ECBA Report on Justice Forum, Brussels,
9 November 2009

The last meeting of the Justice Forum dealt with the forthcoming EU instruments on procedural safe-guards for suspects and defendants in criminal cases, according to the Roadmap presented by the Swedish Presidency of the EU and adopted by the Council on October 23: the right to interpretation and translation (Measure A), the right to a letter of rights (Measure B) and the right to legal advice and legal assistance (Measure C).

The debates on measure A, regarding which a Proposal FD has already been adopted by the Council, occupied the morning session of the Justice Forum.

The meeting was opened by Jacek Garstka (Head of General Justice Issues and e-Justice unit, DG JLS), who underlined the place of the Justice Forum in the future Stockholm Programme under which the Council invites the Commission to go on improving the activities of the "*European Forum for Justice as a privileged partner for debate on all matters relating to justice, including as a place for examining future proposals for legislation and for examining whether existing legislation functions properly. The European Forum for Justice should also be a place for the exchange of views with the EU institutions and the Member States*" (see 3.2.2).

Peter Csonka (Head of Criminal Justice Unit, DG JLS) mentioned that it was the 20th anniversary of the fall of the Berlin Wall and that both he and Jacek Garstka would not be sitting around the table today had the Wall not fallen. Afterwards he mentioned that Measure A, which had just been passed by the Council, would not be adopted as such and will be transformed into a new proposal for a Directive, due to the entry into force of the Lisbon Treaty (meaning that it will now be subject to co-decision procedure). Other than that he mentioned that there are arising difficulties regarding the costs of implementation and that there will be more trouble in the future to put a costing on the coming measures.

Measure A - the right to interpretation and translation

The debates around measure A started with the speech from the Representative of the General Secretariat of the Council, Steven Cras who mentioned the difficulties of agreeing to a proposal, in particular regarding the issues of costs, practicability and compliance with the ECHR, implying that it would be impossible to change even a comma (let us see what will be the position of the EP). Some provisions in the Proposal FD have deliberately been left vague in the hope that the ECJ will eventually lay down a ruling on their interpretation, thus the MS had different understandings on the reach of the jurisprudence of the ECtHR, e.g. the *Hermi* case.

Professor Erik Hertog, founder of EULITA (European Association of Legal Interpreters and Translators) presented some conclusions on the state *status quo* of legal interpretation and translation in the Member States and gave the following recommendations: *(i)* legal services and legal professionals should recognise the professional profile of the interpreter/translator (Netherlands has passed a new law on the interpreter/translator, that could be a model for other Member States); *(ii) t*here should be training for interpreters/translators provided

by the governments and leading to national certification, covering languages and knowledge of the legal system; *(iii)* there should be a code of conduct for legal interpreters/translators; *(iv)*legal professionals should also be taught how to work with interpreters /translators and how to work across languages and cultures; *(v)* there should a sufficient budget, including competitive pay-scales to retain qualified people. EULITA will be launched at the end of (www.eulita.eu) at the end of November 2009.

Professor Gert Vermeulen (Ghent University) presented the report undertaken to obtain up-to-date information on the level of provision of procedural rights in the EU (right to information, the right to legal advice, the right to free legal assistance, and the right to translation /interpretation) according to which there are great differences in the provision of such rights in practice in the MS. Therefore, Professor Vermeulen believes that there is need for EU action.

Liese Katschinka, FIT (soon to be EULITA) stressed that African languages were those most needed in the EU and she also stated that sign language should be kept in mind. As an important measure, she mentioned the training for Judicial actors, which would raise awareness on the importance of having good translation/interpretation – so as to avoid, for example miscarriages of justice. It was also stressed that it is important to use the same inter-preter/translator throughout the whole proceedings.

Referring to the questions raised in the preparatory document distributed to the participants, Ilias Anagnostopoulos (CCBE) said that interpretation should be provided free of charge for meetings between a lawyer and accused and objected to the addition in Recital 12 of the Proposal FD. Regarding cost, he mentioned the example of Greece, where many foreign defendants go to consular authorities which hold lists of lawyers who speak foreign languages. Therefore, it could be reasonable to provide for interpretation on request by the defence.

Margarete von Galen (CCBE) said that the accused should be provided with translation of essential written documents, not with oral summaries (article 3.6), which would not be in compliance with the ECHR. Under the definition of "essential documents" should be included all documents containing evidence on which the prosecution relies on, as well as documents presented by the defence. In Germany, only the indictment is translated. However, this situation is compensated for by the right to interpretation of lawyer-client conversations, on state costs without any limitation, allowing the defence lawyer to go through all the documents together with the client with the help of an interpreter. This balance could be endangered by the FD, since there is no guarantee of interpretation of lawyer-client conversations and there is no definition of what essential "documents" are.

