



**JUSTICE Preliminary Response for the Home Office to
the Commission Green Paper on Procedural Safeguards
for Suspects and Defendants in Criminal Proceedings
throughout the European Union**

April 2003

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1. JUSTICE is a British all party law reform and human rights organisation. It is the British section of the International Commission of Jurists.
2. JUSTICE welcomes the Commission Green Paper seeking to establish minimum standards in procedural safeguards across the European Union as a positive step in protecting the rights of the individual in the European Judicial Space where judicial co-operation between police and prosecuting authorities is increasingly close. This preliminary response outlines JUSTICE's basic position in relation to the questions asked by the Green Paper. It addresses those questions which JUSTICE is best positioned to respond to and may be extended with a more comprehensive response to the Commission in due course.

General

Q 1 – Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

3. JUSTICE believes that, as an absolute minimum, there is an urgent need for EU standards in procedural safeguards in the specific circumstances of criminal proceedings involving international judicial co-operation¹. The rapid advancement of the principle of mutual recognition in judicial co-operation in criminal matters, notably through the European Arrest Warrant,² needs to be underpinned by measures enhancing mutual trust. JUSTICE does, however, support the initiative for the establishment of procedural safeguards across the EU in both international and purely domestic criminal cases. While minimum standards applying solely to cases with a cross-border element³ may help in founding mutual recognition on genuine mutual trust, if those minimum standards

¹ See JUSTICE proposal for a Framework Decision on the rights of the individual in criminal proceedings involving international judicial co-operation, 23rd January 2002 (available at www.justice.org.uk)

² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190/1 of 18.7.2002

³ Mirroring the approach taken in the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26/41 of 31.01.2003.

were not also applicable to purely domestic cases, it is difficult to see how such differing standards in national criminal legal systems could be justified.

4. There are a number of existing rights relating to procedural safeguards established by both the European Convention on Human Rights (ECHR) and the EU Charter of fundamental rights and freedoms (the Charter) which apply across the EU. The difficulty within the European Union is that these rights are guaranteed and interpreted in varying ways from jurisdiction to jurisdiction. Any exercise in establishing minimum standards in the EU must, therefore, go further than simply reiterating these rights in general by establishing with sufficient clarity, exactly where the line lies in the EU for respecting those rights. Once the level of minimum standards is established, that level must be enforceable and JUSTICE believes that a framework decision would be the appropriate instrument with which to implement minimum standards. JUSTICE would suggest the following as a useful hierarchy of sources for identifying where that line must lie:
 - the case law of the ECHR
 - additional international norms (such as Council of Europe recommendations and UN instruments)
 - the procedure and practice in the Member States themselves (JUSTICE is in a position in particular to comment on the system in England and Wales)
 - the highest level of minimum standards available within the EU in a Member State's legal system should provide the guide rather than the lowest
5. While any proposal for minimum standards must take into account the political realities of its potential for acceptance, it should aim to raise standards in general in the EU and not simply to endorse the status quo. JUSTICE is concerned that a non-regression clause should be incorporated into legislation on minimum standards so that Member States cannot use the establishment of minimum standards at EU level as a reason to lower existing national standards.
6. JUSTICE strongly opposes the use, in the context of EU minimum standards, of the notion of "margin of appreciation" as developed in Strasbourg jurisprudence. As judicial co-operation on an EU level is founded on trust between the legal systems of the Member States, there should be no room for a margin of appreciation on standards in criminal procedure within the EU.

7. The notion of proportionality should be incorporated into any legislation on minimum standards relating to procedures that involve limitations on the exercise of fundamental rights.

8. An overarching principle in any statement of minimum standards on procedural safeguards must be the enforceability of those standards. JUSTICE believes that any instrument establishing minimum standards across the European Union must have the following qualities:
 - It must be binding on Member States
 - Implementation of the rules on minimum standards must be independently monitored across the European Union
 - It must contain provision for judicial accountability at a European level in case of breach of the rules on minimum standards (including the right of the individual to bring proceedings in case of breach) – the appropriate forum for decisions to be taken at EU level would be either the ECJ or some form of European Criminal Court
 - It must contain provision for sanctions against Member States who are found to be in breach of the rules on minimum standards
 - It must require adequate funds to be provided by Member States and/or a central EU fund for appropriate legal representation of defendants and suspects.

