

Defence rights in the EU and access to justice

Effective criminal defence is an essential component of the right to fair trial. Whether, in any particular jurisdiction, a person who is suspected or accused of having committed a crime has access to effective criminal defence does not simply depend upon whether they have access to the assistance of a lawyer. Competent legal assistance, whilst necessary, is not sufficient. For criminal defence to be effective there must exist a constitutional and legislative structure that provides for the rights set out in the ECHR, play a critical role in establishing standards in respect of effective criminal defence.

However, there are both practical and systemic limitations on their ability to provide detailed standards for, and to ensure full compliance with, all of the essential components of effective criminal defence. There is significant variation and there are important limitations on access to effective criminal defence in all countries of the EU examined. In addition to the consequences for the individuals caught up in criminal justice processes, this has significant implications for the European Union (EU) policy of mutual trust and recognition.

Responsibility for compliance with ECHR standards principally rests on the governments of member states. The EU also has responsibility particularly because it has set itself the objective of maintaining and developing an area of freedom, security and justice and, since ratification of the Lisbon Treaty, the ECHR has become an integral part of EU law. Furthermore, article 82 § 2 of the Treaty of the European Union provides for the establishment of minimum rules in respect of, inter alia, the rights of individuals in criminal matters. The EU has commenced this process with the adoption of the Stockholm Programme and the accompanying Roadmap for fostering protection of suspected and accused persons in criminal proceedings. However, responsibility does not end there.

Analysis shows that criminal justice professionals, including lawyers who advise and assist suspects and defendants, do not always respect the rights of those suspected or accused of crime, and there is much to be done, beyond the reach of legislation and procedural rules, to realize a real commitment to effective criminal defense rights as an essential element of the right to fair trial.

The EU programme of action in respect of the rights of individuals in criminal proceeding has already begun with the publication of a draft Directive on translation and interpretation. This is to be followed by legislative proposals on: information on rights and on charges; legal advice and legal aid; communication with relatives, employers and consular authorities; and special safeguards for vulnerable suspects and accused persons. The programme also includes plans for a Green Paper on whether other minimum procedural rights need to be addressed.

1.1. General recommendations for action by the EU:

- The EU should include in its legislative programme all of the specific areas for action that we identify below in order to establish minimum requirements that would contribute to, and enhance access to, effective criminal defence in all member states. Such legislation should include mechanisms for monitoring implementation to ensure that, over time, member states meet those minimum requirements.
- Working with member states and professional organisations, the EU should establish mechanisms for identifying and disseminating good practices which contribute to enhancing access to effective criminal defence including, specifically, a 'whole cost' approach to criminal justice policies.
- Working with member states, the EU should encourage and support the routine collection and publication of statistical evidence, and relevant research, in order to render criminal procedures and practices transparent, and to enhance accountability.

- Working with relevant professional organizations, the EU and member states should encourage and support suitable training for criminal justice professionals (the judiciary, prosecutors, police, lawyers, and interpreters and translators) to assist in entrenching practices and attitudes directed to facilitating effective criminal defence.
- The EU should encourage and support bar associations to articulate standards of good practice and, to take responsibility for disseminating and enforcing such standard, in order to improve both the status and professional standards of criminal defence lawyers, including those who are funded by the state.
- The EU should encourage member states to develop organized, systematic and purposeful responses to the need to provide free and effective legal assistance to all indigent criminal defendants, including by the establishment of independent executive agencies to administer legal aid. Such agencies would be responsible for formulating and implementing the government's legal aid policy and budget, monitoring its performance, determining legal aid needs and finding cost-effective solution for legal aid delivery

2. Recommendations for legislation by the EU

We make the following specific recommendations for legislation by the EU, although we recommend that the governments of member states take appropriate action as soon as is practicable.

2.1 Information on rights and charges

A Directive should include –

With regard to information rights –

- A requirement that a Letter of Rights be given to a person when they are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and in any event no later than when they are factually deprived of their liberty).
- An obligation to take steps to ensure that a person served with a Letter of Rights understands it, including the provision of a translation of the Letter of Rights where the recipient does not understand the relevant language or is unable to read or comprehend it.
- Minimum requirements as to the rights to be referred to in the Letter of Rights, including legal assistance, legal aid, the right to silence, the right to information as to the grounds for arrest or detention, and additional rights for vulnerable suspects and defendants.
- An obligation to establish effective enforcement mechanisms designed to ensure that the Letter of Rights requirements are complied with, including an obligation to obtain written confirmation of receipt from the suspect or accused, and appropriate evidential mechanisms.

With regard to information as to detention and the suspected offence –

- An obligation to inform the person concerned of their status in a criminal investigation and, in particular, whether they are a suspect or a witness.
- An obligation to inform a person who has been arrested or detained of the grounds for their arrest or detention.

- An obligation to provide, before the first interrogation by police or a prosecutor, information as to the material on which the suspicion or accusation is based or, if such information is not provided, a prohibition on any adverse consequences resulting from failure or refusal to answer questions, or failure or refusal to provide information that may subsequently be relied upon in the person's defence.

