



**JUSTICE Response to the House of Lords Select
Committee on the European Union, Sub-Committee E,
Inquiry into the proposed Framework Decision on
certain procedural rights in criminal proceedings
throughout the European Union**

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JUSTICE Response to the House of Lords Select Committee on the European Union, Sub-Committee E, Inquiry into the proposed Framework Decision on certain procedural rights in criminal proceedings throughout the European Union

1. JUSTICE is an independent all party law reform and human rights organisation that aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE has been strongly involved in monitoring the development of a European area of freedom security and justice. It has, in principle, supported the decision made by the Tampere European Council that 'mutual recognition' - of judicial decisions and judgments taken in other member states – should become the new governing principle in judicial co-operation in criminal matters. This support has, however, been conditional on the development and implementation of adequate EU-wide procedural safeguards for suspects and defendants in criminal proceedings. JUSTICE sees this as necessary to ensure that foreign suspects and defendants in particular are treated in a fair and comparable way wherever they face criminal proceedings in the EU, and to create mutual trust between member states so as to facilitate efficient co-operation.
3. Given the rapid pace at which prosecution-driven aspects of the mutual recognition programme have advanced since September 11th, the European Commission's initiative for common procedural safeguards is highly welcome, if long overdue. JUSTICE welcomes the Commission's assurance that this is only a first step towards addressing the current disparities in implementation and unacceptable levels of compliance with the right to a fair trial across the EU, notably those aspects that may be prejudiced in cross border cases such as admissibility of evidence, bail, and the presumption of innocence.
4. The UK has high standards of procedural rights in criminal proceedings and a good record of compliance. It should take the lead in Europe to ensure that its mostly enviable standards set the pace for EU-wide rules and not those of the lowest common denominator. British citizens facing justice abroad will only be guaranteed access to standards of criminal justice comparable to those in the UK if the government takes a stronger stance on minimum safeguards now.
5. If the Framework Decision is to meet expectations, it must guarantee a high level of protection that reaches at least that of the European Convention on Human Rights (ECHR). It must also be drafted in sufficient detail if it is to add value to the ECHR and

ensure consistency across the EU. Finally, its implementation must be regularly and independently monitored, and the conclusions made public, in order to promote compliance and inspire mutual trust between all those involved in the criminal justice process in the EU. JUSTICE's assessment at this stage is that the proposed Framework Decision does not meet all these requirements as presently drafted.

6. The main points to which JUSTICE wishes to draw the Select Committee's attention are as follows:

- This Framework Decision is vital as a first step towards redressing the current imbalance in favour of prosecution-led measures to enhance judicial co-operation on the basis of mutual recognition in the EU. It should produce both greater equivalence of procedural safeguards between member states and greater compliance with the ECHR. In particular, it will address some of the special legal, linguistic, financial and technical difficulties experienced by foreign suspects and defendants and make rights more visible. In turn, this will encourage more efficient co-operation.
- The Framework Decision must, at least, meet the standards of the ECHR and the EU Charter. To add value to these instruments, it must be drafted in sufficiently precise language that will promote greater conformity amongst EU member states.
- It is imperative that monitoring be regular and independent to successfully tackle the issue of non-compliance with the ECHR. The results should be published to demonstrate improvement and foster mutual trust, or to indicate problem areas.
- To ensure the Framework Decision applies to the same kinds of cases and from the same point in proceedings, 'criminal proceedings' must be treated as an 'autonomous concept' in line with the case law of the ECtHR. The point at which a person is treated as having been 'informed that he is suspected of committing a criminal offence' also needs to be clarified.
- The right to legal assistance can be considered the most crucial procedural safeguard since it facilitates all the others. Articles 2 – 5 of the Framework Decision do not, however, meet the standards of article 6 ECHR. In particular, the right is unjustifiably limited to legal 'advice', it does not adopt the 'interests of justice' test and the right to confidential communications with a lawyer is not protected.

