



FAIR TRIALS ABROAD

THE OFFICE OF EUROPEAN PUBLIC PROSECUTOR

REVISED DELIBERATIONS ON THE
EUROPEAN COMMISSION GREEN PAPER (DECEMBER 2001)
PREPARED FOR THE PUBLIC HEARING (SEPTEMBER 2002)

**“CRIMINAL-LAW PROTECTION OF THE FINANCIAL
INTERESTS OF THE EUROPE COMMUNITY AND THE
ESTABLISHMENT OF A EUROPEAN PROSECUTOR”**

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EXECUTIVE SUMMARY

1. Fair Trials Abroad has a particular concern in the implementation of law and new measures proposed for the European legal space that might have adverse results for European citizens facing trials in a foreign country. We rely on our experience of monitoring hundreds of cases and the findings of research projects

2. Our basic approach is to subject all such measures to a civil liberties audit. We examine whether the measure is likely to increase the numbers of citizens facing criminal trial in a foreign country and whether their fundamental rights will be adequately protected once the measure comes into effect.

3. The quantification of likely cases is considered in the Green Paper and we deduce that a considerable number of defendants will find themselves appearing in foreign national courts as a consequence in the absence of any evaluation of their safeguards.

4. The Commission has recognised elsewhere that such citizens face special difficulties but conversely, the Green Paper dismisses the particular difficulties faced by foreigners.

5. The discussion of fundamental rights in the Green Paper is unexceptional but superficial and ignores practical problems. Work being undertaken elsewhere in the Commission on these problems is not taken into account.

6. The question of double jeopardy has been raised as a specific problem relating to the function of the European Public Prosecutor: this issue has also been exhaustively examined by the Commission for the proposed European Arrest Warrant.

Conclusion

7. It is alarming to note the disregard for civil liberties and fundamental freedoms displayed throughout the Green Paper. We therefore call for all initiatives proposing reform or revisions relating to criminal justice in the European legal space to have a specific civil liberties audit. This should be mandatory, and the views of the appropriate section of DG Justice and Home Affairs sought and incorporated.

8. Protection for the citizen should be built into the procedures followed by the Public Prosecutor at the earliest possible stage; it should be borne in mind that the unfortunate victim can spend

months in custody before the issue of sufficient evidence to commit to trial can be judicially decided.

The Office of European Public Prosecutor

*All references and Quotations from the Green Paper are in Italics. Most FTA papers cited are to be found on the Web Site **Fairtrialsabroad.org***

Introduction

Fair Trials Abroad is a unique organization concerned with the rights of EU citizens to due process in the administration of justice abroad. Our mission defines due process in accordance with international law and, in particular, the European Convention on Human Rights. Our particular concern is in the implementation of current law and the changes of domestic or international law or practice that might have adverse results for European citizens facing trials in a foreign country. This paper is written with this concern in mind.

We rely on our experience of monitoring hundreds of cases of European citizens who have complained of problems in having access to justice with due process by virtue of their being “foreign”. Further, the findings of two research projects funded by the European Commission inform our work.

It therefore follows that our deliberations of these proposals follow the same criteria as our reflections on the principle of mutual recognition¹ and other centralised developments arising within the European legal space.

Our basic approach is to subject all such proposed measures to a civil liberties audit. Our first concern is whether the measure is likely to increase the numbers of citizens facing criminal trial in a foreign country, since adequate safeguards are not yet in place. Secondly, and with regard to those affected by the measure, an examination of whether the individual’s fundamental rights will be adequately protected when it is likely to come into effect.

¹ “Mutual Recognition of Final Decisions in Criminal Matters Response to the Communication from the Commission to the Council and the Parliament 26/7/00 Ref: Com/2000/495 final; FTA Sept.200

Thus we aim to answer one of the questions posed by the Commission: *Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured?*

Background

The historical origins of the Green Paper are referred to at length within it². Reference is made to the detailed studies made under the General Framework of Corpus Juris and the subsequent ongoing debate³. In particular, reference is made to the UK House of Lords enquiry⁴ to which FTA gave detailed written and oral evidence.⁵ We do not propose to reiterate what was stated in our evidence at that time. Further, a series of papers published since the Tampere summit of 1999, and in particular, the programme for criminal justice of the Laeken summit in December 2001, and our overview of current developments⁶ also deal with the general problems affecting fundamental rights in the European Legal Space and proposed solutions.

