European Arrest Warrant. As part of the procedural rights project and in accordance with the Action Plan implementing the Stockholm Programme, the Commission intends to publish a Green Paper in 2011 where it will explore possibilities of taking action for resolving problems in the area of both pre- and post-trial detention, including sub-standard detention conditions and alternatives to imprisonment. In addition, a mechanism to address the issue of long pre-trial detention of non-resident EU-citizens should be provided by Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, which was based on the Commission’s proposal and has an implementation date of 1 December 2012.

I note that the operation of the EAW requires ongoing scrutiny and the Commission has consistently reserved the right to consider all options, including legislation, in respect of ongoing issues in the light of further experience and of the new context for Justice and Home Affairs legislation after the Lisbon Treaty. I very much appreciate your ongoing support for my work on procedural rights for suspects and accused persons and your ongoing input into identifying where improvements must be made in the EAW system.

Yours sincerely,

[Signature]

The European Arrest Warrant

Criminal Justice 2008

With financial support from Criminal Justice Programme

European Commission – Directorate-General Justice, Freedom and Security

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 interest and concern and to provide advice, information and recommendations to inform FTI’s work.

2. The second meeting of LEAP took place in London on 15 May 2009. LEAP members representing seven European countries were in attendance and the meeting was chaired by HH Dennis Levy QC.

3. As part of its casework, FTI regularly receives requests for assistance in cases which involve a European arrest warrant (‘EAW’) and FTI has become increasingly concerned about the human rights issues which arise out of the operation of the EAW scheme. The topic of the May meeting was therefore the law and policy surrounding Extradition and the EAW.

Injustice arising from the EAW scheme

4. It is clear that a person’s extradition to another country can have a serious impact on the enjoyment of their basic rights to liberty, to respect for their private and family life and, in some cases, their right to a fair trial. Although it was accepted that states should continue to cooperate in bringing to justice those guilty of criminal offences, it was considered that the fast-track system for extradition within Europe (the “EAW”) was, in many cases, leading to injustice.

5. The following problems with the operation of the EAW scheme were, in particular, identified:

   i. Authorities in Member States are not fully taking into account the burdensome effects of extradition on individuals and as a result there is an absence of sufficient safeguards against extradition for very minor offences.

   ii. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality and EAWs have, in practice, been issued for very minor offences. Not only does this lead to injustice in individual cases but also places a significant and unjustified burden on the resources of Member States. This is also contrary to the underlying purpose of the EAW scheme, being to tackle serious organised crime and terrorism.

   iii. The right to an effective appeal against a decision to extradite has not been granted to individuals subject to an EAW in all Member States. Furthermore, the rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. There is also limited availability of legal aid to support legal representation in the requesting state and the executing state.

   iv. The Framework Decision on the EAW makes it clear that the EAW scheme is subject to the obligation to respect fundamental rights and the rule of law. Courts in Member States have not, however, been effective in upholding the integrity of the EAW scheme by using the European Convention on Human Rights and the human rights protections in their own constitutions to ensure that the injustices which arise out of the implementation of the EAW are addressed.

   v. There is regretfully much uncertainty and ambiguity concerning the status of the Framework Decision on the EAW within the constitutional framework of the European Union and domestic legal systems. Constitutional challenges to domestic legislation implementing the Framework Decision on the EAW in Germany, Poland and Cyprus represent this ambiguity. This has contributed to the reluctance of domestic judicial authorities to interpret the Framework Decision on the EAW and respective implementing legislation in light of fundamental principles of European law, including respect for fundamental rights and the free movement of people.
vi. It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW on general grounds such as the passage of time. In some cases, EAW alerts have remained in place even after a person has served their prison sentence in the state issuing the warrant.

6. In order for the EAW scheme to be deemed a real success the scheme must operate in a just and fair way which respects fundamental rights, the principle of proportionality and the rule of law. Proposals to provide guarantees of basic procedural rights across Europe should be welcomed but would not, in themselves, be sufficient to remedy the flaws with the EAW.

Action required for a fairer EAW scheme

7. The following urgent action was recommended by the panel:

i. Extradition and the prospect of a trial abroad is in and of itself hugely burdensome on individuals and should not be used for minor offences. Appropriate procedures must be implemented in executing states to ensure EAWs are only issued when proportionate to the offence. The chapter on proportionality in the European Arrest Warrant Handbook is not sufficient to ensure Member States respect the principle of proportionality when issuing an EAW.

ii. Judicial authorities in member states have the authority to ensure extradition procedures within Europe respect the rule of law, the fundamental principles of EU law and human rights guarantees in domestic constitutions. Domestic courts should be more willing to exercise this authority to refuse to execute a warrant where:
   a. the execution of the warrant will result in a breach of human rights;
   b. the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.

iii. Training should be provided to defence lawyers to equip them to use EU constitutional principles to challenge inappropriate uses of EAWs.

iv. Compensation schemes must be made available to individuals who have spent time in custody pending the completion of proceedings relating to an EAW which does not lead to a charge.

v. The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting state and the executing state and it was essential for individuals to have lawyers representing them in each country

vi. The financial burdens resulting from the implementation of EAWs should be borne by the issuing state to create a disincentive against inappropriate uses of the EAW scheme.

vii. Mutual recognition of judicial decisions must be pursued and promoted within Europe for decisions not to execute a warrant just as they are for decisions to issue a warrant. Decisions to refuse to execute an EAW on general grounds, such as the passage of time, by one Member State should be recognised in other member states.
viii. The system for removing EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for issuing EAW alerts. The system for removing EAW alerts must also be made more accessible to individuals.

ix. Further research is needed into the fate of individuals against whom EAWs had been executed in order adequately to gauge the success of the EAW scheme. In particularly, it would be instructive to collect statistics on the conviction and charge rates in cases where individuals have been surrendered under an EAW. It is also necessary to determine what legal aid and legal representation is available to individuals being tried after the execution of an EAW against them. Research in these areas by the European Union, Member States and independent bodies like EuroMos must be encouraged and supported.

x. Coordinated action must be taken by civil society organisations across the EU to highlight the cases of injustice which are currently arising from the EAW scheme. As well as lobbying for change to the Framework Decision on the EAW, member States should be lobbied to fulfil their duty to ensure that the domestic implementation of EAW scheme complies with the fundamental principles enshrined within the European legal system.

Conclusion

8. The EAW scheme was implemented to ensure perpetrators are brought to justice and do not take advantage of Europe's open borders to escape responsibility for criminal offences. Faith in the EAW scheme and, more broadly, in the ability of the European Union to build an area of freedom, justice and security within Europe will be undermined if the EAW continues to cause injustice in individual cases. Mutual cooperation in criminal justice must remain subject to the fundamental principles underlying the European Union: respect for human rights and the rule of law.
Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (11 September 2009)

Discrimination against non-national and non-resident defendants in the EU

Criminal Justice 2008

With financial support from Criminal Justice Programme
European Commission – Directorate-General Justice, Freedom and Security
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 third meeting of LEAP took place at the TMC Asser Institute, The Hague, Netherlands on 11 September 2009. Sixteen LEAP Members representing nine European countries attended and the meeting was chaired by HH Dennis Levy QC.

2. FTI regularly receives requests for assistance in cases where real disadvantage is suffered as the result of a person being non-national or non-resident. The meeting focused on the problems faced in the various Member States represented, particularly in interpreting/translation facilities and bail.

3. Members agreed that the main areas where non-nationals face discrimination in criminal justice are: translation and interpretation; bail; failure to understand the legal system, making them unable to participate or exercise their rights; failure to obtain legal advice, especially in cross-border cases; and finally, direct discrimination by some criminal justice agencies in investigations and proceedings, as well as in policy formulation.

4. It was agreed that more should be done by practitioners whose clients suffer such discrimination, to make use of legal developments and European Court of Justice rulings on the free movement of persons and other European treaties. For example, in relation to bail, where a citizen of an EEA country is seen as a flight risk, their passport can be taken and they can be required to attend a police station weekly: refusal to allow this in appropriate cases violates the Citizens’ Directive, which gives all EEA citizens the unconditional right to remain in the State of their choice and move freely between States.

