Procedural Safeguards in the European Union: a Road well travelled?

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Abstract

This article considers the approach to procedural safeguards in criminal proceedings in the European Union. It sets out the historical development of activity in this area, from the decision of the EU to engage in judicial and police cooperation in criminal matters to the resolution of the Council on the Roadmap on procedural safeguards. It seeks to identify the current legal framework for protection of the rights of the defence from both an EU and fundamental rights perspective, and analyses how effective this protection is likely to be. Finally it considers what future legislative initiatives are to be expected from the EU and the changes in political ideology surrounding the provision of protection measures for suspects in criminal proceedings. The article will ultimately conclude that whilst an initially strong commitment appeared to be made by the member states of the EU to procedural rights, this commitment is always transitory and negated by competing interests as the priorities within the EU evolve.

I. Procedural Rights in Criminal Proceedings

It is first necessary to set out what is meant by procedural rights in criminal proceedings and which of these have been seen as a priority for the EU to engage with. The starting point is article 6 of the European Convention on Human Rights (ECHR) which sets out the rights which will enable a fair trial to take place. Article 6(3) specifically lists which minimum rights are expected in criminal proceedings: to be informed promptly and in detail of the nature and cause of the accusation, the right to defend oneself in person or through legal assistance, free where the suspect cannot pay, to examine witnesses and to have the assistance of free interpretation. Article 5(2) also provides protection in criminal proceedings by asserting the right to be informed promptly in a language the suspect understands of the reasons for his arrest and the charge against him. The case law of the European Court of Human Rights has confirmed that these rights must be practical and effective, not theoretical and illusory[1] and to this end, it has confirmed that legal aid must be provided by the state where certain circumstances exist,[2] that the suspect is entitled to disclosure of the case that the prosecution wishes to rely upon and to any material which would assist the defence,[3] to the presumption of innocence and to the right to remain silent (though this can be qualified so long as legal advice is provided to

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[1] *Airey v. Ireland,* app. no. 6289/73 (9th October 1979)

[2] *Quaranta v. Switzerland*, app. no. 12744/87 (24th May 1991), [35] – The seriousness of the offence and the severity of the potential sentence, the complexity of the case, and the social and personal situation of the defendant.

[3] *Edwards v. United Kingdom*, app. no. 13071/87 (16th December 1992) [36]

explain the consequences).[4] The ECtHR has also confirmed that these rights apply as from the first interrogation by the police who have detained the individual upon suspicion of committing an offence,[5] through to the final outcome of an appeal. As such 'trial' is interpreted in the widest sense.

Wider than these initial rights, the jurisprudence of the ECtHR has recognised the need for translation of written documents,[6] and that personal characteristics of suspects require recognition and protection in order to ensure a fair trial.[7] Vulnerable people may therefore require assistance from a parent, guardian, lawyer or other assistant in order to help them understand the proceedings.[8]

In the EU an inability to understand the language being used in cross border cases can create an impenetrable barrier to understanding the case against an accused person. Moreover, the differences in legal systems can lead to a lack of trust between member states as to how their national will be treated in other countries. Whilst the ECtHR has laid down general principles in certain cases which can be applied across the EU, in the majority of cases it is careful to indicate that its judgment applies to the specific circumstances before it, that member states have a wide margin of appreciation, and that the mechanism used to give effect to the rights is for domestic legislators to prescribe. In an increasingly integrated EU this method of ensuring safeguards are applied is no longer effective.

II. Cooperation in criminal matters

With the success of the internal market and free movement around the EU, together with expanded accession, criminal activity across borders, particularly with respect to offences of a cross border nature, such as drug trafficking, people trafficking, and fraud, have increased[9]. The Maastricht Treaty first legislated to allow EU action in this area, though this was limited. Whilst many instruments have been developed within the Council of Europe over the past half century to tackle criminal activities, these have been piecemeal in the EU, and taken account of the optional provisions in different ways. Most importantly, the systems in place were far too slow and laborious to react effectively to the nature of criminal activity in the EU. Nevertheless, legal systems in the EU, and in particular criminal justice, have historically developed independently of each other and the member states have been extremely reluctant to cede sovereignty through the harmonisation of criminal law measures. Whilst this would be the easiest answer to the difficulties that are now

[4] *Murray v. United Kingdom*, app. no. 18731/91 (8th February 1996)

[5] *Salduz v. Turkey*, app. no. 36391/02 (27th November 2008)

[6] *Luedicke, Belkacem and Koç,* app. Nos. no. 6210/73; 6877/75; 7132/75 (28th November 1978); *Kamasinksi v. Austri,* app. no. 9783/82 (19th December 1989), [74]

[7] *T. v. United Kingdom,* app. no. no. 24724/94 (16th December 1999)

[8] *S.C. v. United Kingdom,* app. no. 60958/00, (5th June 2004)