9. The main problem at the moment in terms of standards, as identified by the Commission in their previous consultation paper, is not their absence but the deficiencies in practice. Without the possibility of enforcement, the establishment of minimum standards would do little to change this. JUSTICE believes that effective enforcement and sanctions for breach of minimum standards is absolutely crucial in the establishment of meaningful minimum standards across the EU.

Legal Representation

10. The main applicable provisions relating to standards of legal representation are Article 6 of the ECHR, in particular:

Article 6.1: In the determination ... any charge against him, everyone is entitled to a fair ... hearing ...; and

Article 6.3: Everyone charged with a criminal offence has the following minimum rights: ...

- (b) to have adequate time and facilities for the preparation of his defence;
- (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;
- (d) to examine or have examined witnesses against him ...

and Article 47 of the Charter:

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

11. Minimum standards should require free legal aid to be provided where the 'interests of justice' demand it and the person concerned does not have access to the means to pay for their own legal representation. The possibility of imprisonment as a result of the proceedings should always be enough to fulfil this requirement, as should an international element in the proceedings such as extradition.

12. In *Pakelli v Germany*⁴, the European Court of Human Rights stated that 'if [a person charged with a criminal offence] does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require'. Relevant criteria in the determination of the 'interests of justice' in this context include the complexity of the proceedings, the capacity of the individual to represent himself and the severity of the potential sentence⁵. It is clear that a sentence is sufficiently severe if it involves imprisonment.⁶ It is also worth noting that the protection

⁴ (1984) 6 E.H.R.R. 1 at p31

⁵ *Quaranta v Switzerland* (1991) Series A No 205, *Granger v UK* (1990) 12 E.H.R.R.469

⁶ (1996) 22 E.H.R.R. 293

provided by Article 6, though primarily concerned with ensuring a fair trial by a 'tribunal', may also apply to pre-trial proceedings⁷

13. The 'interests of justice' test has a long history in English practice. A report in 1966 provided five potential criteria which, if met, should lead to the grant of legal aid. These have been known as the 'Widgery criteria' after the name of the chair of the committee producing the report.⁸ They were subsequently given statutory force and are currently contained in the Access to Justice Act 1999 para 5, Schedule 3. Thus, English courts have over 30 years experience of using the following five criteria, during which only minor amendments have been made to the wording. The relevant statutory wording in the Access to Justice Act 1999 is as follows:

5(1) Any question as to whether a right to representation should be granted shall be determined according to the interests of justice.

(2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account-

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation;
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;
- (c) whether the individual may be unable to understand the proceedings or to state his own case;
- (d) whether the proceedings may involve tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
- (e) whether it is in the interests of another person that the individual be represented.

14. The Widgery criteria have stood the test of time in English courts and the five criteria would appear to have a wider relevance for criminal cases in all courts seeking to implement Article 6(3)(c) of the Convention. English courts are, of course, operating within a common law system whereas most other Member States will operate within a civil law approach. However, it is difficult to see that any of the criteria would, thereby, be

⁷ see *Berlinski v Poland*, Judgment of 20/06/2002, Hudoc Ref. 00003658

⁸ *Report on Legal Aid in Criminal Proceedings* HSMO 1996.

invalidated. The first three would seem to be unproblematic. The fourth might need the commentary that such tracing, interviewing etc could only adequately be undertaken by the defence to meet the different circumstances where, say, an investigating magistrate was responsible for such functions. The fifth should remain though might have less application in courts where proceedings are less adversarial than in the UK.

15. The above provides the background for the following answers to the questions posed.

Q2: In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should all Member States be required to establish a national scheme for providing legal representation in criminal proceedings?

16. All Member States should establish national schemes to provide legal representation in criminal proceedings in order to comply with the provisions of Article 6(3)(c). The implementation of standards inherent in the ECHR is, in the first instance, a task for the European Court of Human Rights which will be concerned that all states subscribing to the ECHR have, in practice a common minimum standard.

17. It would seem particularly desirable that Member States of the EU agree minimum standards of compliance between themselves. The advancement of the principle of mutual recognition, as seen in the adoption of the EAW will make this particularly necessary. Courts of one Member State will need to be able to trust the standards applied by the judiciary or prosecution authorities of other Member States executing warrants across national borders. Hence, it would be reasonable for all Member States to adopt common standards for national schemes.