1. Numbers of citizens facing trial in a foreign jurisdiction

The quantification of likely cases is considered in the Green Paper based on 1999 figures.⁷

The proportion of all the cases of irregularity detected by the Commission and the Member States which entail criminal proceedings - i.e. where there is intent - was estimated by the Commission and the Member States in 1999 at around 20% of known cases

Number of cases:

*Reports from Member States 1.235 OLAF investigations 252
Total 1487* Therefore, an estimate of cases, per annum involving prosecution (as at 1999) is of the order of **300**.

Likely Number of Foreign Defendants:

² 1.1 The origins of the Commission's proposal to establish a European Prosecutor.

³ 1.2.2 the question of a European public prosecutor: an ongoing debate.

⁴ Prosecuting fraud on the communities finances-The Corpus Juris 8.5.1999

⁵ Prosecuting Community Fraud Evidence to the house of lords European Committee enquiry on proposals for a corpus juris. FTA January 1998

⁶ A programme for Criminal Justice: Laeken Summit, December 2001; Civil Liberties Audit – FTA, February 2002

⁷ (See 1.2.1) *Fraud against the Community's financial interests: a phenomenon that needs to be repressed*

Note the comment from the Green Paper: *Fraud affecting the Community's financial interests primarily concerns major cases involving the criminal courts of several Member States. They are complex and distinctly transnational in nature*⁸. This argues for a likely outcome of numerous foreign defendants appearing in the national court of choice for the Prosecution, and as a consequence, that when the proposed system is functional, a considerable number of defendants will find themselves appearing in foreign national courts.

The Commission has recognised elsewhere that such citizens face special difficulties “*From the time of his arrest, a person against whom an arrest warrant is issued is entitled to the services of a lawyer and, if necessary, an interpreter. This is an important guarantee for the protection of individual rights. It is justified by the fact that, being arrested in a probably unfamiliar legal and linguistic context for transfer to another Member State, the person must have legal advice from the beginning of the procedure.*”⁹

Conversely, the Green Paper dismisses concerns of particular difficulties faced by foreigners when it states “*The matter of geographic remoteness is not so important if it is borne in mind that the accused has himself been operating in several Member States and therefore accepting the risk*”¹⁰ (sic). This approach is of concern as it denies the possibility that fundamental rights which normally exist may not do so by virtue of being foreign e.g. availability of bail; having an understanding of the charges made etc., in spite of language difficulties. We also note that the wording used in this instance appears to assume the guilt of the accused by virtue of the assumption that he has already weighed up the risks.

2. The protection of fundamental rights

The discussion of fundamental rights in the Green Paper is divided into a preliminary point and more detailed examination.

The preliminary point:

*It is clear that the European Public Prosecutor must act with full respect for fundamental rights as secured by Article 6 of the Union Treaty, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms.*¹¹

The preliminary point is unexceptional, but begs the question: are the fundamental rights, as set out, adequate in the altered

⁸ *ibid*

⁹ Council Framework Decision on the European Arrest Warrant COM (2001) 522

¹⁰ (See 8.1.4) *Committal for trial*

¹¹ (See 6.2.1.) *Fundamental rights*

circumstances envisaged by the creation of a European Public Prosecutor?

The detailed examination:

Without claiming to be exhaustive, it is worth stressing the importance of certain general principles at the preparatory stage. At this stage, the European Public Prosecutor would conduct the investigations needed to ascertain the truth, gathering all evidence that will help to prepare the case. Investigations must be conducted with all due despatch to assemble all evidence for and against the suspect.

*The performance by the European Public Prosecutor of acts adversely affecting the accused would then be subject to the principle of the presumption of innocence and the principle of adversarial proceedings. For the Green Paper the latter principle means that the parties and their lawyers are entitled to have access to the European Public Prosecutor's file. As far as the accused is concerned, it also means that defence rights must be respected, and particularly the right to make his views known on the facts concerning him. The European Public Prosecutor should also be subject to the principle of equity and to compliance with the law as regards the fact that his conclusions must be based solely on the valid evidence before him.*¹²

Again the principles underlying the performance of the office are unexceptional but the devil is in the detail.