- In the interests of consistency, clarification of when it is 'necessary' to provide free interpretation of legal advice is needed, as well as which documents are 'relevant' for the purposes of providing free translations.
- Technical training and accreditation for translators and interpreters needs to be provided by member states to ensure there are adequate numbers of suitably qualified professionals to meet the special requirements of those to whom the Framework Decision will apply. National registers of competent translators and interpreters should be established and made publicly available.
- Member states should set up a visible complaints mechanism to assist the detection of unsatisfactory legal and language services.
- The Framework Decision unjustifiably limits the specific attention some suspects/defendants may require to instances where by virtue of his 'age, mental, physical or emotional condition' he 'cannot understand or follow the content or meaning of the proceedings'. The categories of those entitled to such attention should not be exhaustive, nor should the specific attention be limited to those who cannot understand the proceedings. In particular, all suspects should be entitled to timely medical assistance.
- Greater precision is needed to ensure that the Letter of Rights is given to a suspect before he answers any questions in relation to the charge.
- To give real value to the Letter of Rights, further detail in its content is necessary. In particular, the circumstances surrounding the suspected offence and the possible penalties that could be incurred in the event of conviction should be specified, as should the legislative source of any powers relied on to detain the suspect. The suspect's right to remain silent must also be included.
- Member states need to give a firm financial commitment to implement the provisions of the Framework Decision if it is to make a real difference to existing practice.

Need for action at EU Level

7. EU judicial co-operation in criminal matters has been developing rapidly to remove barriers to investigations and prosecutions since the Vienna Action Plan was agreed in 1998 and further expounded by the Tampere European Council in 1999. The introduction

of the European arrest warrant¹ marked the debut of the mutual recognition principle in this field. Subsequent measures have included the draft framework decision on financial penalties,² a draft framework decision on confiscation orders,³ a framework decision on freezing orders to prevent the destruction, transformation, moving, transfer or disposal of evidence⁴ and a proposal for a European evidence warrant⁵ as a first step towards replacing the mutual assistance regime in the EU. These instruments simplify and streamline prosecutions and investigations on the basis of the principle of mutual recognition.

8. The success of the mutual recognition programme largely depends on the existence of mutual trust between all those involved in the criminal justice systems of the 25 EU member states. To achieve this mutual trust, a high and comparable level of procedural safeguards must be shown to apply in practice in all EU member states so that people will not be treated unevenly according to the jurisdiction dealing with their case. There is a particular need to address disparities in the way that the special legal, linguistic, financial and technical implications of cross border litigation are presently dealt with in the different member states. This was specifically envisaged from the inception of the mutual recognition project as a precondition for both protecting the right to a fair trial in cross border cases and achieving greater efficiency in prosecutions.
9. Such safeguards have so far, however, failed to receive the same attention as moves to enhance the efficiency of investigations and prosecutions. In its response to the Home Office consultation on the European evidence warrant in June 2004, JUSTICE highlighted that

In the absence of equivalent safeguards in all member states, mutual recognition may in fact breed mistrust, suspicion and uncertainty rather than fostering the culture of trust and co-operation necessary to effectively tackle cross-border crime.

10. The ECHR is frequently, but falsely, assumed to supply the requisite level and consistency of safeguards across the EU. That all EU member states are signatories to the ECHR indicates a common commitment in principle to a set of fundamental rights. In practice, however, variations in standards and key differences in the application and

¹ OJ L 190/1 18.7.2002

² OJ C 278/4 2.10.2001

³ 6229/04 LIMITE COPEN 20, 13.2.2004

⁴ OJ L 196/45 2.8.2003

⁵ COM (2003) 688 14.11.2003

interpretation of the ECHR provisions prevent the ECHR from being able to provide a sufficient basis for the mutual trust implicit in the EU's mutual recognition programme.

11. Moreover, the application by the European Court of Human Rights (ECtHR) of the margin of appreciation doctrine to determine the appropriate means of compliance reflects the broad membership of the Council of Europe and the need to accommodate the different legal cultures, historical traditions and moral values of 45 countries. This approach will not, however, achieve the consistency necessary to substantiate the mutual trust at the heart of greater judicial co-operation in criminal matters between EU member states.
12. There are also issues of compliance with the ECHR. The case law of the European Court of Human Rights provides ample indication that there are serious violations by all EU member states.⁶
13. Persistent violations of the ECHR will continue to undermine trust between member states and so block co-operation based on mutual recognition. This is also confirmed by recent case law in both France and the UK where extradition has been refused on the basis that the prosecution case was based substantially on information obtained by means of torture.⁷ These cases illustrate that the only way to expedite extradition requests is by ensuring individual rights are in fact adhered to across the EU. The introduction of the European arrest warrant will not reduce this imperative.
14. Given the divergences in implementation of the ECHR and the present number of violations, it is unacceptable to remove geographical barriers to investigations and prosecutions while preserving national boundaries in relation to defence rights. This will neither secure equivalent protection for all suspects and defendants wherever they are in the EU, nor will it generate the mutual trust necessary to improve the efficiency of international judicial co-operation.
15. The principle of 'subsidiarity' has often been raised in objection to the development of EU common procedural safeguards. However, from the point that the member states, including the UK, signed up to the mutual recognition principle as the cornerstone of judicial co-operation in criminal matters, deference to national rules in this field was no

⁶ In an appendix to its publication on the European arrest warrant, JUSTICE highlighted the vast number of judgments against almost all member states and accession countries for breaches of articles 3, 5 and 6 alone in the years 2001-2003.