[9] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final, Explanatory Memorandum, para 8.

arising in the adoption of legislation in criminal proceedings, the differences between legal concepts are still too stark to attempt harmonisation.[10]

As such, the single market concept of mutual recognition was set upon as a suitable mechanism to deal with the need to coordinate law enforcement responses.[11] The mechanism applies crudely given the different nuances and justifications for penal policy between the member states,[12] but nevertheless it has formed the basis for activity in the field of police and judicial cooperation for the past ten years and resulted in an extensive list of framework decisions, decisions, resolutions and positions on criminal procedure.[13]

What it has struggled to do in all of this conscientious activity, however, is provide defence safeguards either in the instruments themselves or through a separate framework. The highpoint for defence protection was in fact the adoption of the framework decision on the European arrest warrant (EAW). This does recognise that the scheme should not displace fundamental rights, and requires the provision of legal representation in order for a person to decide whether to consent to surrender and if not, on what basis they can attempt to defend the request.[14] This safeguard has created a mechanism for hearings before a judicial authority in the executing state to scrutinise the EAW, assess its veracity and consider the impact upon the requested person. The EAW scheme has nevertheless met with great criticism from a number of quarters, not least the defence lawyers attempting to provide an effective defence, but even from the member states themselves as to how it is operating in practice (though their primary concern is not how requested persons may defend EAWs).[15] No other instrument since passed provides the same mechanism for scrutiny, yet each instrument will impact upon a stage in criminal proceedings from pre-trial detention through to where a finally convicted person will serve their sentence. Many commentators argue that in an effort at efficiency, defence rights have been sidelined by the desire of the member states to fight crime.[16]

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[10] *V. Mitsilegas*, EU Criminal Law (Hart, 2009), ch. 3; P. Craig, The Lisbon Treaty (OUP, 2010), pp 379-378.

[11] Developed during the UK Presidency of the EU in 1998, Cardiff European Council, Presidency Conclusions, 15 and 16 June 1998, SN 150/1/98 REV 1, pp 14 and 15; Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final 2.

[12] *V. Mitsilegas*, The constitutional implications of mutual recognition in criminal matters in the EU, CML Rev. 43 (2006) 1277-1311, *Craig*, n 5, p 373 and references at n 134 therein.

[13] *S. Peers*, EU Justice and Home Affairs Law (OUP, 2011), ch. 9; *A. O'Neil*, EU Law for UK Lawyers (Hart, 2011), ch. 11.

[14] Council framework decision, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O J L190/1 (18. 7. 2001) article 11(2)

[15] See the evaluation, follow up and final reports on the fourth round of mutual evaluations "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States," Council of the European Union, available through the search function at http://www.consilium.europa.eu/documents

[16] *G. Vernimmen-Van Tiggelen* and *L. Surano*, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union, EC DG JLS (20th November 2008); European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level, PE 410.6 (7th January 2009);

III. The roadmap on procedural safeguards

The EU Commission did attempt to introduce a set of procedural rights when the EAW framework decision was being concluded in 2003. It issued a green paper[17] to consult as to which rights should be included, and subsequently a proposal for a framework decision which comprehensively attempted to protect the key rights set out in article 6(3) ECHR.[18] However, after the 9/11 attacks on the World Trade Centre and other targets in the United States of America, 'rights' were off the agenda and a group of member states defeated the attempts at establishing safeguards for suspects. It was argued that there was no legal or evidential basis in the EU to legislate in this area; All EU member states were parties to the ECHR and therefore defence rights were protected. This led to a stalemate in 2007 when the framework decision was shelved.[19]

However, over the next few years research demonstrated the need for EU action by revealing how poor the provision of procedural rights is across the EU, how ineffective the ECtHR with its mammoth backlog is, and how citizens of the EU crossing borders should be entitled to a uniform provision of rights irrespective of where they are arrested.[20] As for legal base, the Lisbon Treaty had been agreed and specifically provided for minimum rules to facilitate mutual recognition of judicial decisions and cross border police and judicial cooperation.[21] Moreover, the new TEU provided that the rights of the citizen were now the priority of the Union, the EU was acceding to the ECHR and the EU Charter of Fundamental Rights would become binding when the Lisbon Treaty was brought into force.[22]

Equally those member states who accepted a need for procedural rights and were concerned about their own citizens being arrested in other less salubrious locations within the EU did not give up on the cause. Under the Swedish Presidency an idea to progress on a step by step basis was formulated which led to the drafting of a 'roadmap' setting out procedural safeguards that the EU might commit to adopting over the five years between 2009 and 2014. An apparent change of heart within the

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[17] COM(2003) 75 final

[18] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final.