“All due despatch” should not only rest on Art.6 but also Art.5 (3) which includes the right to be released pending trial. It is of concern that problems regarding legal representation, provisional liberty and interpretation have not received specific mention in this section of the paper. Reliance on the European Convention on Human Rights is not enough. For example, the Convention makes no reference to translation of documents requiring the signature of the accused, or witness(es).

Work being undertaken elsewhere in the Commission is exploring many of these gaps,¹³ yet their consultation paper states that “Member states will have budgetary constraints and objectives must therefore remain realistic”. In all initiatives, such as the one under examination in this Green Paper, there must be a thorough

¹² (See 6.2.1.1) *Defence rights and protection of the accused*

¹³ See Procedural safeguards for suspects and defendants in criminal proceedings JHA consultation paper, Jan 2002

evaluation of safeguards to fundamental rights, with the same rigorous thought and budgetary support given to this as to law enforcement initiatives.

Double Jeopardy

The question of double jeopardy has been raised within the Green Paper as a specific problem relating to the function of the European Public Prosecutor.

This problem has already been exhaustively examined in the work done by the Commission on the European Arrest Warrant.

We are particularly concerned by the possibility of an unacceptable increase in the number of people held in prison whilst an argument on applicability is raised, particularly if this is to be resolved long after arrest. It is possible that this may be resolved with the procedures drawn up for the European arrest warrant.

The principle of double jeopardy, *pace* the outcomes of Case C187/01 now pending before the European Court of Justice, should never be applied in such a way that the individual is imprisoned for whatever period of time before the evidence against him is fully gathered.

Conclusion

General

Whilst we would reiterate that FTA's particular concern is with changes to law or practice within the European Union that might have adverse results for EU citizens facing trials in countries which are not their own, it causes us some alarm to note the continuing disregard for civil liberties and fundamental freedoms displayed throughout the Green Paper by virtue of a blind faith in, and acceptance of, the principle of mutual recognition.

It is stated on numerous occasions that mutual recognition is possible because of a common core of legal principles and a trust in all national legal systems.¹⁴ This is matched by a total reliance on the Convention (ECHR), which may be inadequate to the task of

¹⁴ (See e.g. pp56 or 62)

responding to the new environment created by current initiatives in the European legal space. To date there has been no evaluation to test these assumptions. Further, it is suggested elsewhere by the Commission that it is not constructive “*to examine what provision currently exists with a view to pointing out the lacunae in Member States’ current practices.*”¹⁵ It is our view that it is hugely risky to embark on reform if there is no understanding of the current situation and any problems inherent in it. If current Member States are to work closely together it cannot but be productive to know how and where principles and application differ, not least in view of imminent enlargement. Nevertheless, FTA welcomes the vital initiative taken by Justice & Home Affairs, as it is the first attempt made to assess how best to safeguard the rights of the individual.

We therefore call for all initiatives proposing reform or revisions relating to criminal justice in the European legal space to have a specific civil liberties audit. This should be mandatory, and the views of the appropriate section of DG Justice and Home Affairs sought and incorporated.

Specific

We note:

- the likelihood of an unacceptable increase in the number of defendants who will have to rely on untested, unevaluated safeguards;
- fundamental rights have been given little thought in terms of their protection in a new, efficient-law-enforcement European legal space.
- protection for the citizen should be built into the procedures of the Public Prosecutor at the earliest possible stage; it should be borne in mind that the unfortunate victim may spend months in custody before the issue of sufficient evidence to commit to trial can be judicially decided.

¹⁵ Procedural safeguards for suspects and defendants in criminal proceedings JHA consultation paper, Jan 2002

Further reflections(September 2002)

The creation of the office of European public prosecutor is as has been discussed dependent upon the progress of the community mechanism for protection of the citizens fundamental rights¹⁶ At present it is understood that progress in practical terms is being blocked by certain National governments refusing to take steps to implement their obligations under article 6 of the ECHR by the provision of legal aid and/or an effective interpretation and translation service for those defendants that require them.

Fair Trials Abroad Sept 2002

www.fairtrialsabroad.org

¹⁶ Op. cit Procedural safeguards for suspects and defendants in criminal proceedings JHA consultation paper, Jan 2002