⁷ Extradition request by France to the UK, *R v SSHD, ex p Rachid Ramda* [2002] EWHC 1278 Admin, Extradition request by Spain to France, Cour d'appel de Pau, *Irastorza Dorronsoro* (No 238/2003), judgment of 16 May 2003.

longer viable. The disparities in practice between procedural safeguards across the EU will remain unless tackled with sufficient political will at EU level.

Relationship with the ECHR

16. The ECHR is an international treaty that supplies a minimum floor of standards for 45 states. It was never intended to achieve the equivalence between parties that is warranted by the co-operation in criminal matters developing between EU member states on the basis of mutual recognition. Given that the EU has begun to remove safeguards and barriers in sole reliance on the equivalence achieved by the ECHR it must now incorporate the ECHR into EU law, as the new constitution proposes to do, and pin down the substance of those ECHR rights in the EU.
17. A binding Framework Decision that secures a high level of procedural safeguards, drafted in sufficient detail and supported by regular and independent monitoring will promote greater consistency and compliance with the ECHR amongst EU member states. It will also add value by improving the visibility of the requirements of article 6 ECHR whose full implications are not presently self evident to anyone unfamiliar with the case law of the ECtHR.

Minimum standards

18. The level of standards proposed does not, in every case, meet that presently offered by UK legislation, or even by the ECHR. Unless the standards are raised, as discussed below, British citizens facing criminal proceedings elsewhere in the EU will not be guaranteed protection equivalent to that in the UK. This may act as a barrier to further European integration and will, in particular, present an obstacle to greater judicial co-operation. Furthermore, a constitutional crisis in the EU will be created if ECtHR finds the Framework Decision is not compliant with the minimum protections of the ECHR. This is to be avoided at all costs.
19. JUSTICE welcomes the inclusion of the non-regression clause in article 17 of the Commission proposal. There will, however, always be an implicit danger of the legitimising effect of minimum standards and the downward pressure they may induce. This was, for example, the effect in Belgium of the minimum standards introduced by Council Directive 2003/86 EC of 22 September 2003 on the right to family reunification. The Home Secretary's proposals to reduce the burden of proof for serious crimes and to place restrictions on trial by jury demonstrate the strong interest of the state in securing convictions. There is a potential danger that standards in the UK will be reduced to the minimum standards that are eventually agreed by the EU unless a stronger stance is

taken now to ensure the level of protection is indeed that which is presently offered by the UK. Furthermore, this will be the only way to secure that same level of protection to UK citizens facing criminal proceedings abroad.

Scope of the Framework Decision

20. JUSTICE considers that there are other crucial areas that will have immediate and direct cross-border implications as a result of the EU mutual recognition programme. These include common rules on admissibility of evidence; the burden of proof in criminal trials; bail; double jeopardy; the presumption of innocence; common rules on data protection; and EU rules on detention and prisoners' rights. The Commission has argued that by virtue of their complexity these merit consideration in separate Framework Decisions. This does not imply that these areas are any less important than those covered by the present Commission proposal. Work in these fields should begin at the earliest opportunity where it has not already done so.

Scope of application of the Framework Decision

21. Article 1(2) applies the Framework Decision to all persons suspected of having committed a criminal offence in any proceedings to establish his guilt or innocence, or to decide on the outcome following a guilty plea in respect of a criminal charge 'from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until finally judged'. This includes any appeal from such proceedings.