Injustice arising from the lack of interpreting and translation

5. It is clear that the right to legal interpreting and translation exists to ensure that no one facing criminal proceedings in the EU should suffer significant disadvantage by reason of their lack of competence in the language of the proceedings. Members agreed there is significant divergence between different Member States’ provision of these facilities. Non-nationals commonly face difficulties at the police station getting legal assistance and a quality interpreter. Following a wide-ranging discussion with input from several jurisdictions and from members of the legal and interpreting professions, the following key points were identified:

   i. Assessing linguistic needs: Careful thought must be given to who carries out the assessment and how it should be appealed. Courts are often not competent to make the assessment, although training would help. Defence lawyers should also be trained on assessing linguistic competence and challenging decisions on it. Proper time must be set aside to assess linguistic needs and for any appeals.

   ii. Preservation of original recordings: All Member States should have rules requiring the preservation of recordings when police/prosecuting authorities have conducted interviews with the aid of an interpreter, or where court proceedings are interpreted.

   iii. Time limits: Procedural rules should take account of the time needed to translate documents and transcribe recorded interviews or other proceedings. The rules should allow time extensions where necessary.

   iv. Training: Professionals must be qualified in both legal interpreting and translation: these are distinct skills and both are required in the criminal justice context. Training must cover assessment of linguistic competence. Efforts should be made to identify best practice in
v. **Technology:** Careful consideration should be given to the use of technology such as video-linking where, for example, personal attendance is impossible or there is an emergency situation. The legal and interpreting professions should be consulted on appropriate conditions and facilities. Regarding rarer languages and dialects, telephone and internet access could be a solution until sufficient interpreters have been trained and registered. Audio-taping should be used whenever interpreters are involved and video-recording should be considered.

vi. **Information to suspects:** The reasons for detention or arrest should be explained well enough to enable the non-national suspect to understand *in detail* the nature and cause of the accusation. This should be in writing, translated if necessary.

6. **Role of interpreters – independence, standards, pay, and security**

i. The code of ethics for legal interpreters should make it clear the interpreter is independent and does not represent the defendant or the prosecution, but is there to serve the interests of justice by faithfully rendering words spoken from the source into the target language.

ii. Interpreters are often under-paid (for example, in Greece, €15 per case in police investigations). Some interpreters claim to speak several languages yet do not reach the necessary standards in any.

iii. In Germany, interpreters in police stations are engaged and paid by the police and can become biased towards the prosecution, due to dependency on work from this single source.

iv. The problem of interpreters' and translators' independence is serious in Central and Eastern European countries because of the greater role of State agencies, particularly during the pre-trial investigation phase.

v. Great caution should be used around subcontracting interpreting/translation services to agencies, as costs are likely to increase and independence could be compromised.

vi. Interpreters' identities should be kept confidential and not shown on documents provided to defendants, for security reasons, unless strictly necessary.

Discussion of Framework Decision Proposal

7. **General reception:** A Framework Decision on interpreting and translation would be a positive development, providing defence lawyers with a valuable tool to get the facilities their clients need. It would raise awareness of the need for good facilities and high professional standards. Raising standards will result in costs savings and fewer delays, appeals and quashed convictions.

8. **Scope of interpreting and translation facilities**
i. The Explanatory Memorandum should state that interpretation is needed: at the police station; at all meetings between the lawyer and the client; in court proceedings; and in detention, to ensure prisoners can also exercise rights effectively.

ii. The text should cover the interpreting of interviews with witnesses, not merely suspects; and the provision of interpreters and readers for blind and/or illiterate suspects and defendants.

iii. It should provide that clients will have their legal advice translated as of right rather than having to apply for this, as the proposal currently envisages; and that documents the legal adviser cannot understand should be translated so s/he can advise on their content.

9. Quality, pay, training, ethics

i. The Reflection Forum on Multilingualism and Interpreter Training made detailed recommendations to the Commission in its report: these should be followed in the Proposal and Resolution on best practice.

ii. Registration should impose an obligation on interpreters to abide by the Code of Conduct. The Code should form part of the compulsory syllabus for interpreters.

iii. Registration should only last a fixed period, with extension dependent on attested CPD or other quality assurance or monitoring systems. An online directory of qualified and registered legal interpreters would be useful.

iv. Adequate remuneration is crucial. Becoming qualified, obtaining and maintaining registration will be expensive for legal interpreters/translator.

10. Adequate time and facilities: The Explanatory Memorandum and Framework Decision should refer to the need for adequate time and facilities for interpreting and translation, reflecting the need for the defendant to understand in detail, in a language he understands, the nature and cause of the accusation (Article 6).

11. In summary, Members welcomed the proposal for a Framework Decision on translation and interpretation, though its detailed provisions will need further work to ensure it is capable of preventing significant disadvantage due to lack of linguistic competence. It will be an important tool for achieving better facilities for defendants. Practical issues need addressing, such as satisfactory time allowance and the need to record interviews and testimony to allow for mistakes in interpretation to be identified and the record corrected.

Disadvantages faced by non-nationals in applications for bail

12. Bail is rarely granted to non-nationals. When non-custodial supervision orders are made they are usually more coercive than those against nationals/residents. Most States use two criteria in deciding bail applications: the likelihood of further criminal behaviour; and the risk of absconding. When bail is denied, both effective defence and future rehabilitation are harder to achieve. The practice in a number of States was discussed:

i. Greece: Judges dealing with bail applications can either order conditional release or pre-trial custody for up to 18 months. Non-nationals are generally deemed ineligible for conditional
release. Greek courts consider all non-residents potential fugitives from justice, particularly when they have resisted extradition.

ii. Germany: Courts have ruled that given the EAW’s ability to bring fugitives back easily, the lack of an address in Germany is no longer a ground to refuse bail. Bail money is seen by German courts as the best way to address flight risk.

iii. France: Decisions on bail use the same criteria as those on pre-trial custody, ie: is there a risk that evidence or witnesses will be interfered with, or will public opinion be shocked by releasing the person or granting bail pending trial? A new scheme is being piloted with the UK, with Prisoners Abroad supporting applications for parole or conditional freedom by informing the authorities about resettlement services available to prisoners on arrival in the UK. If effective, it could be introduced in other States.

iv. Netherlands: Dutch courts will only order a defendant’s surrender on condition that the requesting State: (1) guarantees they will be returned to Holland after trial if they wish to return; and (2) permits the sentence to be converted to Dutch standards. If a Dutch defendant is in prison abroad after being surrendered from Holland, bail is often granted, on the basis the defendant will be returned anyway, on being sentenced and having his sentence converted. If a Dutch person is arrested abroad, bail is problematic. If bail is granted and the defendant absconds, an EAW must be issued to secure his return: Holland will only order surrender on the two conditions referred to above, which result in conversion to a shorter sentence. If bail is not granted overseas, the Dutch national will remain in prison following trial and the sentence becomes irrevocable: if he requests transfer back to Holland, most States only agree on condition the sentence will not be converted.

v. Romania: As in some other Central and Eastern European Member States, there is no general concept of bail in Romania. Suspects are either held until trial or granted liberty. If there is a risk of absconding or witness interference, custody is imposed, ranging from 29 to 180 days.

vi. Italy: Bail is not granted if there is a risk of reoffending, evidence manipulation or absconding. Non-nationals are seen as a flight risk, despite the EAW and Schengen systems effectively guaranteeing their return.

vii. UK: In minor cases, defendants are often given the choice between pleading guilty and paying a fine, or being refused bail and held in custody for a week.