[19] See UK House of Lords European Union Committee, Breaking the deadlock: what future for EU procedural rights?, 2nd Report of Session 2006-2007, HL Paper 20 (TSO, 2007) and UK House of Lords European Union Committee, Procedural rights in EU criminal proceedings – an update, 9th Report of Session 2008-2009, HL Paper 84 (TSO, 2009)

[20] See in particular, *T. Spronken* and *M. Attinger*, Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union, University of Maastrict, EC, DG JLS (12th December 2005); *G. Vernimmen-Van Tiggelen* and *L. Surano*, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union, EC DG JLS (20th November 2008); European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level, PE 410.67 (January 2009); *Tilburg, Griefswald*, An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Draft Introductory Summary, EC DG JLS/D3/2007/01, (January 2009), *T. Spronken* et al, Effective Criminal Defence in Europe (Intersentia, 2010).

[21] Art 82(2) Treaty on the Functioning of the EU (TFEU)

[22] TEU arts 2, 6 and 7.

previously sceptical governments removed the former obstacle, and together with the new evidential and legal basis for activity, a resolution was agreed by the Council in December 2009 that adopted the Roadmap.[23]

The Resolution provides at article 2 that "…The rights included in this Roadmap, which could be complemented by other rights, are considered to be fundamental procedural rights and action in respect of these rights should be given priority at this stage." It confirms that five rights will be provided – interpretation and translation, information on rights and about the charges, legal advice and legal aid, communication with relatives, employers, consular authorities, and special safeguards for vulnerable persons. It also makes provision for a green paper to examine appropriate measures to reduce the length of pre trial detention.

The Lisbon Treaty provides co-decision in this area meaning that the European Parliament is now afforded an equal say in the legislative process. It was the Parliament that insisted on an instrument on safeguards to compliment the framework decision on the European arrest warrant and ought to be a reliable supporter in the improvement of procedural rights standards. But not only can the Parliament now exert far greater influence over the drafting of the instruments passed, the Commission can bring infringement proceedings in the Court of Justice of the European Union (CJEU) if any instrument fails to adequately protect safeguards or a member state fails to implement domestic legislation in accordance with the directive. These developments laid the groundwork for a promising approach to procedural safeguards under the new treaty.

The Resolution on the Roadmap has now been in force for two years and much progress has been made. Measure A is adopted and awaits implementation at national level, Measure B is agreed and awaits adoption in the Council, Measures C and D have had six months of consideration by the Council, an impact assessment is being carried out on Measure E and a Commission consultation process ended in November 2011 in relation to Measure F. The remainder of this paper will consider the substantive rights that are likely to be made available under measures A, B and C.

IV. Measure A – The Right to Interpretation and Translation

The Commission presented a framework decision on the right to interpretation and translation prior to the Lisbon Treaty coming into force but the Council was unable to agree the content. As such, this was the first instrument that the Council presented as an own initiative directive under the new Treaty. Negotiations progressed with the Parliament and the directive was adopted on 20th October 2010 and must be implemented by 27th October 2013. It is the first EU instrument to attempt to improve rights for suspects in criminal proceedings. The recital sets out

[23] Resolution of the Council of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 (4. 12. 2009)

specifically the need for action in this area – see recitals (6) '*Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States'* and (7) '*Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.*'

The Directive sets a scope of application from the moment a person is made aware that they are suspected of committing an offence to the final determination of the proceedings, including any appeal (art 1(2)). However, it does not apply to minor offences which are not dealt with through the criminal courts, unless a sanction is applied that can be appealed to a court. At that point, the protection will be available (art 1(3)). It is not yet clear what the reach of this provision will be. It is intended to ensure that providing the right does not impact on practical administration of justice. The example given in recital (16) is traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations it might be deemed unreasonable to require the competent authority to ensure all the rights under this Directive are guaranteed. But one may wonder if this is correct, how a person who does not speak the local language yet is affected by such a control is to understand that an administrative control or sanction has been placed upon them? It would be correct to say that a parking inspector in Sweden cannot carry 23 language versions of a ticket around with them in case the number plate of an offending car indicates the driver comes from Poland. But what is the person to do who finds a ticket on their car? It would be helpful for the EU to consider, if it is not possible at the material time to provide interpretation or translation, how this could be provided after the event. A starting point would be the "ejustice" web portal which has the ambitious target of providing information about each justice system in all official languages of the EU. There are a multitude of different 'minor offences' which will attract the same problem and ought not to be ignored.

The substantive right is to interpretation without delay during police questioning, all court hearings and any necessary interim hearings.[24] It shall also be available for communication with the suspect's legal counsel in connection with any questioning or hearing, in order to lodge an appeal or for making other procedural applications. The right extends to appropriate assistance for hearing or speech impaired suspects (art 2(3)). A system must be in place to ascertain the need for assistance (art 2(4)) and for an assessment denying assistance to be challengeable (art 2(5)). The interpretation must be of sufficient quality to safeguard the fairness of the proceedings (art 2(8)).