Criminal proceedings

22. In the absence of an autonomous definition of 'criminal offence' and 'criminal charge', the limitation of the protections of the Framework Decision to 'criminal proceedings' will not necessarily achieve equivalence across the 25 member states of the EU. The ECtHR has repeatedly emphasised that there is no common definition of these terms across the Union and has developed autonomous concepts to ensure the protections of article 6 apply in all the member states of the Council of Europe in comparable circumstances.⁸ Three criteria are taken into account: (a) the classification of proceedings in domestic law; (b) the nature of the offence or conduct in question, including how the offence is regarded in other Council of Europe countries and whether the offence applies to the population as a whole or only to an identifiable sub-group; and (c) the severity of any possible penalty. The problem is illustrated in the UK by the

⁸ Engel v Netherlands (1979-80) 1 EHRR 706; Benham v UK (1996) 22 EHRR 293.

concept of 'civil penalties' in the draft identity cards legislation. The Framework Decision must therefore be interpreted in light of the jurisprudence of the ECtHR.

Suspected Person

23. More problematic still is the pivotal phrase 'from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence'. This is an ambiguous notion in UK law that may not, at present, entitle a suspect to the Framework Decision rights before a police interview takes place unless being cautioned is treated as being so informed. It is highly likely, therefore, to be an equally ambiguous notion in many other EU member states, with the result that the Framework Decision rights will apply at different points in the proceedings depending on where in the EU a person is being investigated. This is unacceptable both from the point of view of rights being 'practical and effective' as required by the ECHR and for the purposes of mutual recognition.

UK example

24. In the UK, most of the PACE Code C rights only come into play when a suspect has been arrested and arrives at a police station. There is a duty to take a suspect to a police station immediately after arrest, though the Code C rights also apply to those who attend voluntarily. The major right available to those being questioned who have not been arrested is the duty of police to caution those who are suspected of committing an offence (Code C s 10). The leading case is *R. v Absolam (Calvin Lloyd) (1989) 88 Cr. App. R. 332 Times, July 9, 1988* which is authority for the proposition that questions put by a police officer for the purpose of securing evidence and answers to them, are an 'interview' for the purposes of the Police and Criminal Evidence Act 1984 and must therefore be conducted under caution.

25. In JUSTICE's view, a person should therefore be entitled to the protection of the Framework Decision from the moment that he is cautioned, and not from arrest. Any other conclusion would give the police an incentive not to arrest suspects and bring them to a police station but instead to caution and question in a location other than a police station where the full Code C rights will not apply. The potential injustice of this is compounded by the fact that under s.34 of the Criminal Justice and Public Order Act 1994, a tribunal may draw inferences from a suspect's failure to mention a fact which he could have been reasonably expected to have mentioned when questioned. Under s.34 (2A), if the suspect was in an authorised place of detention, such inferences can only be drawn if the suspect had been allowed access to a solicitor.

26. A related problem is stop and search procedures. In most circumstances, searches can only be undertaken where there is reasonable suspicion that an offence has been committed and the reason for the search is communicated to the suspect (see Code A Pace). Again, this would trigger the Framework Decision rights but not all the Code C rights. JUSTICE therefore considers that, in UK law, a search warrant should be considered as informing a person that he is suspected of having committed a criminal offence for the purposes of the Framework Decision.
27. In order to achieve both the level of protection and the consistency the Framework Decision seeks, article 1 therefore needs to be more precise as to the proceedings to which it applies and at what point it comes into play. Following the case law of the ECtHR, it should clarify that it applies to all proceedings that are criminal in substance, with reference to the criteria employed by the ECtHR to make this determination. Reflecting the article 2 Framework Decision right to legal advice, it should specify that it applies before any police questioning takes place in relation to the suspected offence.

Right to legal advice

28. Articles 2 to 5 of the Framework Decision set out the right to legal advice, including the right to free legal advice. The rights guaranteed by these provisions are, however, significantly narrower than those protected by both the ECHR and the 1999 UK Access to Justice Act (AJA).

Definition

29. First, the very definition of the entitlement has been unacceptably limited to 'legal advice' so that it does not comply with the ECHR.

Article 6(3)(c) ECHR reads

(3) Everyone charged with a criminal offence has the following minimum rights:

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

Article 2 of the Framework Decision reads

1. A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.

2. A suspected person has the right to receive legal advice before answering any questions in relation to the charge

30. The wording of article 2 is repeated in article 3 in relation to free legal advice and neither matches the ECHR right to legal assistance nor the AJA 1999 categories of assistance to be funded by the Legal Services Commission, which distinguish between advice and representation. The Framework Decision refers only to providing legal 'advice' which will not necessarily extend to advocacy assistance at trial, nor the presence of a lawyer during police questioning, the tracing of witnesses or the obtaining of expert evidence.

