JOINT STATEMENT

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.

FAIR TRIALS INTERNATIONAL

Irish Council for Civil Liberties

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.[1] On 11 April 2012, the Presidency published a further draft of the Directive.[2] 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[3] 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.[4] 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.[5] 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.[6] A person's position is significantly affected when they are charged, which for the purposes of Article 6(1) of the ECHR, 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".[7] The Court in *Zaichenko v Russia* held that the right to legal assistance arises once freedom of action has been curtailed.[8] The ECtHR similarly found violations in *Brusco 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.[9] Whether a breach of Article 6 of the ECHR 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]

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, it 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"*.[10]

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 ECHR.[11] 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 *Salduz 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.[12] 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.[13] 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.[14] 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.[15]

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 those 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 ECtHR has also emphasized the importance of respecting a person's right to counsel and waiting for the lawyer to arrive. In *Pishchalnikov v Russia,* the ECtHR 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.[16]

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 ECtHR on this issue. The ECtHR 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 ECtHR clarified the reasons behind early access to legal assistance and the scope of activities that must be permitted during the pretrial stage:

"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".[22]

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 at 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.[23] 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.[24] 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 ECtHR's definition of "criminal". The ECtHR has held that offences classified as minor, petty, regulatory, or administrative may still be considered to be criminal under the Convention[25] 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.[26] Any one of these criteria may make the charge criminal; it does not need to satisfy all of them.[27]

Applying these three criteria in *Öztürk v. Germany*,[28] the ECtHR 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 ECtHR 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.[29] It has also held a minor offence of causing a nuisance to be a criminal matter.[30]

The ECtHR 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 ECtHR.

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[31] 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.[32] 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

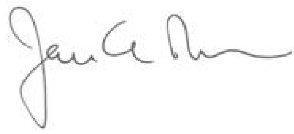
Our organisations consider that the enactment of a Directive of the European Parliament and of the Council on the rights of access to a lawyer and of notification of custody to a third person in criminal proceedings represents an important step towards full mutual recognition within the common European justice space. The case law of the ECtHR 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 ECtHR, 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.

[1] Council of the European Union, Presidency, "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 – Revised Text" [DROIPEN 25 COPEN 49 CODEC 574].
[2] Council of the European Union, Presidency, "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 – Preparation of Coreper" [11497/11 DROIPEN 61 COPEN 152 CODEC 1018].
[3] European 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) 326/3] {SEC(2011) 686} {SEC(2011) 687}.
[4] Cape, Namoradze, Smith and Sproken, *Effective Criminal Defence in Europe* (Intersentia, 2010), pp. 615, 620, 623.
[5] *Shabelnik v Ukraine,* ECtHR, Judgment of 17 February 2009, at para.57.
[6] *Shabelnik v Ukraine,* ECtHR, Judgment of 17 February 2009, at para.57.
[7] *Zaichenko v Russia,* ECtHR, Judgment of 28 June 2010, at para. 41.
[8] *Zaichenko v Russia,* ECtHR, Judgment of 28 June 2010, at para. 41.
[9] *Brusco v France,* ECtHR, Judgment of 14 October 2010 at 44-45.
[10] CPT standards – Council of Europe document CPT/Inf/E (2002) 1 - Rev. 2010. Available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf
[11] *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, para. 54-55.
[12] *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, para. 54-55.
[13] *Ibid.*
[14] *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, para. 72.
[15] See the Executive Summary of Cape, Namoradze, Smith and Sproken, *Effective Criminal Defence in Europe* (Intersentia, 2010) at page 8. Available at: http://www.soros.org/initiatives/justice/articles_publications/publications/criminal-defence-europe-20100623/criminal-defence-europe-summary.pdf . See also the German Country Report at page 17, the Hungary country report at pages 11 and 51, the Poland Country Report at page 12, and the Turkey Country Report at pages 29-30. All Country Reports available at: http://www.unimaas.nl/default.asp?template=werkveld.htm&id=4T1475L07W4211EF1376&taal=en
[16] *Pishchalnikov v. Russia,* ECtHR, Judgment of 24 September 2009, at para. 79.
[17] *Dayanan v Turkey,* ECtHR, Judgment of 13 October 2009, para. 32.
[18] *Ocalan v Turkey,* ECtHR, Judgment of 12 May 2005, paras. 66, 70.
[19] *Basic Principles on the Role of Lawyers*, Principle 13.
[20] *Brennan v. the United Kingdom*, ECtHR, Judgment of 16 October 2001, at para. 58; *S v. Switzerland,* ECtHR, Judgment of 28 November 1991 at para. 48.
[21] *Brennan v. the United Kingdom*, ECtHR, Judgment of 16 October 2001, at para. 58.
[22] See http://www2.ohchr.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 (LXII) 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.
[23] *Adolf v. Austria*, ECtHR, Judgment of 26 March 1982 at para. 30.
[24] See, for example, *Deweer v. Belgium*, ECtHR, Judgment of 27 February 1980 at para. 42 and 46; and *Eckle v. Germany*, ECtHR, Judgment of 15 July 1982 at para. 73.
[25] *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 49.
[26] *Engel and Others v. the Netherlands*, ECtHR, Judgment of 8 June 1976 at para. 82, 83. These principles were subsequently upheld by a number of Grand Chamber judgments, such as: *Ezeh and Connors v. the United Kingdom,* ECtHR, Grand Chamber Judgment of 9 October 2003 at para. 82.
[27] *Jussila v. Finland*, ECtHR, Grand Chamber Judgment of 23 November 2006, at para. 31.
[28] *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 46-53.

[29] *Lutz v. Germany*, ECtHR, Judgment of 25 August 1987 at para. 182; *Schmautzer v. Austria*, ECtHR, Judgment of 23 October 1995; *Malige v. France*, ECtHR, Judgment of 23 September 1998.
[30] *Lauko v. Slovakia*, ECtHR, Judgment of 2 September 1998.
[31] European 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) 326/3] {SEC(2011) 686} {SEC(2011) 687}.
[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.



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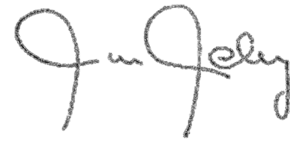

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