

**JUSTICE**  
**59 Carter Lane**  
**London**  
**EC4V 5AQ**  
**DX 323 Chancery Lane**  
**(020) 7329 5100**  
**(020) 7329 5055**  
**admin@justice.org.uk**  
**www.justice.org.uk**

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Dear Sir

I am writing to you on behalf of JUSTICE to alert you to our priorities and recommendations for the UK Presidency of the European Union in the field of justice and home affairs. We realise that this is likely to be a difficult Presidency, however the Hague Programme presents an opportunity for the UK to take the lead in creating an 'area of freedom security and justice', aspired to since the 1999 Amsterdam Treaty, that is firmly rooted in fundamental rights and the rule of law.

The UK should use its Presidency to champion:

- access to justice for all;
- key safeguards for those implicated in cross border investigations and proceedings;
- a counter terrorism policy that complies with civil liberties and fundamental rights;
- a framework of privacy and data protection standards;
- a common asylum and immigration programme rooted in humanitarian principles and fundamental rights;
- a robust Fundamental Rights Agency.

#### *Access to justice for all*

Developments such as the European Arrest Warrant make the provision of adequate legal aid schemes vital throughout the European Union, particularly in criminal matters. There will be increasing movement of suspects and defendants between Member States through the use of the warrant. Standards of legal aid should be guaranteed by the European Convention on Human Rights but it is clear that adherence to the Convention often reflects aspiration rather than reality. Adequacy of legal aid provision was monitored by the European Commission during the process of accession of the states that joined last year. It is being monitored in the case of Bulgaria and Romania. In a number of cases, the Commission criticised states for non-compliance with Convention standards. Compared with many other states in the Union, the UK has a good system of criminal legal aid. We are thus in a strong position to take a lead during this Presidency to increase legal aid coverage within the Union. Legal assistance throughout Europe will become increasingly visible to the public as the result of increased transfers of defendants. Unless unsatisfactory provision is tackled now, it is likely to erupt when UK nationals are sent to countries where they will receive inferior assistance than they would in the UK. The Commission has a number of relevant proposals at various stages of consultation, the UK should take the lead in ensuring high and consistent standards of protection for suspects and defendants throughout the Union.

## *Safeguards for the rights of the defence*

JUSTICE recognises the opportunities offered by improved judicial co-operation within the Union to tackle serious and cross border crime. Co-operation with our European partners must not, however, result in inferior protections for European citizens facing justice in another Member State. It has been decided and affirmed at the Tampere and Hague European Councils respectively that the Union will strive to achieve greater recognition and enforcement of foreign judgements based on the principle of 'mutual recognition', of which the European Arrest Warrant is the most significant example.

Co-operation based on the principle of mutual recognition is premised on the existence of an equivalent, if not identical, level of fundamental rights protection in all Member States and on there being significant mutual trust between all actors in the criminal justice system. Without approximation of standards, particularly as regards defence rights, and their full respect *in practice*, reliance on the mutual recognition principle will result in individuals receiving different levels of protection depending on where they are investigated or prosecuted in the EU. Such differential levels of protection run counter to the rule of law and will deepen suspicion and mistrust of other states' legal systems. Any approximation of minimum procedural safeguards must involve a levelling up of standards across the EU and apply to all criminal offences.

The Tampere and Hague Programmes rightly identified full respect for the rights of suspects and defendants as preconditions for the legitimacy as well as the success of EU-wide efforts to enhance judicial co-operation in criminal matters. Measures to address the special legal, linguistic, financial and technical difficulties experienced by foreign suspects and defendants and to make rights more visible are long overdue. Important proposals have been initiated, notably on procedural safeguards for suspects and defendants in criminal proceedings, a European Supervision Order, double jeopardy and minimum evidential safeguards. These are not, however, being pursued with the same vigour as prosecution-led proposals to enhance co-operation. This is clearly demonstrated by the fact that the European Arrest Warrant is already in force in all 25 Member States despite the lack of agreement on basic procedural protections for suspects and defendants, including effective legal advice and representation, access to interpreters and translators and the availability of criminal legal aid. The suggestion by the UK that 'serious and complex' forms of crime could be excluded from the scope of these minimum protections would deprive individuals of their basic protections in precisely those cases where prosecutions may result in a loss of liberty or livelihood. The proposed limitation is arbitrary, incoherent and would likely violate the ECHR. Finalising the terms of this elementary but crucial proposal is not at present stated to be a priority of the UK Presidency even though the Hague Programme directs that agreement should be reached on it by the end of 2005.