Entitlement to legal aid

31. Secondly, the article 5 Framework Decision right to free legal advice is restricted to those instances where article 3 of the Framework Decision applies, i.e. to any suspected person who

- Is remanded in custody prior to the trial, or
- Is formally accused of having committed a criminal offence which involves a complex factual or legal situation or which is subject to severe punishment, in particular where in a member state there is a mandatory sentence of more than one year's imprisonment for the offence, or
- Is the subject of a European arrest warrant or extradition request or other surrender procedure, or
- Is a minor, or
- Appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition

JUSTICE has hitherto argued that, in the interests of justice, the existence of an international element in connection with criminal proceedings should suffice to obtain legal aid, as should the possibility of a mandatory sentence of *any* period of imprisonment. Furthermore, there should be a presumption in favour of granting legal aid in all of these situations given the prejudice to the defence that may otherwise result.

'Interests of justice' test

32. Thirdly, the test of 'undue financial hardship to the suspect or his dependents' does not reflect the article 6(3)(c) ECHR 'interests of justice' test where a suspect or defendant

'has not sufficient means to pay for legal assistance'. The Commission's research revealed that not all member states (including the UK) applied a means test to qualify for legal aid, on the basis that it was more cost effective to provide legal aid than to carry out the means testing. Furthermore, those member states that do apply a means test will set different levels of income or capital assets to qualify for legal aid. A means test alone, therefore, will not only be unsuitable for some member states but it will also fail to establish parity of access to justice across the EU.

33. JUSTICE advocates the adoption of a means test that reflects the ECHR standard, where applicable, combined with a wide 'interests of justice' test as applied by the ECtHR and the UK courts. Any means test must be transparent and must require the state to demonstrate that a suspect could pay for his own legal costs without his income or state benefits falling below the national minimum and without requiring the unreasonable sale of any capital assets.

34. The 'interests of justice' test should be assessed by reference to the facts of the case as a whole and should not be restricted to a limited number of considerations as articles 3 and 5 of the Framework Decision purport to do. In particular, the criteria listed do not take account of the possible public value or importance of a case. Moreover, under article 3, the complexity of a case and the severity of potential punishment are only relevant for the purposes of entitlement to legal aid where a suspected person is 'formally accused'. This will not protect suspects who are being investigated in connection with such an offence but who have not been formally charged, nor does it comply with the autonomous definition given by the ECtHR to 'charge'.

Confidentiality

35. Fourth, no provision is made for an accused's right to confidential communications, both written and oral, with his lawyer. This may also necessitate the provision of private interview facilities. This is an essential aspect of the right to have adequate time and facilities for the preparation of the defence, as guaranteed by article 6(3)(b) ECHR, and must be included in article 2 of the Framework Decision.

Children

36. Children are listed in article 3 amongst those entitled to legal aid as a category of suspect/defendant entitled to special assistance. This raises the issue of the very real disparities in the age of criminal responsibility between member states, ranging from eight in Scotland to 15 in Portugal and Finland. It provides an example of where

substantive law may need to be harmonised if minimum procedural safeguards are to produce comparable results across the EU.

Lawyer of choice

37. A further shortcoming in article 2 of the Framework Decision is its lack of reference to the suspect/defendant's right to a lawyer **of his own choosing** in accordance with article 6(3)(c) ECHR.

Compatibility of UK law

38. The article 2 requirement to provide legal advice 'as soon as possible' does not appear to admit any exceptions. As such, PACE 1984 Code C section 6 6.6 and Annex B, which provide exceptions to the general rule that a detainee who wants legal advice may not be interviewed or continue to be interviewed until he has received such advice, may not comply. Annex B allows the police in cases of serious arrestable offences (defined in s 118(2) of the main Act) to limit a suspect's rights to notify others and have access to legal advice where the police have reasonable grounds for suspecting that their exercise will lead to interference with evidence, harm to a witness, the alerting of other suspects, or hinder the recovery of property. Annex B, sections 8-12, provides special rules for persons detained under the Terrorism Act 2000, which extends the grounds to include 'interference with the gathering of information about the commission, preparation or instigation of acts of terrorism' (section 8 (iv)) and 'making it more difficult to prevent an act of terrorism' (section 8(v)).

Effectiveness

39. Article 4 of the Framework Decision reflects the case law of the ECtHR on article 6 ECHR, which requires legal representation to be 'practical and effective' and not simply nominal.⁹ In *Artico v Italy*, the ECtHR emphasised

[A]rticle 6(3)(c) speaks of 'assistance' and not of 'nomination'. Again, mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.