European Supervision Order (“ESO”)

13. The Framework Decision on the ESO is expected to be adopted at the 23 October 2009 Justice and Home Affairs Council meeting. Members consider it to be a positive development which could provide a helpful tool for defendants to seek release in appropriate circumstances. The following general points were made:

i. As the system is discretionary it is hard to predict how national courts will apply it, how it will interact with the EAW, or with the “Roadmap” measure on pre-trial detention.

ii. Clearly the system could work well for low level offences, given the obvious appeal for judges to be able to send defendants back if they are sure the proceedings would not be compromised by subsequent absconding or the other State’s failure to re-surrender the
person. But where there was a risk of reoffending in serious offences, there is little chance judges would risk using the ESO. There may also be practical and resourcing difficulties in meeting conditions, for example, insufficient bail hostels.

iii. For the ESO to function properly, courts will need to know about other countries’ arrangements for monitoring bail conditions. Making effective use of the ESO system will also cause extra work for defence lawyers, for example collecting evidence that bail conditions can be complied with or probation services have capacity.

14. In terms of specific provisions:

i. Contradictory terms are used regarding decision-making: “issuing authority” (in the ESO) and “judicial authority” (in the Explanatory Memorandum, section 3). Members agreed that only judicial authorities should take decisions on bail and custody. If prosecutors decide such matters, there is a risk of conflict of interest.

ii. The prospect of “medical treatment” being imposed as a condition also raises concern.

15. In summary, Members agreed non-nationals have less chance of getting bail and less understanding of legal proceedings and their rights. Members welcomed the ESO Framework Decision proposal, but questioned the extent to which it would be used and highlighted concerns over non-judicial authorities taking decisions on bail. Over time, as defence lawyers seek to maximize its potential for clients, test cases in the ECJ might emerge, for example regarding freedom of movement.
Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (5 February 2010)

(1) European Arrest Warrant: Developments since May 2009

and

(2) Letters of Rights: Information on Charges

Criminal Justice 2008

With financial support from Criminal Justice Programme

European Commission – Directorate-General Justice, Freedom and Security
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 fourth meeting of LEAP took place at the offices of Clifford Chance in London on 5 February 2010. 22 LEAP Members representing 12 European jurisdictions attended. The meeting was chaired by HH Dennis Levy QC.

2. Since the May 2009 meeting on the European Arrest Warrant ('EAW') this topic has received much attention. FTI's own EAW casework has increased, as has that of several Members. Members agreed that the issues highlighted at the May 2009 meeting continue to cause concern, including:

   i. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality. Extradition is often ordered for minor offences and insufficient attention is being paid to the passage of time since the alleged offence;

   ii. Insufficient attention is being paid to human rights considerations and whether the issue or execution of an EAW offends against the rule of law or amounts to an abuse of process;

   iii. Given the serious impact extradition has on an individual's personal and family life and the likely difficulties the person will face in understanding proceedings in another language and culture, legal representation is essential, if necessary paid for by legal aid;

   iv. The rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. Legal aid to pay for representation (in both the requesting and executing States) is often limited;

   v. Individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal laid down in the Framework Decision on the EAW.

3. The first part of this meeting was spent revisiting the EAW, in particular: the proportionality issue; rising costs being incurred by Member States as a result of the increase in EAWs being issued; availability of bail following surrender; legal challenges to the EAW; and the possibility of a test case at the European Court of Justice.

4. Members agreed that problems with the EAW are being exacerbated by the continuing lack of minimum defence protections in the EU. The investigative stage of criminal proceedings is of paramount importance to protecting fair trial rights. The absence of timely and clear information about legal rights and the charges against the suspect devalues the right to a fair trial, making rights that exist in law illusory in practice. The second half of the meeting focused on this issue. Presentations were made by academics conducting research in the field and Members discussed existing practice in their own jurisdictions and made recommendations for an EU-wide letter of rights.
European Arrest Warrant (EAW): introduction of a proportionality check?

5. At the European Commission’s experts’ meeting in November 2009, the consensus was that: (a) the lack of a reliable proportionality check was the greatest defect in the EAW system; and (b) any duty to conduct proportionality checks should fall on the issuing State. The Commission is considering which Framework Decisions need to be recast as Directives following the abolition of the “Third Pillar” under the Lisbon Treaty. This could provide an opportunity for reforming the EAW legislation.

Court of Justice test case on proportionality/freedom of movement grounds?

6. Members agreed that Court of Justice guidance was needed on which categories of case were serious enough to justify use of an EAW: the list of 32 offences and a certification regarding applicable minimum sentences were not sufficient in themselves. The Kadi case established that the EU principle of proportionality, inspired by Member States’ constitutions, prevailed in any dispute over the interpretation of EU law or domestic implementing legislation.

7. A reference could be made either by the issuing State (taking the position that a refusal by another State on proportionality grounds was contrary to the EAW Framework Decision and the principle of mutual recognition), or by the executing State (seeking clarification and certainty on the proportionality principle and support for a decision to refuse surrender on proportionality grounds). Good statistical evidence and the right test case would be needed to illustrate that a State was issuing EAWs disproportionately.

8. A Court of Justice reference could also be made by a national Court to which an individual had applied under Article 111 of the Schengen Convention for removal of an alert after surrender had been refused, if the issuing State refused to recognise this refusal and remove the EAW. The principle of mutual recognition based on mutual confidence would support such a reference as being necessary to uphold the right of free movement.

9. Draft reference questions would be prepared for a sub-group of Members to review. Efforts would be made to identify a suitable case for a reference.

Political lobbying for a proportionality test, backed by statistics on EAW use and costs

10. Members agreed that a further way to get States to address the proportionality problem was to exert political pressure through effective lobbying and campaigning. To be effective, this would need to highlight:

   i. the human cost, in individual cases, where EAWs were issued for trivial offences; and

   ii. the resources being wasted by over-use of EAWs where more appropriate and proportionate solutions were available.

11. Governments should be receptive to sensible suggestions for curbing costs incurred in processing unnecessary and disproportionate EAWs and using appropriate alternative measures. Statistics should be provided to government departments and political representatives to illustrate the problem. Members agreed to send Freedom of Information requests to their governments asking:

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i. how many EAWs were issued;
ii. how many EAWs were received (and from which issuing States);
iii. with what eventual outcomes (proportion of EAWs resulting in release without charge, acquittal, how long spent in pre-trial detention); and
iv. estimated costs per EAW received or processed, broken down into:
   - court costs for proceedings;
   - detention;
   - prosecution costs;
   - defence representation;
   - interpreting/translation; and
   - transportation.

12. Members agreed that an effective way of shifting the cost burden to the issuing State was to impose a fixed charge of up to €5,000 per EAW.

Recent EAW trends in Member States: (a) challenges on proportionality and other grounds

**Ireland**: Decisions from the Irish High Court are producing useful jurisprudence on proportionality. Many trivial EAWs are received from Poland and the Czech Republic: the resulting high costs are exacerbated by substantial legal aid and interpreter costs.

**France**: Old warrants are finding their way onto crime databases and re-emerging as EAWs. France has lengthened its limitation period to 20 years, so if a minor is arrested for possessing 2g of marijuana today, he could receive an EAW for that offence more than 20 years later. There should be a limit of 5 years for EAWs with judges empowered to renew them for further 2 year periods if appropriate.

**Spain**: Spain imprisons more people than any other Member State (one third of prisoners being foreign nationals). In 2009, it issued 1,800 EAWs, but only received 117. It is almost impossible to challenge an EAW successfully in Spain. Many public defenders know nothing about the EAW. They are paid only €300 per case, so clients are being advised not to challenge surrender. The statute of limitations allows EAWs to be issued decades after the events in question and this should be changed, in the way suggested for France (above).

**Poland**: Conflicting information had been reported on why so many EAWs are being issued by Poland. The principle of legality is often identified as the reason but this was questioned by some at the November 2009 experts’ meeting.

**Germany**: For German nationals, the court sometimes applies proportionality principles in denying surrender, whereas a Polish client was recently surrendered for theft of €25.