2.2. Legal assistance and legal aid

A Directive should include –

- A requirement that a right to legal assistance arises no later than the point when a person is made aware by the authorities that their situation may be substantially affected by criminal proceedings (and in any event no later than the when they re deprived of their liberty), and which applies throughout the criminal proceedings.
- An obligation on the investigative or prosecution authorities to bring the right to legal assistance, and to legal aid, to the attention of the person concerned in a form that they can understand, both in writing by means of a letter of rights, and orally, and an obligation on the judiciary at the first available opportunity to verify that the accused understands the implications of not being legally represented.
- An obligation to establish mechanisms that ensure that legal assistance is available without delay at all stages of the criminal process, including for those who cannot afford to pay for legal assistance themselves.
- An obligation to establish effective enforcement mechanisms that apply where acces to legal assistance is delayed or denied, which may include prohibition on conducting procedural actions, the exclusion of evidence, and/ or judicial review.

- Minimum requirements regarding eligibility for legal aid, including a merits test that ensures that vulnerable suspects and defendants and those who are at risk of a custodial sentence are eligible, and a means test that ensures that those who cannot afford to pay for legal assistance are eligible. Further, there should be a requirement that procedures for determining eligibility do not interfere with access to legal assistance at the time that it is required.
- Requiring that member states, in cooperation with the respective bar associations, develop and implement minimum quality criteria for criminal legal aid and quality assurance mechanisms, and establish minimum requirements regarding remuneration for lawyers providing legal assistance paid for by the state that ensure that sufficient competent lawyers are willing and able to provide legal assistance when it is required.

2.3 Interpretation and translation

- A draft directive has been published by the EU (*proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings*, Brussels, 9.3.2010 COM (2010) 83 final). The need for such a directive has been established by this research.
- The draft directive does not prescribe a procedure by which the need for interpretation or translation is required, but we note that it does require that an accused person be given the right to challenge a decision that there is no need for interpretation or translation.
- The draft directive prescribes in wide terms the circumstances in which interpretation is to be provided. Consideration must be given to requiring either that interpretation of lawyer-client consultations be provided by a different interpreter than an interpreter appointed for conversations where the police or prosecutor are present, or that interpretation of lawyer-client consultations be covered by the equivalent of legal professional privilege.

- The draft directive provides for translation of 'all essential documents', which falls short of a requirement that all prosecution material be translated. A suspect or accused must be permitted to make a reasoned request for translation of further documents, and that they be given the right to challenge a decision that translation is not necessary. Authorities must be required to consider such requests, or such challenges, by reference to the right to fair trial and not by reference to the potential cost.

- The draft directive requires that interpretation and translation be of 'a sufficient quality to safeguard the fairness of the criminal proceedings'. This must be extended to include an obligation that it be provided in such a way that is sufficiently independent of the appointing authority and that, where possible, it be provided by an interpreter or translator who is a member of a professional body that has responsibilities for quality and professional discipline.

2.4. Access to the case-file, and time and facilities to prepare the defence

There should be a Directive concerning access to the case file, and time and facilities for preparation of the defence that includes, or that one of the other proposed directives should include –

- An obligation to provide the accused with access to the case file, or prosecution material, in such a form and at such a time that is sufficient to enable a suspect or accused person to effectively prepare their defence, and to enable them to prepare for any particular hearing.
- A requirement that the obligation normally be satisfied by making available copies of original documents (or electronic versions thereof) unless this is contrary to the interests of justice, the safety of witnesses, or security.
- An obligation to provide for a procedure during the pre-trial phase that enables an accused person be given the right to challenge a decision not to provide access to the (complete) case file.
- An obligation to provide such information free of charge to the accused.
- An obligation to establish mechanisms enabling suspects or accused persons to make application for witnesses to be interviewed or material to be gathered, with the possibility of judicial review where an application is refused by the investigative or prosecution authorities.

2.5 Pre-trial detention

The Green Paper should include consideration of –

- A requirement that an accused person has a prima facie right to pre-trial release, which may only be displaced where there are substantial grounds for believing that the accused will abscond, commit further imprisonable offences, or interfere with the course

of the investigation or justice, or where it is in the accused's own interests to be kept in pre-trial detention.

- A requirement that if unconditional pre-trial release is not appropriate for the reasons listed above, then the suitability of conditional release must be considered, and that conditions may only be imposed for the purpose of ensuring that the accused will attend court, will not re-offend, or will not interfere with the course of justice, or for their own protection. Also, a requirement that any money bail condition be set at a level that takes into account the financial circumstances of the accused and is proportionate to the specified risk.

- A requirement that member states ensure that alternatives to pre-trial detention are available together with practical mechanisms facilitating their use, and that suitable facilities are available for accused persons in particular circumstances, for example, bail hostels, drug units, etc.

- A requirement that pre-trial detention hearings observe, as far as possible, the same adversarial principles as apply to trials, and that accused persons are given access to material on which an application for pre-trial detention is based in sufficient time to enable them to make an effective application for pre-trial release.

- A requirement that pre-trial detention may only be ordered by a judicial authority, that the determining authority should be required to give written reasons for their decision, that detention be reviewed at established regular intervals in order to determine whether it continues to be necessary, that decisions be subject to review by a higher court.

(Effective Criminal Defence in Europe; CAPE Ed; NAMORADZE Zaza; SMITH Roger and SPRONKEN Taru, Intersentia 2010)