JUSTICE calls on the UK Presidency to affirm its commitment to ensuring that fundamental rights and the rule of law are respected in practice across the EU. The leadership that saw the European Convention on Human Rights implemented in the UK through the Human Rights Act should now strive to see its provisions respected in practice in all EU Member States. The UK has an opportunity to drive negotiations on minimum evidential safeguards towards fruition, which would facilitate use of the European Evidence Warrant in criminal proceedings across the EU, and on a framework decision on double jeopardy, a vital corollary of the principle of mutual recognition. The agreement of a robust proposal on procedural safeguards by the end of the UK Presidency, as well as on a European Supervision Order that would allow pre-trial supervision measures to be monitored in the country of residence, would be excellent legacies of this Presidency. These proposals are not only desirable but imperative to secure the legitimacy and success of further co-operation measures.

## *EU counter-terrorism and compliance with human rights*

Through increased police and judicial co-operation, the 25 Member States of the Union can work together to tackle terrorism more effectively. However, it is imperative that the activities of the Union in this field comply with fundamental rights and incorporate adequate safeguards for those suspected of terrorist offences. The risks of abuse are multiplied at a European level by the increased complexity and reduced accountability that may result from multiple laws, deficiencies in transparency and the greater numbers of actors involved. Many of the counter-terrorism laws adopted since September 11<sup>th</sup> 2001 by individual Member States as well as the EU as a whole raise serious concerns over their compatibility with basic rights.

Counter-terrorism measures must respect fundamental rights and freedoms and be clearly directed at the threat they seek to address. The threat of terrorist attack has however been used to justify the accelerated agreement of a growing number of measures whose scope has not been restricted to fighting terrorism. The European Arrest Warrant and co-operation agreements with the US are notable examples. At the same time, EU proposals have sought to exempt persons accused of terrorism offences from enjoying even basic procedural protections under common EU standards, such as the right to access to legal advice. The trend looks likely to continue under the European Commission's May 2005 Action Plan, in which the exchange of "all relevant information and intelligence with respect to terrorist activities involving persons, groups or entities listed in the annex to common position 2001/931/CFSP" – the so-called 'EU terrorist lists' – between the security and intelligence services of each Member State is proposed. The Commission is pressing ahead with the use of such lists, notwithstanding the fact that the EU Network of Independent Experts in Fundamental Rights has condemned the lists as violations of the rights to an effective remedy before a judge, the presumption of innocence and the preservation of a person's reputation.

The UK Presidency must ensure that respect for fundamental rights is a core value of all EU counter-terrorism policy and activities. In particular, the EU's response to terrorism should comply with international and domestic human rights standards, including the ICJ's 2004 Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism. To reinforce and sustain this commitment, we recommend that the EU Counter-Terrorism Coordinator be charged with specific responsibility for ensuring that EU counter-terrorism activities and the activities of individual Member States respect procedural rights and democratic freedoms and ensure his work is subject to parliamentary scrutiny by national parliaments as well as by the European Parliament. There should be no further extension of common EU law enforcement powers unless and until corresponding safeguards have been put in place to ensure that any person named in an 'EU terrorist list' has the opportunity to challenge the evidence for their inclusion and any measures taken against them.

## *Data Protection standards*

The EU is increasing the amount of personal information that it gathers, stores and shares about anyone who lives in – or merely visits – the EU. This includes proposals for collection and sharing of biometric data (e.g. fingerprints, iris scans, DNA) in an increasing number of areas (e.g. visas, passports, immigration and criminal law). There are also serious concerns about the sharing of data gathered by EU agencies with foreign governments.

There are already a number of different databases operated by EU agencies, storing various kinds of information on EU nationals and visitors, including the Schengen Information System, Customs Information System, Europol, Eurodac. While each of the established

databases is subject to oversight, the current system remains fragmentary and there is, as yet, no single, over-arching framework for the protection of information rights in the EU.

Despite this, there is now a raft of proposals for further increasing the collection and exchange of personal data of EU inhabitants that is gathered by EU agencies. These include the G5 call for development of DNA and fingerprint databases and increased data-sharing; an EU Commission proposal for a centralised 'European criminal record'; a draft framework decision proposed by the Swedish government for 'equivalent access' of 'information and intelligence' held by law enforcement agencies of different Member States; and the Hague Programme's 'principle of availability of information' under which information held by law enforcement agencies of one Member State will, in principle, be made available to those of other Member States.