**Bulgaria**: The EAW has been favourably received. The prevailing view is that Member States receiving EAWs should not carry out proportionality tests, as this contradicts the principle of mutual recognition. Instead, they must presume that the issuing State has satisfied itself as to proportionality. Bulgarian statistics suggest that in 2008, 38 people were surrendered, 4 EAWs were refused and 4 were pending. The 4 refusals were on technical grounds: no proportionality-based refusal is permitted.

**UK**: Surrenders have been refused where: the requesting country is not ready to prosecute but merely wishes to investigate; surrender would breach specialty; and where re-trials following a conviction in absentia were not guaranteed.

**Hungary**: The recent FTI case of Turner and McGoldrick, surrendered to Hungary, was widely covered in the media. They spent months on remand and prosecutors appeared to be merely investigating and not ready to prosecute81. Members agreed it should be possible to challenge such a premature use of an EAW as contrary to Article 1.1 of the Framework Decision regarding the permitted uses of an EAW, which do not extend to mere investigation.

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81 as apparently now accepted following their release from Hungarian custody on 27 February 2010
Recent EAW trends: (b) refusal of bail following surrender

13. Members agreed it is virtually impossible for a defendant to avoid pre-trial detention once surrendered, despite the risk of absconding not being identifiable in every case. However, if bail is refused on pure nationality grounds, this could be challenged via a reference to the Court of Justice or European Court of Human Rights (as in the case of Andrew Symeou, extradited to Greece in July 2009).

**UK:** Availability of EAWs to secure attendance at trial has been used with limited success to get bail.

**Spain:** Non-availability of bail is a particularly serious problem given pre-trial detention periods of up to 4 years.

**Portugal:** The maximum period of pre-trial detention has been reduced to 3 years and 6 months. Portugal does not trust in the EAW system to guarantee a person’s attendance at trial and refuses bail in most non-national cases.

Letters of Rights: Information on Charges

14. It was agreed that timely information is crucially important because if defence rights are not exercised early, irreparable harm can be done to the defence. Not only would clear and timely information about rights reduce this risk: the requirement to provide it would foster greater respect for defence rights among police and prosecution officers. Many States do not provide information on rights until after initial interrogation and often only do so orally (therefore, unverifiably). In England and Wales, a person must be informed in writing on arrest of the rights applicable including, most importantly, access to free legal advice.

15. There is highly variable underlying rights provision across Member States: for example, in many States there is no right to the translation of key documents. There is also great variance in what rights are referred to in Letters of Rights: many Letters do not refer to the right to an interpreter, yet that right is theoretically guaranteed in the legal systems of all States. In some countries, Letters of Rights are provided, but not in translation.

16. Research suggests that although many Member States have legislated to provide information on rights to suspects, they are not in fact providing it. In some cases, Letters of Rights improve protections, for example, referring to the right to free access to a lawyer from the first arrest, but if the approach is too formalistic, loopholes can be exploited by prosecution authorities.

17. Poor compliance with fair trial rights is partly due to defence lawyers’ inability to provide their clients with effective representation and preserve their fair trial rights (often due to unacceptably low legal aid provision in many States). Bar associations and law societies are not doing all they could to ensure adequate training and monitoring so that the highest possible professional standards are met. Members agreed that, given this situation, adequate, clear and timely information on rights is all the more important.

Panel’s recommendations on Letters of Rights/Information on Charges

18. The legislation must recognize the risks suspects face at the early investigative stage, before they have contacted legal advisers, consular officials or relatives. The inequality of arms at this stage is at its greatest and must be compensated for by clear, timely information, even before arrest is made.
19. Difficulties arise in defining what should trigger the provision of information on charges because “charge” is not a universally recognized concept. What matters is the way a person’s situation could be affected by developments in the case: for example, when a witness becomes a suspect. Members suggested that the Commission and its researchers consult practitioners as well as government and prosecution officials, to ensure rights to information are adequately safeguarded for all EU legal systems. Additional protections should be inserted for young or vulnerable suspects.

20. All suspects must be given, as soon as possible after becoming a suspect, clear information, in a language and form they can understand, about their rights to:

- contact with consular officials and family members or other trusted persons
- legal advice and representation (including information that a lawyer’s presence is allowed during police questioning (if applicable))
- legal aid
- interpretation
- translation of key documents
- the right to silence (if applicable); and
- information about the charges and the reason for arrest or detention.

21. Where a person is asked to confirm that information has been given, the time and date it was given must also be required to be stated. It is not acceptable for information about rights or charges only to be given orally, or for police to self-certify its provision. Verification procedures must exist. In this context, consideration should be given to tape- or audio-recording of the provision of information.

22. Where information on a right is provided, nothing must be said or done by police or prosecution authorities to suggest it might be detrimental for a suspect to seek to exercise that right.

23. Clarity of information is crucial; arrest is a traumatic experience for most, and information at or immediately after the first contact with police, in clear and simple language the suspect understands, is therefore necessary. Translations into locally prevalent languages are necessary. The Letter of Rights must be clear about precisely when each right arises, for example, when the suspect has a right to legal advice.
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

Criminal Justice 2011

With financial support from Criminal Justice Programme

European Commission – Directorate-General Justice, Freedom and Security
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.
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.

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.
Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (London, 4 February 2011)

(1) Pre-trial detention and bail in today’s European Union

and

(2) Prisoner transfer and mutual recognition of custodial sentences
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 European policy position. The sixth meeting of LEAP took place at the offices of Clifford Chance in London on 4 February 2011. 18 LEAP Members and 8 invited guests, representing 13 European jurisdictions, attended. The meeting was chaired by HH Dennis Levy QC.

2. Since its creation LEAP has had a huge impact, allowing FTI to use members’ expertise to achieve change. For example, there has been significant progress on the European Arrest Warrant (“EAW”), which has been discussed at two previous LEAP meetings. There is now increasing acknowledgment of the need for reform, as illustrated by the UK Government setting up an independent panel to review the UK’s extradition arrangements. A group of LEAP members, together with FTI, has also written to Commissioner Viviane Reding, voicing their concerns about the EAW and calling for reform. Mrs Reding responded, accepting there was “significant room for improvement in the operation of the European Arrest Warrant.”

3. Increasing use of the EAW is having the undesirable and unnecessary outcome of ever greater numbers of individuals spending significant time in prison on remand in EU countries other than their own. In the first part of the meeting, members discussed the use of pre-trial detention in their jurisdictions and the apparently discriminatory way bail decisions are made where defendants are non-nationals. As well as discussing problems under the current system, members examined the Framework Decision on the European Supervision Order (“ESO”), discussing its potential for improving the system and foreseeable problems with its operation. The ESO is due to be implemented by all Member States by 1 December 2012.

4. The second part of the meeting was dedicated to discussing prisoner transfer between EU Member States and the expected impact of the Framework Decision on the mutual recognition of custodial sentences, which is to be implemented by all Member States by 5 December 2011, apart from Poland, which has secured a 5 year extension.

1. Pre-trial detention and bail in today’s European Union

5. The Panel agreed that non-nationals are frequently discriminated against when it comes to bail decisions. They are more likely than nationals in similar cases to be held in pre-trial detention, which impacts on their ability to prepare for trial effectively. Members explained how bail operated in their jurisdictions and commented on existing practices which can lead to unfairness for non-national defendants.

Spain: In Spain bail is reviewed before a judge every week or two weeks. For non-nationals, bail is difficult to get. The maximum period of pre-trial detention is 4 years. The length in practice depends on where in Spain the defendant is held. For example, 4 years’ pre-trial detention in Madrid is unusual, yet in Tenerife it is frequently served. If the case has not been decided before the four years have elapsed, the person is released on bail. Bail review hearings are mainly dealt with on paper, but lawyers can address the judge in private to negotiate bail.

Italy: In Italy the judge’s decision whether or not to grant bail involves an assessment of the seriousness of the offence. Italy has a maximum pre-trial detention period of 6 years, yet some cases can go unresolved for 10 years or more. (In Italy time is counted as pre-trial detention until all final appeals have been exhausted.)
The maximum length of pre-trial detention in the Czech Republic is 16 months. Release is automatic once this limit is met. Bail is available as an alternative: there are no mandatory bail conditions. However, it is almost impossible for non-nationals to get bail. Once a decision to remand in custody is made, the person has a right to regular review. However, in practice, the original decision is usually rubber-stamped in subsequent review hearings.