[24] Article 2. Whether anything turns on 'necessary' here is unclear. The qualification was retained during negotiations but it is hard to consider a court hearing which would not be necessary for the purposes of interpretation; if a hearing is taking place, the suspect is entitled to assistance.

The assistance can be provided through communication technology unless the physical presence of the interpreter is necessary to safeguard the fairness of the proceedings (art 2(6)). Whilst this may go some way to ensuring that where it is not possible to obtain the physical presence of an interpreter for a particular language, it should certainly be a last resort and in any event, the technology used, be it video or telephone conferencing must be of a high standard to ensure that both the interpreter and suspect can hear. In court proceedings where the interpreter has to provide simultaneous translation of a number of witnesses it can be very difficult for them to do this adequately without being present in the room. Any measures used will have to meet the article 2(8) fairness requirement.

With respect to translation, the substantive right is to translation of all essential documents within a reasonable period of time (art 3(1)) and of sufficient quality to safeguard the fairness of the proceedings (art 3(9)). The relevant documents are limited to a decision depriving the suspect of their liberty, charge or indictment, and judgment (art 3(2)), and only such parts as are relevant for the person to have knowledge of the case against them (art 3(4)). There need be no written summary of the case or witness evidence provided prior to these decisions. There is no requirement that the decision or judgment explain what evidence it was made in consequence of, although there is an inherent duty to give reasons under the ECHR.[25] The suspect may however submit a reasoned request for additional documents to be translated (art 3(3). Again a procedure must be in place to challenge a decision not to allow a document to be translated, or to complain about the quality of the translation (art 3(6)). A stark presumption has been made here that the suspect will be in a position to know there are other documents of relevance and that the translation received is not reflective of the case. This would at a minimum require the services of a legal representative who has access to the file. Whether this is possible will depend on the progress of measures B and C of the Roadmap, considered below. Where documents are available in the national language it may only be possible to have these interpreted.

Article 5 separately reiterates the need for quality of the services: concrete measures must be taken to give effect to articles 2(8) and 3(9). In particular member states must 'endeavour' to establish a register of interpreters and translators of independent professionals who are appropriately qualified. This article is sadly not mandatory, but at least there is a measure upon which to build. 'Where appropriate' the register must be made available to legal counsel and relevant authorities. It is hard to think when this would not be appropriate in this context as verifying whether the interpreter is registered would be the best mechanism of ascertaining their quality.

Article 6 requires legal professionals to be trained in the process of communication with interpreters so as to ensure efficient and effective communication. Since training the professionals is the best mechanism of improving legal process, this is a strong article.

[25] *Taxquet v. Belgium*, app. no. 926/05 (16th November 2010) [90]-[92]

V. Measure B – the right to information about rights and to information about the charges.

Negotiations have been taking place on the second instrument since July 2010 and it is anticipated that a final agreement will be adopted early in 2012.[26] This instrument has two distinct parts. The first part concerns understanding what rights a person actually holds as a suspect in proceedings. Research[27] has demonstrated the wide ranging approach member states currently take to informing suspects of their status. Most surprising was the discovery that in France and Belgium, despite there being a right to remain silent, there is no obligation to inform the suspect of this right.[28] The second part concerns the amount of disclosure concerning the case that will be made available to the suspect and access to the case file that is prepared by the police or prosecution. There was much discussion during the negotiations amongst the member states about how this could practically be achieved given the variance in approach.[29]

The draft directive includes the same references in the recitals as in Measure A to the ECHR and Charter rights it builds upon (arts 6, 47, and 48 respectively), and the need to enhance mutual trust through providing common minimum rules. It covers the same scope and exclusion of minor offences. The justification here is perhaps that the parking inspector cannot be expected to carry letters of rights with him in every language. It may be argued that there are no 'rights' as such in these cases as decisions are made on a summary basis and would only be hindered by the provision of notification. As indicated above, however, it may be necessary for the EU to engage in the provision of information about the consequences of these convictions or sanctions. Article 9 provides a similar training provision for professionals to that in Measure A.

The starting point in article 3 is that all suspects must be provided promptly with information concerning at least the following rights, as they apply under national law: access to a lawyer, advice free of charge, information about the accusation (as defined later in article 6), interpretation and translation and the right to silence.[30] The information shall be provided either orally or in writing and in simple and accessible language, taking into account any particular need of vulnerable suspected or accused persons (article 3.2). Article 4 then sets out that a suspect must additionally be promptly provided with a written letter of rights, which they must be entitled to keep throughout detention, setting out the rights detailed in article 3.

[26] Council, Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings: Approval of the final compromise text with a view to a first reading agreement with the European Parliament, 16342/11 (Brussels, 11. 11. 11).

[27] *T. Spronken*, EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice (University of Maastricht, 2010)

[28] The ECtHR has recently underlined the requirement to ensure the effective right to remain silent in *Brusco v. France,* application No. 1466/07 (judgment of 14 October 2010).