⁹ *Artico v Italy* (1981) 3 EHRR 1, para 33

40. However, it is not clear at what point the state is required to intervene where a suspect/defendant is dissatisfied with his legal representation. The ECtHR has taken a relatively narrow view in such cases and has held that

[t]he competent authorities are required under article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is **manifest** or **sufficiently brought to their attention in some other way**¹⁰ [emphasis added]

41. The most practical way of bringing ineffective legal representation to the notice of the authorities would be by the suspect/defendant himself. In order to make this workable, he would need to be made aware through the Letter of Rights of his right to *effective* legal advice, of the possibility of informing the appropriate authorities where he is unhappy about the legal representation he has been provided with and of his right to be given a replacement lawyer of his choice. Member states must be responsible for establishing a visible complaints mechanism to which all those involved in the proceedings can report.

42. The Commission identifies in its Extended Impact Assessment¹¹ that disparities in the levels of remuneration and training of lawyers across the EU is a serious problem but does not address these vital issues in the Framework Decision. Member states should be required to provide appropriate training to ensure that lawyers appointed under the Framework Decision have the necessary expertise to deal with the highly specialised types of case that may arise under EU co-operation measures such as the European arrest warrant. They must also be committed to adequate levels of pay for those participating in national legal aid schemes if they are to attract lawyers with the necessary qualifications. JUSTICE recommends that member states establish a register of suitably qualified legal representatives, including those who participate in national legal aid schemes.

43. As a further check on effectiveness, article 4(1) of the Framework Decision only allows lawyers as defined by Directive 98/5/EC to be appointed. The Directive limits the definition of a lawyer to advocates, barristers and solicitors. JUSTICE considers this an appropriate condition. There may, however, be two areas of incompatibility with UK law. Under the Courts and Legal Services Act 1999, although only these professionals have rights of audience in court, the right to conduct litigation – including the provision of advice - has also been extended to legal executives by s40 AJA 1999. Secondly, under s

¹⁰ *Kamasinski v Austria* (1991) 13 EHRR 36, para 65. See also *Imbrioscia v Switzerland*, *ibid*, for a similar decision in the context of a private lawyer.

¹¹ SEC (2004) 491 28.4.2004.

6.12 and 6.12A Code C PACE, 'solicitor' is defined to include trainee solicitors, accredited representatives, and non-accredited and probationary representatives sent by or on behalf of solicitors. These categories of solicitor will be insufficiently qualified for the purposes of providing expert advice to foreign suspects and defendants under the Framework Decision.

44. In order to ensure the Framework Decision complies with the ECHR and that British citizens are adequately protected when abroad, JUSTICE urges the Committee to press for stronger guarantees to legal advice and assistance and free legal aid. These should conform to the UK standards set out in the AJA 1999 which extend to legal advice and assistance and advocacy assistance and adopt a broad 'interest of justice' test of entitlement to legal aid. The elementary right to a lawyer of choice and to confidential communications with that lawyer must be incorporated in conformity with the ECHR. To ensure legal representation is effective, member states must establish a visible complaints system and publish a register of suitably qualified legal representatives. Current disparities in levels of remuneration and training across the EU must also be addressed.

45. In substance, article 2 does not add to the rights that already exist under article 6(3)(c) ECHR. As noted above, it does not at present even match them. It does, however, clarify when the entitlement to legal advice arises, namely 'as soon as possible and throughout the criminal proceedings if he wishes to receive it', and, in any event, 'before answering questions in relation to the charge'. Combined with the Letter of Rights it will facilitate a suspect's access to legal advice by alerting him to this entitlement, particularly in relation to pre-trial questioning. In *Imbrioscia v Switzerland*, the ECtHR held that articles 6(1) and 6(3)(c) do not require a state to take the initiative to invite an accused's lawyer to be present during questioning in the course of the investigation. However, where an accused or his lawyer request the lawyer's attendance this must be granted if, as will be highly likely, there is a risk that information obtained will prejudice the accused's defence. The Framework Decision will therefore improve access to legal assistance by both clarifying when the right arises and alerting the suspect of this right.

Right to interpretation and translation

Language

46. Translation and interpretation services should be provided in all Community languages, all domestic minority languages and Braille for those with sight impairments.

When is it 'necessary' to provide free interpretation of legal advice?

47. Clarification of where it is 'necessary' to provide free interpretation of legal advice received throughout the criminal proceedings is imperative to achieve consistency across the EU. It must surely always be 'necessary' whenever a person does not 'understand the language of the proceedings', the criteria used to determine entitlement to free interpretation of the proceedings in article 6(1) Framework Decision.