If a person is charged with a serious offence the burden of proof effectively rests on the defendant to show why bail is appropriate. This infringes the right to a presumption of innocence. When it comes to non-nationals being granted bail, the same approach is followed in England and Wales as in much of Europe.

The trial must start within 140 days of arrest. Monetary bail deposits have been abolished in Scotland, but can still be imposed as a special condition: there are signs that money bail may be brought back. Scottish prisons are full of people who have violated bail conditions and yet, due to prison overcrowding, convicted persons are being released early.

In Bulgaria pre-charge detention is treated differently to pre-trial detention. Following arrest if no charges are brought within 24 hours, the person must be released. There are two types of measures to prevent evasion from justice: 1) measures which do not restrict the defendant's personal freedom (eg signing in at a police station and bail) and measures either resulting in restrictions on liberty (eg home arrest) or leading to deprivation of liberty (eg detention on remand). The law stipulates that pre-trial detention can be imposed provided there is reasonable suspicion that the person has committed the offence. The rationale is that if reasonable suspicion is shown, there is a risk the person will abscond if the crime in question is punishable with a sentence of more than 10 years’ imprisonment. The burden of proving this is not in fact a risk rests in practice, though not in law, with the defence. The bringing of charges is not subject to judicial review and sometimes new charges are formulated in order to ensure more stringent detention conditions are imposed. In most cases, pre-trial detention is not allowed to last for more than one year.

In the mid-1990s responsibility for bail decisions moved from the prosecutor to the court. Pre-trial detention is supposed to be a last resort, where bail will not suffice to protect the interests of justice. Courts can impose alternatives, such as regular signing in at a police station or electronic tagging. It is difficult to persuade a judge to apply tagging due to functional problems with the tagging system.

Pre-trial detention is only supposed to last for 3 months, with an upper limit of 2 years, but in practice these periods are regularly extended. Review hearings are usually a rubber-stamping of previous bail decisions. The defendant is represented at all the hearings but only attends the first. Courts can order pre-trial detention if the prosecutor indicates that the evidence suggests a high probability of guilt, or where severity of the likely sentence leads to a presumption the person will attempt to evade justice. The Court of Appeal adopts exactly the same approach to pre-trial detention as the lower courts. The ECtHR has frequently found Poland in breach of Art 5 ECHR. Legislation alone cannot produce change: the mentality of judges must also change.

Following recent reforms in Romania, 10% of the prison population are pre-trial detainees, reduced from 40%. This reduction was brought about by a change in the Criminal Procedure Code which saw pre-trial detention powers removed from prosecutors and given to judges. This was accompanied by a strengthening of habeas corpus remedies. Under new time limits, pre-trial detention during the investigation stage can last for a maximum of 180 days.
Generally, pre-trial detention can last up to the equivalent of half the maximum sentence for the alleged offence. A shift in the mentality of judges has taken place and a probation service has been introduced. Conditions can be attached to bail, such as a prohibition on leaving the country or a particular city. These measures have helped reduce the number of pre-trial detainees. The impetus for change was EU accession and general modernization of the justice system.

Germany: In Germany pre-trial detention can last for a maximum period of 6 months. This can only be extended in very serious cases. There is automatic review of detention after 3 months. Pre-trial detention is often used as a bargaining chip by prosecutors. However, there is generally a presumption that bail will be granted.

Ireland: In Ireland most people are granted bail even for serious offences. This is now starting to change, apparently due to the large number of non-nationals going through the criminal justice system. Afro-Caribbean and Roma people often receive discriminatory treatment in bail applications. This has pushed up the number of remand prisoners. What is needed is a bail regime free from discrimination and a fixed time limit for the commencement of trial. So far there have been no European Convention on Human Rights ("ECHR") challenges on this point. The length of the possible sentence is explicitly acknowledged as something which can be considered by the judge when making a decision on bail.

6. The Panel identified the following key problems:
   i. in several EU countries pre-trial detention is, in practice, the norm, even though in legal theory it is only meant for exceptional cases;
   ii. decisions ordering pre-trial detention routinely infringe Article 5 ECHR, being ordered on illegitimate grounds connected with the merits of a case, the length of the sentence attributable to the crime, or the apparent strength of the evidence;
   iii. non-nationals and ethnic minorities are over-represented as a class of pre-trial detainees;
   iv. excessively long periods are being spent in pre-trial detention;
   v. conditions in pre-trial detention are often unacceptable, making effective trial preparation impossible and causing needless infringement of Article 8 ECHR rights for defendants and their families (as well as, in some cases, infringements of Article 3 ECHR rights).

7. It was agreed that the crucial fundamental rights protection in this area – one lacking in several EU jurisdictions – is the right to a regular judicial review of pre-trial detention decisions, with defendants present and legally represented. These reviews must be more than a mere rubber-stamping of previous decisions, but be based on a fresh and objective analysis of all available relevant information, with a reasoned decision by the court. Steps must also be taken to eradicate discriminatory approaches to bail in cases of non-nationals and members of ethnic minorities, to end the use of excessively long periods of pre-trial detention, to introduce effective supervision systems, and to raise standards in detention facilities to an acceptable minimum, ensuring particularly that the European Prison Rules are complied with insofar as pre-trial detainees are concerned.

The European Supervision Order

8. The Panel examined the European Supervision Order ("ESO"). This instrument lays down rules according to which one Member State recognizes a decision issued in another Member State imposing supervision measures, as an alternative to pre-trial detention. This would allow defendants in appropriate cases to remain in their home country at conditional liberty, until trial, with express provision for the European Arrest Warrant to be used to require the person's surrender if supervision conditions were breached. The Framework Decision must be implemented by all Member States by 1 December 2012.

9. Members acknowledged the significant benefits of a system of cross-border supervision, particularly given the unacceptable practices currently seen in many European countries with regard to the excessive use and length of pre-trial detention. The Panel welcomed the fact that
Member States had adopted a measure that could substantially reduce the number of non-nationals held in pre-trial detention and safeguard individuals awaiting trial against unjustified infringements of their fundamental right to liberty, family life and the opportunity to prepare properly for trial. With overcrowding a major problem in many EU prisons and non-nationals and pre-trial detainees both over-represented classes of prisoner, such a system had clear potential advantages.

10. However, Members agreed there were shortcomings with the ESO:
   i. the lack of any express obligation on States to issue ESOs in suitable cases;
   ii. the absence of clear, objective criteria for when an ESO should be issued;
   iii. the prospect of administrative as opposed to judicial authorities taking decisions under ESOs: this is not acceptable in situations where an untried person’s liberty and family life are at stake and could also lead to ESOs being issued for inappropriate reasons;
   iv. the absence of provisions about the role and participation of the defence; and
   v. undue complexity around what happens in case of a breach of ESO conditions, which could lead to reluctance on the part of issuing authorities to use ESOs, even in appropriate cases. The ESO could in fact inhibit proactive solutions in cross-border bail arrangements, due to its over-complexity and to the absence of common practices across member states.

11. The Panel recommended that, in order for the ESO to be capable of realising its full potential benefit (both for individuals and member states), further provisions and guidance are needed in the following areas, prior to the ESO’s implementation:
   i. clear provisions on when an ESO should be issued, with an obligation on member states to use ESOs in appropriate cases;
   ii. given the disparity between bail regimes and maximum pre-trial detention periods in today’s EU, there is an urgent need to raise and harmonise standards of decision-making at remand hearings and to bring about greater approximation of alternative supervision measures between member states, including where necessary setting up suitable supervision and bail systems;
   iii. guidance is required on the role and participation of the defence, to ensure that, in suitable cases, defendants can request the issue of ESOs;
   iv. simplification and greater flexibility around what happens if ESO conditions are breached.