[29] See Council, Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*: State of Play*, 15618/10 (Brussels, 29. 10. 10) and Council, Outstanding issues and consolidated text, 12163/11 (Brussels, 1. 07. 11).

[30] Significantly this did not appear in the original Commission proposal which demonstrates the value of civil society intervention and the Parliament as well as member states in Council supportive of safeguards.

Further information concerning additional rights whilst detained must also be recorded in the letter (as they apply under national law): access to the materials in the case, contact with consular officials and a third person, urgent medical assistance, how long the deprivation of liberty can last, and the ability to challenge detention. Again, this must be drafted in simple, accessible language and a model letter is annexed to the proposed directive to indicate how this ought to be achieved. The letter must be available in a language which the person understands. Where this is not available, the rights must be explained orally (presumably through an interpreter) and a letter provided without undue delay. Article 5 provides for a letter of rights in European arrest warrant cases.

Article 6 then turns to the right to information about the criminal act the person is suspected of committing. Article 6(1) requires that information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the criminal proceedings and effectively exercise the person's right of defence. Article 6(2) concerns initial detention and requires that the person be informed of the reasons for arrest including the criminal act they are suspected of committing. Once the case is submitted to court for prosecution, detailed information must be provided concerning the accusation, including the nature and legal classification of the offence, as well as the nature of participation by the accused person (art 6(3)). Where changes to the information are made, these must also be promptly explained where this is necessary to safeguard the fairness of the proceedings (art 6(4)).

Article 7 affords the right to access materials free of charge. Where a person is arrested or detained, member states must ensure that the documents related to the case in the possession of the prosecuting authorities are made available to the suspect. The relevant documents are those essential to effectively challenge the detention in national law (art 7(1). More generally article 7(2) provides that access must be granted to all material evidence in the possession of the prosecution *for or against* the suspect in order to safeguard the fairness of the proceedings and in due time to allow an effective defence, which at the latest is defined as 'the submission of the merits of the accusation to the judgment of the court' (art 7(3)). This phrase is sufficiently wide to allow for the process under the national law of each member state to remain, though as a result loses some of its certainty as a protection. In some jurisdictions this would describe the presentation of the prosecution case at trial and no earlier stage. If this is correct, this would be far too late to ensure the preparation of the case in accordance with article 6 ECHR. The duty is a continuing one and must be complied with where additional material is discovered

Disclosure of material is limited by article 7(4) where to do so might lead to serious risk to life, the fundamental rights of another person, or if it is strictly necessary to safeguard an important public interest, such as prejudicing an ongoing investigation, or where it may seriously harm national security. Nevertheless, to limit access to material must not prejudice the right to a fair trial. The decision to limit must be either taken by a judge or subject to judicial review. Article 8 provides for the suspect to challenge the failure to provide information. Whilst the avail-

ability of independent scrutiny is to be welcomed what is not clear from the article is whether the suspect should be informed that access has been limited at all. It is obvious that no challenge could be made unless the suspect was informed that there is certain material to which he would not be entitled to access. Any decision concerning disclosure will naturally have to be made by the policing or prosecuting authorities. This in itself should require an independent official to ensure objectivity, but unfortunately this has not been included.

The draft directive annexes a model letter for domestic cases and another for EAW cases. These provide examples of how to draft simple and accessible language to explain the rights that are available. The models were developed through the *Letter of Rights* Project[31] which mapped the various ways member states explain rights to suspects and produced a model from the best examples. The annex lists on the first page which rights exist and then explains these in further detail overleaf. The explanation is simple and clear, omitting extraneous details such as the legal codes the rights are drawn from. If member states implement these letters, in all languages used in the EU, in Braille and in audio, much improvement will have been made to enabling suspects to understand the criminal process.

However, notwithstanding the scope of the instrument, the letter focuses very much on the first stages after arrest. In order to ensure information provision follows the full intended scope of the instrument it would be necessary to develop a letter for the later stages of proceedings, once a charge has been brought against the suspect and through the prosecution process. Particularly important is the provision of information about how one may appeal.[32] Given the economic crisis and limitation on public expenditure that member states are imposing, many more people may have to act in their own cause because legal aid may be limited or unavailable. The provision of information about the process is therefore becoming increasingly fundamental in the attempt to ensure a fair trial takes place.

VI. Measure C – the right of access to a lawyer and on the right to communicate upon arrest

The most critical procedural safeguard is that of ensuring access to a lawyer, particularly given the stringent economic circumstances in the EU. A lawyer is able to make representations about all other rights which ought to be afforded. The Commission proposed a directive in June 2011 which is under consideration in the Council.[33] The instrument proposed was 'C-, D+' in that it does not include provision on legal aid (save as to confirm the obligation under the ECHR and CFR) but it does include the right to consular assistance and notification of a third person specified under measure D.

[31] Note 27 above.