Which 'relevant' documents should be freely translated?

48. JUSTICE also recommends providing a non-exhaustive list of 'relevant documents' that should be freely translated for suspects who do not understand the language of the proceedings in order to limit disparities between member states. This will help promote best practice across the EU. This list should include but not be limited to:

- The police statement
- Statements by the complainants and witnesses
- Statements by the suspect/defendant to the police and judicial authorities
- An indictment by the public prosecutor or other prosecuting authorities
- A judicial order imputing the crime to the defendant

Accuracy

49. In order to improve the accuracy of translations and interpretations, member states should be required to appoint a national accreditation body responsible for training and certifying translators and interpreters. Continuous technical training must be available that covers use of specialised terms that may arise in the context of criminal proceedings and the functioning of judicial systems. Member states should be required to publish a register of certified translators/interpreters. The register should indicate where translators/interpreters have undergone appropriate technical training and are certified for the purposes of the Framework Decision. In the UK, there is a duty on criminal justice agencies to use translators on the National Register of Public Service Interpreters whenever possible but, in practice, this is not always the case and there is no statutory requirement for court interpreters to hold the Diploma in Public Service Interpreting or any other qualification. In the absence of a requirement to provide such training and certification, or to publish a register of those who have completed such training, adequate provision of translation and interpretation services will continue to fall short of what is necessary to ensure proceedings are fair in accordance with article 6 ECHR.

50. Again, the issue of inadequate levels of remuneration across the EU was also identified as a problem by the Commission. This critical aspect is also left untackled by the Framework Decision. However, unless adequate training and fees are provided by all member states, with the implicit financial commitment this implies, the rights to free interpretation and translation in all criminal proceedings will continue to be violated in many if not all member states, denying those who do not speak or understand the language of the proceedings the right to a fair trial and inhibiting the success of the mutual recognition programme.

51. To check the accuracy of translation and interpretation services, lawyers, judges, suspects and defendants, and all those involved in the criminal proceedings should be made aware that they can report any concerns they have in this regard and be provided with a replacement. Member states should be required to provide a visible and effective complaints mechanism.

Compatibility of UK law

52. Under UK law, s13 of Code C addresses the issue of suitably qualified interpreters, provided at public expense, for suspects at police stations. No provision is made for translators. This will need to be rectified to comply with the Framework Decision. Furthermore, there are exceptions to the right to interpreters (see s.13.2 Code C) and these may also be incompatible with the Framework Decision.

Specific attention

Entitlement

53. The Framework Decision provides for specific attention to be given to a suspect/defendant 'who cannot understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition'. JUSTICE is concerned that those requiring specific attention may be able to understand or follow the content or meaning of the proceedings but nonetheless require special attention. This qualification of entitlement to specific attention is not broad enough to address the needs of all vulnerable persons in state custody to whom member states have a special responsibility. The categories of those entitled to such attention should not be exhaustive, nor should it be limited to those who cannot understand the proceedings.

Medical assistance

54. Timely medical assistance should be available to **all** suspects wherever a person appears to be suffering from physical illness; or is injured; or appears to be suffering from

a mental disorder; or appears to need clinical attention; and if a detainee requests a clinical examination, not solely where a person cannot understand or follow the proceedings by virtue of his physical condition. This would bring the Framework Decision in line with s 9(b) of PACE, Code C.

Other specific attention

55. Other specific attention will, by its very nature, not be required by every suspect or defendant. The measures listed in article 11 should not be exhaustive and the appropriate measures to be taken must be assessed in light of the particular needs of the individual. More detailed guidance and examples could nonetheless be provided in the Framework Decision without losing the necessary flexibility of the provision.

Compatibility of UK legislation

56. Under UK legislation, PACE, Code C ss 3(b) and 11.15 make provision for special protection for juveniles and other vulnerable groups, primarily by requiring the involvement of an 'appropriate adult', such as a parent or guardian, an interpreter or registered medical practitioner. However, there are the usual exceptions to this provision, which may be incompatible with the Framework Decision. Furthermore, Code C does not require an audio or video recording of interviews as provided by article 11(1) to safeguard the rights of suspected persons entitled to specific attention.

Letter of Rights

57. JUSTICE welcomes the Commission's initiative of a Letter of Rights setting out the procedural rights to which suspects are entitled. This will improve the visibility of those rights and so contribute towards greater accessibility, compliance and consistency across the EU.