12. Members were concerned that, unless these issues were now tackled, there was a danger that the ESO, once implemented, would operate in a discriminatory and uneven way across Europe and would fail to fulfil its potential and meet its original objectives.

13. Members also agreed that a systematic programme of information and education for judges, prosecutors and legal defence practitioners, is crucial to ensure the ESO is used to the full in all appropriate cases.

2. **Prisoner transfer: Framework Decision on mutual recognition of custodial sentences**

14. The Panel shared their experience of the current prisoner transfer system in EU countries. It was agreed that enabling foreign prisoners to return to their home States to complete their sentences improves rehabilitation prospects, as prisoners are placed in a more familiar environment to prepare for re-entry into society. Ensuring that prisoners were detained close to home also makes life easier for family members. However, the current transfer system was agreed to be bureaucratic and slow.

15. Unfairness is also frequently seen in connection with the difficulty some countries encounter when deciding how to enforce or convert sentences imposed overseas which would not have been imposed in similar cases domestically. Such decisions often lead to arbitrary and unjust results for
the transferred prisoner. For example, in England and Wales, there was a disparity in the treatment of transferred prisoners serving determinate and indeterminate sentences. A person serving a life sentence imposed abroad will, in effect, have their sentence converted after transfer. This often leads to a significant reduction in the amount of time served in prison. However, a prisoner serving a determinate sentence will not have the same opportunity. Instead, the sentence simply continues to be enforced. This can mean that more serious offenders will spend less time in prison than less serious offenders.

16. Members examined the Framework Decision on the mutual recognition of custodial sentences, which aims to simplify and speed up the prisoner transfer process. Members expressed some major concerns about the human rights implications of the Framework Decision:

i. Material prison conditions and the laws governing the rights of detainees vary widely across the EU. The Framework Decision could be used to send people to be detained in prisons with very poor conditions. There is also a danger that transfers will be used to ease overcrowding in one Member State, exacerbating overcrowding in another Member State. This could be a particular problem where one Member State has a high proportion of prisoners who are nationals of another, perhaps neighbouring, Member State.

ii. Difficulties will also be encountered around sentencing equivalents. For example, in Belgium, electronic tagging is classed as a prison sentence, whereas in most other EU States it is not. Widely divergent rules regarding conditional or early release could become an obstacle to transfer. Determining equivalent sentences will be especially problematic where the offence falls into one of the categories of offence to which dual criminality checks are not required. It will be difficult for an executing State to enforce an equivalent sentence where there is no equivalent offence.

iii. From a procedural rights perspective, the Framework Decision is disappointingly weak. The procedural rights “Roadmap” measures will not apply to the procedures envisaged by the Framework Decision because it is not concerned with the pre-conviction period. However, the fact that the Framework Decision removes the requirement that the sentenced person consents to transfer means that even greater attention must be paid to the possible infringement of fundamental rights, post-transfer. Greater access to information on prison conditions and other States’ criminal justice systems is therefore vital. This will enable issuing States to take all relevant factors into account before initiating transfer.

iv. Members considered it unfortunate that the instrument contains no express requirement for prisoners subject to transfer decisions to be given information about prison conditions in the home state, or the transfer process generally. In the circumstances, it is all the more important for the protection of fundamental rights that persons subject to a transfer decision are legally represented and their lawyers are given sufficient time prior to transfer to collect information about prison conditions and advise their clients of the effect of the legislation and potential remedies where it could infringe fundamental rights.

v. Given the apparent lack of research on the number of prisoners who will fall within the ambit of the Framework Decision, members feared that some countries will not be sufficiently prepared for its impact. Different Member States have different conceptions of social rehabilitation and of the factors to be considered when deciding whether transfer would facilitate rehabilitation. The Framework Decision does not provide general criteria. However, if each case is assessed on its merits using different tests, this could lead to uncertainty and unfairness.

vi. Given that the Framework Decision removes the requirement that the sentenced person must consent to transfer, even greater attention must be paid to the possible infringement of fundamental rights post-transfer. Greater access to information on prison conditions and other States’ criminal justice systems is therefore vital. This will enable issuing States to take all relevant factors into account before initiating transfer.
Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (Cambridge, 28 March 2011)

The European Arrest Warrant

Criminal Justice 2011
With financial support from Criminal Justice Programme
European Commission – Directorate-General Justice
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 European policy position. The seventh meeting of LEAP took place at Fitzwilliam College, University of Cambridge, UK on 28 March 2011. 16 LEAP Members and 6 invited guests, representing 12 European jurisdictions, attended. The meeting was chaired by HH Dennis Levy QC.

2. LEAP meetings allow FTI to draw on a wide range of practitioner expertise and provide invaluable input into FTI’s policy and campaigning work. This has had a significant impact and aided FTI in its calls for greater protection for defence rights across Europe. The EU’s fast-track extradition system, the European Arrest Warrant (“EAW”), has been discussed at two previous LEAP meetings. These have allowed LEAP members to express their serious concerns about the impact the EAW has on the fundamental rights of requested persons.

3. These concerns were raised in a letter sent by a group of LEAP members, together with FTI, to Commissioner Viviane Reding in October 2010. Mrs Reding responded, accepting there was “significant room for improvement in the operation of the European Arrest Warrant”. In March 2011 the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, recognised that FTI had drawn attention to the need for reform of a system which “has been used in cases for which it was not intended, sometimes with harsh consequences on the lives of the persons concerned”.

4. This final LEAP meeting on the EAW focused on the key flaws in the EAW system and suggestions for reform ahead of the publication of a detailed FTI report (later launched at an event at the European Parliament on 3 May 2011).

The European Arrest Warrant

5. The Panel agreed that the following flaws had been identified with the EAW system:
   i) inadequate protections for fundamental rights;
   ii) disproportionate use of the EAW for minor offences;
   iii) the absence of legal representation in the issuing as well as the executing State;
   iv) the failure by issuing States to remove EAWs when other Member States have refused to execute them;
   v) the lack of adequate appeal processes in some Member States.

Fundamental rights

6. The EAW is based on mutual trust in the justice systems of all EU States. However, this trust is sometimes misplaced as not all European countries offer sufficient protection for the fundamental rights of suspects, defendants and prisoners. In this context blind faith in other States’ ability to adequately respect fundamental rights is inappropriate and is causing widespread injustice.

7. The EU’s continuing work on the Roadmap of procedural safeguards represents one part of the solution to this problem. External safeguards aimed at raising the level of protection for defence rights across the EU is a crucial counterpart to enhanced cooperation. However, given the severe human impact of extradition and the great risk of the process violating the fundamental rights of requested persons, internal safeguards for human rights are also needed within the EAW legislation itself.

8. In some States the human rights implications of extradition are not being considered at all prior to surrender being ordered. This is unacceptable. The ECtHR in MSS v Belgium and Greece has
recently held that Member States do not fulfil their own obligations under the ECHR by merely assuming, in the face of contrary evidence, that another Member State will protect the fundamental rights of individuals sent to their jurisdiction, simply by virtue of that State being a signatory to the ECHR. Although MSS concerned the expulsion of an asylum seeker under the Dublin II Convention, it is clearly analogous to extradition proceedings and should be applied at extradition hearings throughout the EU.

9. Some Member States already consider the fundamental rights aspects of extradition and their implementing legislation explicitly allows extradition to be barred where it would violate the Convention rights of the requested person. However, in too many States the human rights bar is being interpreted in a way which sets it so high it is virtually impossible to meet in practice. This is the case even where detailed and recent evidence has been adduced as to the risk of infringement if extradition takes place.

10. Greater guidance must be provided to judges, either through training or the insertion of a human rights bar in the Framework Decision on the EAW, to ensure that in extradition decisions mutual recognition does not always “trump” fundamental rights concerns. Without respect for fundamental rights at the centre of the EAW, there will be a continued erosion of trust in the instrument and the principle of mutual recognition more generally. In addition, insufficient weight is being given to the EU law principle of “effective judicial protection”.