Q3: If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?

18. Quality will, of course, be affected, to some extent, by the level of fees paid to representation funded by the state. Minimum standards should require payment at an adequate level and funding for such payment should be provided either by Member States and/or, as a last resort, if necessary out of central EU funds (this might help to alleviate the financial burden of increased legal aid in poorer countries).

Q4: If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?

19. Yes. The standard of criminal practitioners in the UK has been a major issue over recent years and considerable measures have been taken to increase them. A major academic study indicated that standards were too low.⁹ As the result of disquiet over standards, a police station duty solicitor scheme was introduced to raise the standards of legal representatives attending interrogations in the police station.
20. The important issue is the standard of representation. This may require some level of experience but experience is not, by itself, a satisfactory criterion of quality.
21. The issue of minimum standards of qualification may be more difficult between different Member States which may, for example, have differences between how acceptable are 'paralegals' or, indeed, may make distinctions in relation to advocacy at higher and lower courts that represent their unique history.
22. Certain kinds of case involve particular levels of expertise in order for legal representation to be effective. This is particularly the case in proceedings with an international aspect and serious, complex crimes such as fraud or money laundering. For this kind of offence, there should be recognised lists of appropriate legal representatives to ensure adequate representation across the EU. It is clearly not appropriate for a trainee lawyer or a purely family law practitioner to be the sole legal representative of someone in a case concerning, for example, international drug trafficking and/or extradition. JUSTICE recommends that National Bars could easily set up an official directory of lawyers appropriately qualified to deal with serious offences and/or cases with an international aspect to ensure an appropriate level of quality of representation in very serious and complex cases.

⁹ M. McConville, J. Hodgson, L. Bridges, and A. Pavlovic, *Standing Accused* Oxford: Oxford University Press, 1994.

Q5: Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation 'if he has not sufficient means to pay for legal assistance'. How should Member States determine whether the defendant is able to pay for legal representation or not?

23. Contributions are difficult to collect and to enforce. As a result in England and Wales, under the s17, Access to Justice Act 1999 legal aid is now available without any payment by the individual to whom it is given in the lower courts, though contributions can be required in the higher courts.
24. Member States should consider whether it is worth seeking to obtain contributions, particularly in their lower courts or for relatively minor offences.
25. It can be forcefully argued that contributions should not be required until the completion of the case and a finding of guilt. Otherwise, payment is being required of someone whom the criminal justice system is regarding as innocent.
26. If Member States wish to collect contributions then they should have a transparent means test set at a level which is above that of any minimum income or basic benefit support level such that legal costs can be paid without either:
- (f) reducing income below such levels; or
 - (g) unreasonably requiring the sale or disposal of capital assets.

Q6: Article 6(3)(c) of the ECHR provides that a person charged with a criminal offence be given 'when the interests of justice so require'. Should this right be limited to offences which carry the risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?

27. Yes. These are provisions contained in the Access to Justice Act above. In addition, the other considerations set out in paragraph 2 of this submission should apply. For example, legal aid should be available where a lawyer would assist the court in determining a point of law; where the individual might otherwise not understand the proceedings (whether by reason of youth, mental capacity or otherwise); where assistance is needed in dealing with witnesses or some other person (eg a victim in a rape trial) may have an interest in the individual being represented.

Q7: If free legal representation is to be provided for all offences except 'minor' ones, what definition of 'minor offences' would be acceptable in all Member States?

28. The principle should be as stated in the first criteria above ie whether the individual would, if the proceedings were decided against them, be likely to lose his liberty or livelihood or suffer serious damage to his reputation. The important point is that Member States should agree the principle.

Q8: Should there be sanctions, other than any findings of the EctHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

29. Sanctions would be appropriate for systematic breach. Individual breach should be remedied by the incorporation of appropriate appeal mechanisms. Some form of systematic evaluation and monitoring would be essential to ensure that minimum standards are maintained. In cases where a Member State is shown to be consistently in breach of commonly agreed minimum standards, suspension of the application of instruments based on mutual recognition (such as the European Arrest Warrant) until such time as the Member State can demonstrate compliance may be appropriate.

30. Financial sanctions may be counter-productive where the reason for failure is an economic issue. The suspension of the application of instruments based on mutual recognition as a possible sanction against persistent and serious breach of commonly agreed minimum standards could reflect, in a limited way, the mechanism contained in Article 7 TEU in cases of serious and persistent breach of the fundamental rights set out in Article 6 TEU.