[32] JUSTICE produces a booklet for convicted people in England and Wales called *How to Appeal* which aims to explain the process in an accessible way. It can be downloaded from our website here: http://www.justice.org.uk/resources.php/274/how-to-appeal

[33] COM(2011) 326 final (Brussels, 8. 6. 2011); Council, Progress Report, 18215/11 (Brussels, 6. 12. 2011)

Access to a lawyer varies greatly amongst the member states in terms of when it begins and what a lawyer is able to do. Some of this relates to whether the system is adversarial or inquisitive in nature, but the ECtHR has in recent years acknowledged that the lawyer has a substantial role to play. In particular in the case of *Salduz v Turkey* the Grand Chamber clarified that for a person to have a fair trial they must have access to a lawyer as from the first interrogation by the police where the information gained is used to further the prosecution. Subsequently it has commented on how that right might be made practical and effective.[34] The Commission in its proposed directive sought to bring all these elements into an instrument which adds value to the Strasbourg jurisprudence.[35] It was intentionally drafted widely to encompass persons at the outset of an investigation who may be treated as a witness or suspected of a lesser offence, which has been shown to be a tactic employed by the police to avoid suspect's rights.[36] Equally, communication with a third person is very important to ensure that the suspect's affairs can be administered in their absence and more seriously that challenge to their detention can be made if needs be. The draft directive includes the right to communicate with a consular assistant, which is important for foreign suspects, although the right under the Vienna Convention on Consular Relations 1963 is to communicate *in person*[37] which at present is not explicitly stated.

Since the draft directive was presented, many provisions have been substantially altered or removed by negotiations in Council. It is necessary therefore to consider these changes in comparison with the rights that the Commission aimed to introduce. The European Parliament will have an important role to play in ensuring that the directive provides practical and effective safeguards where the Council negotiations have removed these.

The proposed directive covers the same scope as in Measures A and B, and the same limitations with respect to minor offences, though there is some suggestion that this might be extended to cover court martials and other procedures. This would be a worrying advancement. It is not clear why suspects in these types of proceedings should not receive the same access to legal advice.

Article 3 originally set out the scope of the right. It provided access to a lawyer as soon as possible and before *any* questioning by law enforcement authorities, or upon carrying out any procedural or evidence gathering act, or from the outset of deprivation of liberty. Queries have arisen in the Council working party about how the right will apply to 'questioning.' For example should it apply where a person voluntarily attends the police station, and what about when they are stopped on the street? The position ought to be clear from the judgment of the Strasbourg court in *Salduz v. Turkey*: the right applies as from the first interrogation, it does not matter where this occurs and under what circumstances. Arguably, the mechanism to allow

[34] *Dayanan .v Turkey,* application No. 7377/03 (13th January 2010)
[35] Explanatory Memorandum, para 14, COM(2011) 326 final.
[36] CPT Annual Report 2011
[37] Article 36(c).

this to work in practice is for police and prosecuting authorities to refrain from asking questions likely to elicit a response which would further the prosecution prior to a lawyer being present. As such, lawyers do not need to attend the roadside, rather the questioning must wait until the police station where it can be properly recorded and lawyers can attend. Alternatively, any questioning must not be used as evidence in the case. In order to try and clarify the issue the working party has amended the proposal to refer to 'formal questioning'. However, this in itself is a vague term and will need further clarification.

Another aspect of article 3 has proved controversial. This is allowing the presence of the lawyer at evidence gathering. Some member states which do not allow this have suggested the provision to progress further than 'minimum rules.' However, article 3(2) as originally drafted had already been qualified where presence would 'prejudice the acquisition of evidence'. Whether this provision will remain is uncertain. It is likely to be further limited in any event.

Article 4 deals with the content of the right. It sets out that the lawyer shall be granted access to a lawyer in a time and manner so as to allow it to be effective. This includes allowing communication with the lawyer, to presence in interview and for the lawyer to participate in the interview, which should be recorded in accordance with national law. The directive as proposed set out that this participation includes asking questions, requesting clarification and making statements. The current draft places these details in a recital. This is a disappointing weakening of the right since ensuring *effective* defence requires a lawyer to actively participate in proceedings at the police station as well as in court. The proposal also provided the opportunity to lawyers to inspect the detention conditions of the client. Many member states do not see this as a role for the lawyer. Equally lawyers may not wish to engage in this activity. However, since lawyers attend the police station every day it is a way to ensure standards remain consistent. Naturally it would only apply upon complaint by the client about conditions and this could be made clearer in the directive. It may also be argued that the provision is better placed in a directive on detention following the green paper, but no doubt the Commission did not want to wait for an instrument on detention which may never arrive.