Proportionality

11. It is unacceptable that EAWs are being issued for minor offences. Given the huge financial and human impact of extradition, the EAW should be reserved for serious crimes.

12. In order to combat the disproportionate use of extradition, Member States should be legally required to carry out a proportionality assessment before issuing an EAW. Although some Member States currently undertake such a proportionality assessment, others, which apply the principle of legality in decisions whether to prosecute, do not. Guidance in the Handbook on the EAW is insufficient to deal with this problem. Instead the Framework Decision on the EAW should be amended to include a proportionality requirement for issuing States.

13. EAWs for the purposes of prosecution should not be issued if there is no real likelihood of a custodial sentence being imposed at the end of the trial process. The likely sentence which will be imposed should form a greater role in assessing whether an EAW should be issued.

14. As another means to ensure that the EAW system is used in a proportionate manner, more consideration should be given to the idea of attaching financial ramifications to issuing an EAW. If there were financial implications to issuing a warrant this may ensure that sufficient care is taken over the decision about whether the EAW is necessary in the circumstances and if there are alternatives to extradition. At present, EAWs are too easy to use: in Poland they are easier to issue than domestic warrants. One member had seen an EAW used to check whether a supervision order had been complied with.

15. However, a proportionality test in the issuing State alone is not enough. Certain key factors which affect the proportionality of extradition, such as the impact extradition will have on the family life of the requested person, only come to light in the executing State. For this reason it is essential that the executing State should also be required to determine whether extradition would be proportionate. This double proportionality check would offer an important protection for requested persons.

Dual representation

16. The requested person should be provided with legal assistance in both the issuing and executing State. In most EAW cases requested persons are only provided with legal assistance in the executing State, meaning they are often represented by lawyers who are unfamiliar with the legal system and human rights situation in the issuing State. This places the requested person at a disadvantage.
Many LEAP members have seen the benefits of dual representation in practice. Legal assistance in the issuing State enables negotiation with judges and prosecutors and can lead to a withdrawal of the warrant or the requested person consenting to surrender.

Although dual representation can have cost implications, it is important to note that it can often help prevent wasted resources. Timely contact between defence practitioners in the two Member States can prevent the need for evidence requests being made. Furthermore, negotiated withdrawal of a warrant saves the cost of extradition hearings and surrender.

The EU should ensure that dual representation becomes the norm in EAW cases, perhaps by including the necessary binding provisions in the forthcoming Directive on the right to legal assistance under the Roadmap of procedural safeguards. Funding to ensure training and the establishment of an effective network of defence lawyers would also assist in establishing an efficient dual representation system.

Removal of warrants

Too often EAWs are refused on substantive grounds by the executing State, yet the issuing State refuses to withdraw them. This runs contrary to the principle of mutual recognition as the decision of the executing State should be respected and applied by all other Member States, including the one issuing the EAW.

In practice the failure to remove warrants can have a devastating effect on the lives of individuals. Crossing a national border opens them up to the possibility of being re-arrested and detained on the same warrant. This effectively traps the person in the executing State and curtails their right to free movement.

The decision to refuse a warrant should be respected by the issuing State, which should withdraw the EAW. Where the EAW has been refused on a technical ground or on the basis of facts which later change, an EAW can be reissued. A requirement that issuing States remove warrants once they are refused could be added to the Framework Decision. At the very least, guidance on this should be included in a non-binding form, for example in the Handbook on the EAW.

Appeals

Too many Member States do not offer a sufficient appeal process for those undergoing extradition procedures. In Spain and the Netherlands, for example, there is no right of appeal in extradition cases.

In Member States such as Ireland and France it is possible to appeal but only on limited grounds. In practice this restricts the ability of requested persons to challenge the initial decision that they should be extradited.

Conclusion

The EU should take action to reform the EAW to address the problems highlighted above. Defence practitioners see time and again the impact these flaws in the EAW system have on individual lives. The purpose of the EAW is to deliver justice, yet it cannot do this if the fundamental rights of requested persons are sidelined. Reform is necessary to avoid further cases of injustice and a resulting erosion of trust in the EAW and the criminal justice legislative mandate of the EU.
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)
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 website82), 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 arrest83. 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 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 roadside 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.84

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84 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.”
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.

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

Pre-trial detention in today’s European Union
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. Since the February 2011 meeting when detention issues were last discussed by LEAP, the European Commission has launched a Green Paper consultation on detention. This was issued in June 2011 and ends on 30 November 2011. It is designed to establish what action is required at EU level to raise standards across all EU countries in the whole area of detention.

3. FTI has since undertaken significant research on pre-trial detention in the EU and has been working on a detailed report to submit in response to the Green Paper. The report was circulated in draft before the meeting. It contains comparative research on the pre-trial detention laws of 15 EU Member States, undertaken in collaboration with Clifford Chance LLP and LEAP members in those 15 EU jurisdictions.

4. Europe’s excessive use of pre-trial detention is ruining lives and costing billions every year. The European Supervision Order could save billions and ease the severe overcrowding in prisons in over half of all Member States. However, many EU countries’ systems do not yet have the requisite mechanisms in place in order to make full use of it.

5. Due to the large number of LEAP attendees the meeting was divided into three smaller workshop groups which discussed the Green Paper and FTI's draft report, focusing on the following issues:

   i. Should the EU legislate to set minimum standards for the use of pre-trial detention?

   ii. Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?

   iii. What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?

   iv. In EAW cases, is deferred extradition appropriate when the case is not ‘trial-ready’?

(i) Should the EU legislate to set minimum standards for the use of pre-trial detention?

a. Problems identified in use of pre-trial detention in EU jurisdictions

6. It was widely acknowledged that pre-trial detention offers valuable safeguards to ensure justice is served, evidence and witnesses are protected, and suspects do not evade prosecution. However, it should only to be used where necessary as it conflicts with the presumption of innocence,

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85 The Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom.
infringes the right to liberty and to family life, and tends to impair a person’s ability to prepare for trial. During discussions among the panel members the following problems were identified in the use of pre-trial detention.

7. Pre-trial detention is being used when not strictly necessary, and often for too long, at huge cost to both individuals and the state. Some countries, including the UK, are incarcerating women charged with very minor offences such as shoplifting. This has a huge knock-on socio-economic effect when children are taken into care. Several members were concerned with these wider socio-economic costs of pre-trial detention.

8. Few Member States have an adequate system for the regular and reasoned review of pre-trial detention. In many countries the right to a review exists in legal theory but is not protected in practice. In others, review hearings amount to a rubber-stamping exercise, rather than a genuine reassessment of the need for detention with the opportunity to present arguments in favour of release. Often no alternatives to detention are considered and insufficient reasoning is given for detention decisions. Inappropriate factors are often taken into account in the detention decision such as the seriousness of the offence.

9. Non-nationals are more likely to be detained than nationals on the basis that they present a flight risk. Some Member States’ laws allow for people to be detained for years before trial, meaning people are being extradited only to be locked up in a foreign country for significant periods. This has been exacerbated by the introduction of the European Arrest Warrant (EAW). No transparency exists in a number of Member States (e.g. Spain, Romania and Belgium) in the way detention decisions are taken and reviewed.

10. Across the EU, people who have not been convicted of any crime are being detained without good reason for months or years, often in conditions unconducive to trial preparation. Legislation in some States allows individuals to be detained for years pre-trial: some have no maximum limit. Some countries lack adequate review systems. Non-nationals are more likely than nationals to be subject to arbitrary or excessive pre-trial detention and to be deprived of key fair trial rights. This problem is exacerbated by the European Arrest Warrant, under which growing numbers are being extradited.

11. There is increasing use of pre-trial detention, rather than appropriate alternatives, for fear of negative media (and political consequences) if an individual accused of an offence is released pending trial. In the UK, members saw this after the August 2011 rioting. In Spain, the ‘secreto de sumario’ regime, intended for especially complex and serious cases, has become widespread in cases where the accused is a non-national. Individuals held under this regime are at greater risk of an unfair trial and have insufficient disclosure for there to be effective custody review hearings.

b. What are the essential features of a pre-trial detention review?