Provision of legal translators and interpreters

31. JUSTICE believes that everyone who needs an interpreter should have access to a competent interpreter at all stages of the proceedings from police questioning through trial and sentencing. This should apply to foreign languages, domestic minority languages and disability related interpreting such as sign language. The "letter of rights" suggested by the Commission in the consultation paper should be made available to the

defendant in a language which he/she understands (not just EU languages) and should be available in Braille.

32. JUSTICE understands that practice and principle vary greatly in this area across the EU on this point and that there is a need for some kind of harmonisation of practice. Fair Trials Abroad has done a significant amount of research in this field and JUSTICE would suggest that the results of that research may form a useful reference for establishing minimum standards.

Q9: Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?

33. There should be a presumption that a person whose first language is not the language of the court requires an interpreter in order to defend himself. The duty to establish whether the person has a high enough level in the language of the court to rebut this presumption should be on the judge in the proceedings. The case of *Cuscani v UK*¹⁰ makes it absolutely clear that ‘the verification of the applicant’s need for interpretation facilities was a matter for the judge to determine in consultation with the applicant.....The onus was thus on the judge to reassure himself that the absence of an interpreter at the hearing... would not prejudice the applicant’s full involvement in a matter of crucial importance for him.’¹¹

Q10: Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial should be interpreted for the suspect/ defendant?

34. Yes. All court proceedings at which the suspect/ defendant is present should be interpreted (including those before an investigating magistrate) where an interpreter is deemed necessary according to question 9 above.

¹⁰ Judgment of 24/09/2002, Hudoc Ref 00003784

¹¹ Ibid. para 38

Q11: What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

35. The independence of legal interpreters is paramount and should form part of a code of conduct for that profession (see question 18 below). Where interpreters are required by both the defence and the prosecution at the stage of taking instructions and/or speaking to witnesses outside court that independence, or at least the appearance of independence, may be compromised. In straightforward cases where an interpreter is required purely as a channel of communication between the defendant and the court (and the defendant and his legal adviser prior to hearing) there should be no need for more than one interpreter. The principle of confidentiality between client and legal representative must not be compromised in any way by the use of an interpreter.
36. All questioning and proceedings involving an interpreter should be tape-recorded so that the accuracy of the interpretation can be checked should there be any question of miscarriage of justice.

Q12: Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?

37. Yes, Member States should be required to provide translations of procedural documents in criminal proceedings. These should be all the documents which are key to the proceedings and which have a direct impact on the enjoyment of the defendant's rights. In particular, those documents which outline the charge and the nature of the case against the defendant should be provided in translation in order to allow the defendant to answer the charges against him.

Q17: If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?

38. Yes. In order to ensure quality Member States need to accept that costs will be involved. The costs of interpreting should be borne by the State – failure to cover all interpreting and translation costs in relation to criminal proceedings will in effect lead to discrimination against those who do not speak the official language of the Court.

Q18: How may and by whom should a Code of Conduct be drawn up and regulated?

39. Legal interpreters and translators play an important role in ensuring the fairness of criminal proceedings. As mentioned above, the independence of court interpreters is crucial to their role and should be included in any Code of Conduct drawn up for these professions.

40. A Code of Conduct should be drawn up by the professional bodies of interpreters and translators in cooperation with lawyers professional bodies to ensure that the conduct of interpreters and translators is in line with fair trial requirements.

Q20: Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide interpretation and translation where a person is entitled to it?

41. Yes. The suspension of the application of instruments based on mutual recognition as a possible sanction against persistent and serious breach of commonly agreed minimum standards could reflect, in a limited way, the mechanism contained in Article 7 TEU in cases of serious and persistent breach of the fundamental rights set out in Article 6 TEU.

42. Individual cases will depend on the consequences of that failure and will be a question for appeals procedures through national courts. These appeals and judicial review could include application to the European Court of Justice for a preliminary ruling. They could also include compensation to the individual concerned where appropriate.

Protecting vulnerable groups

Q21: Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:

43. JUSTICE agrees that those categories listed are especially vulnerable. In particular JUSTICE would make comments in relation to the following two categories as to what steps need to be taken to offer an adequate level of protection in criminal proceedings:

(1) foreign nationals

44. Foreign nationals should be guaranteed the right to consular assistance and an interpreter (unless the person explicitly waives those rights) as soon as possible.