One of the most important elements of the content article is *presence* of the lawyer. If this were to be limited to communication alone, the role of the lawyer would be severely curtailed. The Commission for the Prevention of Torture has repeatedly explained how important the presence of lawyers is in police detention to ensure proper treatment and provision of defence. The ECtHR in *Salduz* agreed that this is the most vulnerable time for a person who is suspected of committing a crime. Nevertheless, the UK in particular will certainly require limitation of the article to the circumstances where telephone advice can already be given.[38]

[38] In England and Wales, this is for minor offences where a custodial sentence cannot be imposed, but must allow for a visit where an interview is intended, the suspect is vulnerable or there is cause for concern. In Scotland all advice is initially given by telephone and rarely at present followed up in person.

The proposed directive also covers confidentiality and waiver. Confidentiality should apply to all methods of communication. However, where not in person, this and the other rights set out in the proposal will be subject to derogation under article 8. Whilst the article was originally drafted by the Commission to only allow derogation where there were compelling reasons 'pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person,' (and no derogation from communication whatsoever) the member states see this as too restrictive and have extended it to cover circumstances where the investigation would be jeopardized also. If these extensions remain, they will need to be restrictive in accordance with the Strasbourg case law in *Campbell v UK*[39] and must be assessed on a case by case basis. The option of using an alternative lawyer could also be explored.[40]

Article 9 concerns waiver and intends to ensure that suspects understand the consequences of waiving their right to legal assistance. This is an important aspect of the right. There is much evidence of police officers at the police station advising suspects of the delay to their release by asking for legal assistance as well as suggesting that there is no need for a lawyer.[41] As a consequence the original draft required suspects to have received prior legal advice on the consequences of the waiver or otherwise obtained full knowledge of these consequences. This provision is unfortunately not easy to put into practice and has been amended by the Council working party to require only sufficient information to be provided. The right could be explained through the mechanism of the letter of rights in Measure B and wider public education about the benefits of legal assistance, or through a dedicated phone line whereby initial advice could be sought. Of course the latter option would be costly and therefore is unlikely to be followed.

Perhaps the most controversial right presented by the Commission is the right of access to a lawyer in the issuing state as well as the executing state in European arrest warrant proceedings. This would be a major step forward for legal protection in the EU. JUSTICE is currently conducting a joint project with the European Criminal Bar Association and the International Commission of Jurists on *Best Practice in EAW Cases*.[42] Every defence lawyer engaged in this project has confirmed the necessity of having a lawyer in the issuing country who can assist with advising on the law and on negotiating the operation of the warrant with the issuing authorities. Some cases observed in the project have demonstrated that not only is the information useful to

[39] App no. 13590/88 (25th March 1992), [48] where it was held that correspondence between a prisoner and lawyers was protected by article 8 ECHR and should therefore only be intercepted 'in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.'

[40] This is the case in the UK under the Police and Criminal Evidence Act 1984 Codes of Practice, Code C.

[41] See *L. Skinns*, 'Legal advice in the police station: past, present and future', Crim LR (2011) 1, 19-39, *M. McConville* et al, Royal Commission on Criminal Justice: Custodial Legal Advice and the Right to Silence, Issue 16 of Research Study, (HMSO, 1993), Effective Criminal Defence in Europe, n. 20 above)

[42] Co-funded by the EU Commission JPEN 2009.

evaluate whether to defend a surrender request and whether evidence to support a defence can be obtained, it also has made it possible to pay fines, voluntarily attend, and arrange speedy hearings. However, the Presidency has already made it clear that the consensus amongst member states is that this provision goes much further than the framework decision on the EAW and should not be included. As such, it is deleted from the current draft. This is extremely disappointing given the legal base of the directive in article 82(2) of enhancing mutual recognition. Surely this should apply not only to the prosecution of offences but to ensuring equality of arms.

Distinctly absent from the proposal is any reference to quality and training such as that which appears in Measure A with regard to interpretation and translation. The need for qualification or specialism varies across the member states.[43] In order to ensure effective access to legal advice the EU could require member states to ensure a register of appropriately qualified lawyers is maintained and that these lawyers are required to undertake regular training to maintain their standards. This is particularly important in relation to the provision of legal advice in the police station which is not under the scrutiny of the courts.

VII. Political Pressures

The UK and Ireland negotiated a protocol to Title V of the TFEU concerning the area of freedom, security and justice.[44] These member states can decide on a measure by measure basis whether to opt in to a legislative act or not. They opted in to measures A and B but have not opted in to Measure C. Furthermore, they co-authored a note with France, Belgium and the Netherlands which raises concerns about the operation of the proposed directive.[45] In this note they 'express and explain their serious reservations about the Commission's approach in preparing this proposal which, as published, would present substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities.' The note raises four concerns.