12. The panel agreed it is essential that an accused has the right to have the lawfulness of his detention determined by a court that is independent of the prosecution, at regular intervals. This review should be a genuine reassessment. The onus should be on the prosecution to show, with evidence, why the continued detention is necessary.

13. The presumption of innocence should be paramount and, to reflect this, there should be a presumption in favour of release pending trial. Reasons should not focus on the seriousness of alleged offences but on the factors laid down in the case law on Article 5, including the need to preserve evidence, protect witnesses and ensure the accused does not abscond. A proper appraisal of these matters requires the court to take into account the defendant’s own circumstances, as well as the overall interests of the prosecution. Stereotypical reasons such as
the non-national status of the accused should not be relied on. The court should ensure the prosecution has considered available alternatives such as electronic tagging or regular reporting at the police station. A further factor that could be taken into account is the length of possible sentence on a finding of guilt. Any length of pre-trial detention should not exceed this.

14. The review process must ensure that the accused can present arguments in favour of release, that all relevant alternatives to detention are considered, that reasons are given for a refusal to release and that a person’s means are taken into account when fixing a financial surety. In particular, the fact that an individual is a non-national or does not have community ties should not mean that he is automatically considered a flight risk. The seriousness of the offence should also not be used as a sole ground for refusal.

15. Review hearings should be transparent, with impartial judges hearing both sides before giving clear reasons for decisions to hold a person in pre-trial detention. Hearings should be held in public unless privacy is requested by the accused. It was agreed that the following are essential to a fair review process: sufficient disclosure prior to the review hearing (including both of the charges and the nature of the case against the defendant, and of the evidence relied on by the prosecution of the need for detention); legal representation, legally aided where necessary; and an interpreter and translation of key documents where necessary.

16. Finally, it is the role of the court to take a pro-active approach to monitoring the progress towards trial. Prosecution authorities should conduct the preparation of a case with special diligence where the accused is being held in pre-trial detention. Therefore, where the state has previously relied on the needs of the investigation as a justification for detention, the reviewing court should be proactive in ensuring that the necessary diligence is indeed being applied.

c. How often should detention reviews take place?

17. Most members agreed that monthly reviews of detention would be preferable. However, busy court schedules and lack of resources in some states mean that monthly review hearings are usually no more than a rubber-stamping of earlier decisions. This is the case, for example, in Italy and Romania, countries which do conduct monthly reviews but often to little effect in terms of shortening the delays to trial or periods in pre-trial detention. Some members therefore considered that three-monthly reviews and/or a right to appeal a detention decision to a higher court would allow for a more effective review hearing, enabling new facts and the overall progress of the matter to trial to be assessed and fully reasoned arguments given by the court for the decision to continue detention or to release.

d. What is the legal basis for minimum standards of pre-trial detention?

18. All Member States, as signatories to the ECHR, must ensure that the principles espoused by the European Court of Human Rights (“ECtHR”) in relation to pre-trial detention are observed in their domestic systems. However, this is not happening in practice. EU Member States are consistently found to have breached Convention rights. Given the importance of Article 5 rights, the fact that Member States often do not comply with them and the lack of a sufficient remedy at the ECtHR, it is necessary to have stronger compulsory and enforceable methods, through EU legislative action.

19. The Commission notes in its Green Paper that detention issues “come within the purview of the EU as ... they are a relevant aspect of the rights that must be protected in order to promote mutual trust”. Under Article 82(2)(b) of the Treaty of the Functioning of the European Union,

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there is a clear legal basis for legislating in this area, as pre-trial detention entails "the rights of individuals in criminal procedure".

20. It was widely agreed that due to the existence of mutual recognition instruments such as the EAW, there is a need for mutual trust at EU level. Poor standards of protection for basic rights across the EU erode the trust and confidence necessary for mutual recognition measures. In many Member States, including Germany and Poland, domestic legislation exists that requires compliance with Article 5. However, in reality, Article 5 is not being complied with consistently and there is no effective remedy for its infringement, which can also lead to separate infringements under Article 6. The ESO, although it has the potential to limit pre-trial detention, may not be a sufficient safeguard, as it is a discretionary regime and some countries are not yet equipped to use it fully (see below under (iii)).

21. Many members cautioned that the introduction of legislative minimum standards should not be allowed to permit Member States to reduce standards where their current standards are higher (at least on paper) than those to be proposed under a future EU Directive. A non-regression clause could be included to deal with this, but the key goal of EU legislation must be to make ECHR rights more practical to enforce and monitor.

   e. Should there be a remedy for breach of minimum rules on pre-trial detention?

22. It was widely felt that there should be an effective remedy, including an enforceable right to compensation, in the event that minimum rules on the use or review of pre-trial detention are breached. Some members considered that, for compensation to be payable, there would need to be fault and/or negligence by the prosecution in the way the case was conducted, leading to the case being dropped, or to a finding of miscarriage of justice. Compensation should reflect losses suffered by the individual (for example lost earnings, collapse of a business, and loss of liberty and family life).

(ii) Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?

23. The panel agreed that steps should be taken at EU level to address the extreme variance in different countries’ legal systems concerning periods of pre-trial detention. In a number of EU countries, legislation permitting lengthy periods of pre-trial detention (or the absence of a legal limit) can allow prosecutors to drag their feet and can operate to put pressure on the accused to plead guilty in cases where the sentence likely to be imposed is less than the time an accused could spend on remand. Some members were concerned about extra time spent in prison following a not guilty verdict, when the prosecutor appeals. In some Member States these periods are very long and wholly unacceptable.

24. It was widely felt that EU action was necessary to address this, given that those countries which tend to allow long periods in pre-trial detention rarely if ever demonstrated any good objective reasons for the practice. However, most members felt the solution was not, for the time being, legislation. Instead the panel agreed that the EU should examine the viability of establishing a maximum pre-trial detention limit. Some members felt that six months was a suitable maximum to aim for, others considered a year to be more realistic given the complexity of some cases. Some suggested that if 6 months had passed, there should be a greater onus on the prosecution to show why continued detention was necessary.

(iii) What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?
25. Effective implementation of the ESO will require proper resources and training. It will be necessary to ensure that effective alternatives to pre-trial detention, such as tagging, regular reporting or conditional release are available. In many Member States, the only available alternative to pre-trial detention is money bail, which is impossible for most suspects to provide.

(iv) Is deferred extradition appropriate when the case is not ‘trial-ready’?

26. The panel agreed that this was a good idea in principle but that, in practice, it was often difficult to obtain the necessary information on the status of the investigation at the extradition stage. Where there are reasonable grounds to believe that the case is not trial-ready (for example where evidence requests have been sent overseas and will therefore cause long delays to proceedings, as happened in the Greek prosecution of Andrew Symeou, who spent almost a year in pre-trial detention and who was extradited almost two years before his eventual trial), the executing state should be able to defer extradition, unless satisfied that there is no prospect of protracted pre-trial detention.

Conclusion

27. Following wide-ranging discussions on the topic of pre-trial detention in the EU, members expressed the following views:

- given the widespread misuse of pre-trial detention and its impact on trial preparation and the rights to liberty and family life, as well as wider socio-economic cost, EU action is necessary to set minimum standards for its use and regular review and ensure an effective remedy when these rights are infringed;
- common minimum standards would assist judges and ensure consistency of approach to pre-trial detention;
- the proposals contained in FTI’s draft report for an EU Directive setting minimum standards were appropriate;
- resources and training are required for full use to be made of the ESO system when it is implemented in December 2012;
- deferred extradition should be used to prevent lengthy periods on remand after surrender under an EAW; and
- in addition to limiting the length of pre-trial detention, cutting out delay between charge and trial is essential and judges carrying out review hearings should take a pro-active approach to ensuring diligence in the prosecution of cases, particularly where a person is in pre-trial detention.