When should the Letter of Rights be given?

58. It is not, however, clear from article 14 of the Framework Decision when the Letter of Rights should be given to the suspect. From article 1 it can be deduced that a suspect is entitled to receive the Letter of Rights 'from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence'. As noted above, this will not take place at the same point in criminal investigations across the EU. In the interests of clarity, therefore, it should be specified in article 14 that suspects are entitled to be given the Letter of Rights 'as soon as possible, and before answering any questions in relation to the charge'.

Language

59. The Letter of Rights should be made available in all official Community languages as proposed by the Commission, but also in all the domestic minority languages of the EU and Braille. Audio recordings should also be kept of the Letter of Rights for those who are illiterate.

Compliance of UK law

60. Under PACE, Code C s3.2, there is already a duty to provide detainees with written notice of their procedural rights. Article 14 of the Framework Decision should therefore be easy to implement in the UK. There may, however, be an issue as to when the rights under the framework decision arise, depending on whether being cautioned or presented with a search warrant amounts under UK law to being informed that a person is suspected of having committed a criminal offence. For this reason, it needs to be clarified that the Framework Decision applies before any police questioning in relation to the suspected offence. Written notice must be given in addition to any caution regarding the right to silence under PACE, Code C s10. This should be specified in article 14 of the Framework Decision.

Content of the Letter of Rights

61. JUSTICE supports the structure of the Letter of Rights, set out in Annex A to the Framework Decision. However, greater detail should be added to its content. In particular, to comply with the article 6(3)(a) requirement to inform a suspect 'promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him', to the first sentence 'You [insert name], are a suspected person in connection with [X criminal offence]', should also be added the circumstances surrounding the offence and the possible penalties that could be incurred in the event of conviction. An indication of the legislative source of the powers relied on to detain the suspect should also be given.

62. As mentioned above, the Letter of Rights does not replace the requirement to caution a suspect as to his right to silence. This right, inherent in article 6 ECHR, should be included in the Letter of Rights.

63. Finally, the suspect should be informed through the medium of the Letter of Rights of his right to medical treatment or check-ups.

64. It should be incumbent on member states to regularly update the Letter of Rights.

Right to communicate

Compatibility of UK law

65. Article 12 of the Framework Decision grants a suspected person the right to have his family, persons assimilated to his family or his place of employment informed of the detention 'as soon as possible'. PACE, Code C, Annex B permits this right to be delayed in certain circumstances and may not, as such, be compatible with the Framework Decision.
66. S 7 of PACE, Code C addresses the right to communicate with consular authorities which derives from the Vienna Convention on Consular Relations. However, there is currently no right to assistance from a recognised international humanitarian organisation as an alternative to consular assistance.

Evaluation

67. Given that the principal problem has been identified as one of compliance and lack of consistency across the EU in the implementation and application of procedural rights, regular evaluation, at yearly intervals in JUSTICE's view, is imperative. This will allow the Commission and, most importantly, all those involved in the operation of criminal justice systems across the EU, to gain a true picture of whether and how procedural rights are being respected on the ground. This is vital if genuine trust is to be established between the police and judicial authorities of the member states.
68. The Framework Decision states that the Commission shall supervise and co-ordinate reports on the evaluation and monitoring exercise. Member states are required to collect and make available certain statistics on the operation of the Framework Decision. The evaluations must not, however, be limited to the bare statistics collected by member states themselves. Independent experts should interview professional bodies, especially interpreters, translators and lawyers and carry out spot checks on courts and police stations to gain a fuller picture of how the Framework Decision is operating in practice. The Commission seems to imply in its impact assessment that decisions of the national and European courts should be excluded from the evaluation. This would unjustifiably restrict any serious monitoring exercise and diminish the value of its conclusions.
69. One of the main purposes of the evaluation exercise will be to inform all those involved in the criminal justice systems of the 25 member states, as well as the media, of eachothers' practices and records of compliance. It will therefore be necessary to publish the annual reports.

Financial implications

70. If the Framework Decision is to make a real difference in practice, it will require a firm financial commitment on the part of member states. Without the allocation of adequate resources, the requisite training and remuneration for lawyers, interpreters and translators will not be provided, denying the safeguards of the Framework Decision of any real value. This needs to be given serious consideration in all member states to ensure the Framework Decision is not reduced to another, well intentioned but empty, piece of rhetoric.