Firstly, the effective conduct of investigations and proceedings. The member states argue that the rights of the defence must be balanced against operational needs. The measure in article 3 concerning presence of a lawyer at evidence gathering therefore could impede and delay proceedings. The complaint is that the measure does not distinguish between different types of case. This argument ignores the drafting of the provision which both depends upon the exercise of the right by the suspect (this is not a mandatory provision) and the qualifications (a) that in accordance with domestic law the suspect's presence is required and (b) 'where it would not prejudice the acquisition of evidence'. If those ingredients are present, the investigation can hardly be said to be hampered. Furthermore, distinguishing between different types of proceedings also ignores the sage advice of the CPT that the right of access

[43] See *Spronken T.* et al, EU Procedural Rights in Criminal Proceedings (Maklu, 2009), paragraph 3.2.4.
[44] Protocol 21.
[45] Council of the EU, 14495/11 (Brussels, 22nd September 2011)

should be enjoyed by all suspects no matter how minor the offence. Otherwise there is the danger that suspects will be detained under suspicion of committing a minor offence in order to limit their access to defence rights.[46]

The second objection is that there is no clarity on the Directive's relationship to the ECHR. The note argues that it is not easy to draw general and abstract principles from the ECtHR jurisprudence in relation to criminal procedure which tends to focus on the domestic criminal procedure of the country in issue. The proposal goes beyond the ECHR line of authority, says the note, which requires a clear policy decision based on evidence of the impact of the changes. This view is unfortunate. The aim of these measures, as the Resolution made clear, is to add value to the ECHR jurisprudence for the very reason that its reach is limited. The EU legislative process allows the member states to engage directly with each other to identify where greater safeguards are required and how these may be addressed.

The third objection is that the directive does not take account of the different ways member states secure the right to a fair trial. The note points to other factors which must be taken into account such as maximum periods of detention, speed by which a suspect is taken before a judicial authority, the role of judicial authorities and the availability of legal aid. Member states approach these issues very differently and the balance between the different aspects of national criminal justice systems must be maintained. Yet applying the articles of the proposed directive to each national system, inclusive of the qualifications and the presumption of choice on the suspect whether to seek legal assistance, it is hard to see why it would, as originally drafted, have had the adverse effect that the note suggests.

The fourth objection is to the absence of rules on legal aid. The Roadmap intended the right of a lawyer and legal aid to be considered together. The directive will have a substantial impact on legal aid which at a time of serious economic and financial constraints ought to be taken into account when the measures are considered. Perhaps this final objection reveals the real issue at stake; any extension of the right to legal assistance will incur increases in legal aid. With respect to representation in the police station, when the right was enacted in England and Wales, it was seen to in fact reduce challenges to the admission of evidence because lawyers had been present from the start, and therefore an overall reduction to court expenditure occurred. Yet in comparison with other member states the legal aid bill in the UK is high,[47] and member states do not want to risk increasing their legal aid expenditure at a time of austerity. Indeed, a Bill is currently progressing through the UK Parliament that would heavily restrict the availability of legal aid to many areas of practice and will therefore impact severely on access to justice for many people.[48] One concrete measure in this Bill would seek to reduce the presence of lawyers in police stations by increasing the use of telephone advice.

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[46] CPT, Annual report 2011, page 17, [20]
[47] CEPEJ, Evaluations of European Judicial Systems, 4th Report (Council of Europe, 2010)
[48] Legal Aid, Sentencing and Punishment of Offenders Bill 2011

The approach of issuing a public statement in this way is somewhat surprising given the importance of maintaining a productive relationship with the Commission. The directive is just a proposal at this stage, simply presented by the Commission. Whilst the Commission continues to have a role in the legislative process, it is the Council and Parliament which have the legal power to adopt the final instrument. From the discussion above it is clear that the Directive has already been substantially amended from the original version. The member states who signed this note are well aware of this process, indeed a number of meetings of the Council working party had already taken place prior to its release in which most member states identified the same controversial provisions in need of amendment. As such, this statement can only be seen as political posturing. Nevertheless, provision of access to legal advice in the UK is far more widespread than in the other member states who have jointly signed the note. It is therefore disappointing that the UK has decided not to lead on this measure by positive example and instead has provided the impetus to other member states to refrain from the improvement in their provision of access to lawyers. The European Parliament is yet to step into the process and it is hoped that their approach will be robust in favour of improving access to legal advice.

VIII. Conclusion

The significance of the achievements in this area over the last two years cannot be underestimated, given the political wrangling that has hampered the provision of defence safeguards for almost a decade. Whilst there remain inadequacies in the protections afforded, all three measures so far negotiated provide practical mechanisms to ensure safeguards are effective in a way that has been simply impossible through the Council of Europe. Of course, all of these measures will need to be implemented by way of national law. In a time of economic constraint, whether any measures are in fact enacted to afford greater procedural safeguards is uncertain. The Commission does have enforcement powers through the TFEU, and nationals can seek preliminary references from the CJEU where a principle is unclear. But the ultimate decision to prioritise defence rights will be one for national parliaments to make. There is much more activity to come in this field and practitioners must continue to keep a watchful eye on the EU.