The UK Presidency priorities place the retention, exchange and use of information at the centre of its justice and home affairs policies. No mention is made of the need to protect and respect the information rights of all persons in the EU through a common EU data protection framework that includes oversight of the storage, collection and transfer of personal data by EU agencies carrying out law enforcement and counter-terrorism activities. Moreover, the gathering and use of biometric data should be limited to those circumstances where it can be shown to be a strictly necessary and proportionate interference with fundamental rights. Unless and until common standards are established for the protection of individual genetic information, any attempt to expand the use of DNA databasing at the EU level must be halted. Finally, JUSTICE urges the UK Presidency to put in place adequate guarantees that will ensure any arrangements for the sharing and transfer of personal data gathered by EU agencies with third countries are subject to strict independent scrutiny and consistent with data protection standards.

#### *A humane asylum and immigration policy*

The UK Presidency must use its leadership to facilitate the development of a fair and efficient immigration and asylum system. A key priority for the UK Presidency will be to work with our EU partners to better manage migration flows into and within the EU. Particular importance will be attached to developing a closer partnership with countries of origin and transit. The UK will be presiding over the development of the first pilot projects establishing Regional Protection Programmes in third countries. These pilot projects aim to increase refugee protection capacity, provide access to durable solutions and flexible resettlement programmes; strengthen border-control capacity; and improve the effectiveness of removal and repatriation. The UK Presidency must ensure that EU external action in the migration management field coheres with human rights, development and humanitarian objectives in the regions concerned. Regional Protection Programmes should fulfill their stated purpose of making a positive contribution to international refugee protection and not be used as bargaining chips by the EU to encourage third countries to co-operate in managing migration, or to accept returns.

The UK Presidency will also be tasked with ensuring that the first stage of the common European asylum system is completed with the adoption of the Directive on minimum standards on procedures in Member States for the granting and withdrawing of refugee status (the 'Procedures Directive'). The European Parliament's Committee on Civil Liberties Justice and Home Affairs has strongly criticised the measure and proposed substantial amendments to the text to ensure compliance with Member States obligations under international human rights and refugee law. JUSTICE urges the UK to use its impartial role in Council meetings where the proposed Asylum Procedures Directive is scheduled for

adoption to ensure that Member States take into account the informed views of the European Parliament on this measure.

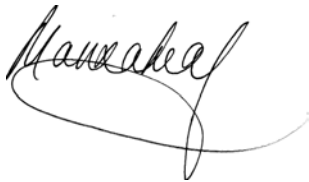
The UK will further be presiding over the negotiation of new legislative instruments, including the upcoming Commission proposal for a Directive on common standards on procedures in Member States for returning illegal third country nationals. We call on the Presidency to ensure that the proposal incorporates fundamental principles of human rights to be respected upon returning third country nationals to their country of origin or transit countries and safeguards against unsafe returns.

### *A robust Fundamental Rights Agency*

JUSTICE fully supports the expansion of the European Monitoring Centre on Racism and Xenophobia into a fully-fledged European Fundamental Rights Agency. The UK Presidency should support the Commission's proposal to secure better protection and promotion of fundamental rights across the Union *in practice* through the development of an independent centre of expertise on fundamental rights issues. JUSTICE considers that the most effective mandate for such an agency must include the monitoring of equality and human rights protection, as set out in the EU Charter, in the Member States. A restriction of the Agency's mandate to data collection and analysis alone would unjustifiably reduce its potential to identify shortcomings and to contribute towards a coherent and effective EU human rights policy. The UK Presidency should seize the opportunity to develop an autonomous expert agency with sufficient resources and a robust mandate to complement the existing European human rights bodies, notably the Council of Europe.

Echoing your recent address to the European Parliament, '[i]n every crisis there is an opportunity'. Measures agreed upon in justice and home affairs affect those who live, work and travel within the European Union daily and will do so increasingly as co-operation expands and greater reliance is placed on the principles of mutual recognition and availability. The opportunity that presents itself to the UK Presidency right now is to use its leadership to demonstrate that fundamental rights and freedoms are truly at the core of EU policy in the area of freedom security and justice.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Marisa Leaf', with a long, sweeping underline that extends to the right.

Marisa Leaf  
Senior Legal Officer for European Criminal Justice

Cc:  
Charles Clarke, Secretary of State for the Home Office  
Jack Straw, Secretary of State for Foreign and Commonwealth Affairs  
Douglas Alexander, Minister of State for Europe in the Foreign and Commonwealth Office