(2) children

45. Children are clearly an especially vulnerable group. They should be accompanied by an appropriate adult at all times during criminal proceedings and, in particular during questioning. As a preliminary step towards establishing minimum standards in relation to minors the problem of the radical variations in the age of criminal responsibility across the EU (from 8 years in Scotland to 15 years in Portugal and Finland) needs to be addressed.

Q22: Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings?

46. Yes. Such an assessment should be made at all material stages in the proceedings. A written note of the assessment is useful in establishing that adequate consideration has been given to vulnerability of the suspect/defendant.

Consular assistance

47. All Member States should be encouraged to facilitate consular access to prisoners and to improve the level of consular assistance that they provide to their nationals abroad.

Consular assistance can provide a key channel for a detainee to contact their family as well as being a source for such information as lists of lawyers and/or interpreters who speak the detainee's language.

48. JUSTICE shares the Commission's view that if all Member States were to ratify the Vienna Convention on Consular Relations 1963, the provisions in Article 63 of that Convention would greatly improve the respect of the right to consular assistance in the EU. Ratification of this Convention would provide a useful EU minimum standard and should be strongly encouraged.

The letter of rights

Q28: Is a common EU wide Letter of Rights feasible? If so, what should it contain?

49. A common EU wide letter of rights is feasible but, in order to be of practical value, it must be relevant to each jurisdiction. The letter of rights should include basic rights with the specific procedural rights applicable in the relevant Member States (i.e. whether right to legal representative during questioning, when right to free legal representation applies etc.). The most important rights to be included are those which are applicable on arrest and up to consultation with a legal representative.
50. The letter of rights should be available in all EU languages and other relevant third languages spoken by people who may be arrested within the EU. It could be made available online in a wide selection of languages for ease of access.

Q29: When should the Letter of Rights be given to the suspect?

51. The Letter of Rights should be given to the suspect on arrest or on arrival at the police station where it is not practicable on arrest. In order for the letter of rights to have practical value, it must be given during the period where the suspect/defendant has had no access to a legal representative.

Q30: Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?

52. A signature of receipt would be a useful record of compliance with a requirement to provide a letter of rights. In circumstances where the defendant may refuse to sign a receipt, a note should be made of that refusal as a record.

Q31: What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

53. The legal consequences of failure would depend on the legal consequences, in fact, on the proceedings of such a failure. In individual cases this would generally be a matter for national courts to decide upon the basis of the facts. Possible consequences could be that failure to give the suspect the letter of rights is made a disciplinary offence. In cases where the failure has had serious consequences on the fairness of proceedings it could lead to an invalidation of proceedings.

Evaluation and Monitoring

Q32: Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?

54. Yes. Any system of common minimum standards must have a mechanism for evaluation of compliance if it is to give any added value to the current system of rights guaranteed by international instruments such as the ECHR and the Charter. The mutual trust underpinning the principle of mutual recognition should be based on mutual knowledge.

Q33: What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?

55. National reports on compliance should be made on a regular basis. The independence of such reports should be guaranteed by independent peer review. This could be carried out through the Commission with groups of experts from other Member States visiting a Member State to compile a report on compliance. Such visits should be unannounced. They should include interviews with independent professional bodies (in particular

interpreters/translators and lawyers) as well as spot checks on courts and police stations and should be facilitated by the Member State under evaluation.

Q34: Is recording of police interviews a desirable tool for efficient monitoring?

56. Recording of police interviews is a crucial tool for efficient monitoring. Video recording in custody suites would add to the reliability of such monitoring and gives an added impetus to compliance with standards.

Q35: Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

57. Sanctions are an appropriate response to a failure to maintain commonly agreed minimum standards. In cases where a Member State is flouting minimum standards in a systematic way, suspension from the application of EU instruments which are underpinned by the principle of mutual recognition (such as the EAW) may be an appropriate response. The principle of mutual recognition cannot be justified in cases where a Member State is known to fall below commonly agreed standards. The suspension of the application of instruments based on mutual recognition as a possible sanction against persistent and serious breach of commonly agreed minimum standards could reflect, in a limited way, the mechanism contained in Article 7 TEU in cases of serious and persistent breach of the fundamental rights set out in Article 6 TEU.

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