Baroness Ludford MEP (rapporteur for Measure A on the LIBE-Committee) pointed out the main differences between her draft report and the current version of the FD: the right should cover all reports, sentencing, etc., until the proceedings are disposed of, even after a conviction; the suspect should be informed of his rights in writing; interpretation/translation of legal advice should be granted on request of the suspect or lawyer; interviews where an interpreter is used should be recorded, in case there is a dispute about what has been said; all essential documents should be translated, in time for a proper defence to be prepared;

there should be appeals to a judicial authority and there should be a mechanism for complaints. The report also calls for reinforcing and broadening provisions on training. This report has not been voted on in Committee (nor will it be, due to the entry into force of the Lisbon treaty), but appears to have cross-party support.

Peter Csonka mentioned that there had been a proposal to extend the FD to the period after the final decision, but the MS did not support it.

Holger Matt (ECBA) started to speak in German, in order to show how important interpretation is; otherwise no one would understand what he was saying. Holger said that the current proposal is a good example of how things should not be done and questioned why MS do not use the experience of defence practitioners, leaving a clear statement that, if defence is at issue, defence practitioners should be consulted. Holger said that he did not understand why we were still discussing if the interpretation of conversations between lawyer and client are important/necessary for the fairness of the proceedings, thus this is case-law of the ECtHR. Furthermore, Holger underlined that the Commission has known for years that the ECBA stresses the right to silence as a fundamental right, but MS reject it as a minimum right and did not include it in the working plan.
He congratulated the efforts of the Swedish Presidency, but stressed that the interpretation of some MS rejecting the inclusion of the right to silence in the fundamental rights in criminal proceedings is wrong and is not in compliance with the case-law of the ECtHR.

Han Jahae (independent expert, member of the CCBE Criminal Law Committee and of the ECBA) said that the current proposals do not mention that the translator should be subject to confidentiality and legal privilege.

Johan Callewaert (Registry of ECtHR) said that they have not been consulted on the last version of the Framework Decision. Therefore, it may not be Strasbourg-proof. He also referred to the EU Charter of Fundamental Rights which is about to come into existence, and will become binding.

Peimane Ghaleh-Marzban (Parquet général de la Cour de cassation) said, along with other judicial representatives, that judges cannot be legislators, and that they want the legislators to express explicitly the EU norms. They want them to be clear and unambiguous.

Jonathan Goldsmith (CCBE) mentioned that the CCBE will be working with EULITA on the production of defendants' rights factsheets for the e-Justice portal under European Commission funding.

Signe Öhman (Swedish presidency) said that the Swedish Presidency thinks that the Framework Decision is Strasbourg-proof.

Netherlands would like to see a smooth and quick adoption of the Framework Decision. It would send the wrong signal if it took another year, and if lengthy discussions re-opened after the current delicate balanced approach. It is very difficult to write standards on an isolated procedural right, without looking at access to documents, access to a lawyer etc. She was glad that practitioners had said that access to documents would not be necessary if other conditions are met.

Costs, capacity and practical implement-tation should be taken into account when negotiating legislation; if we ignore this, we face the risk of adopting legislation that is a 'paper tiger' which will make citizens lose faith in EU laws.

During the afternoon, measures B and C were debated.

Measure B – Information on Rights/Letter of Rights

Regarding Measure B Taru Spronken opened the session with the presentation of her research about the existence of letters of rights in the various MS. Letters of rights exist in 10 of 26 Member States (AT, CZ, UK, IT, LV, LU, PL, SLO, ES, SE); other Member States do not have such a letter, but provide information in writing (however, at different stages of the proceedings). Only one letter mentions the right to a lawyer (others mention the right orally).

Using the example of the UK and Austria, Ilias Anagnostopoulos (CCBE) highlighted the differences between possible models of letters of rights and that some might be drafted in a way that rather threatens than motivates the suspect to request the assistance of a lawyer. One basic principle should be that the letter does not simply refer to existing legal provisions, but is provided in an understandable text even for simple people, with an offer of further information. The letter should be given at the latest before questioning starts (*Salduz*).

Catherine Heard (Fair Trials International) gave examples of people who could not understand their rights and *e.g.* signed confessions in foreign languages without understanding their contents and without knowing that they could have an interpreter/translator.

Liese Katschinka stressed that clear terms must be used; otherwise the interpretation/translation would be difficult.

Jaap Smit (Victims Support Europe) wanted as much sympathy shown for victims as he saw demonstrated today for suspects and defendants.

Margarete von Galen said that there cannot be a single model for the content of a letter of rights, because of different standards on the rights of accused. Furthermore, she stated that there should be consequences if a letter of rights is not handed over to the suspect or accused, such as the inadmissibility of the evidence obtained. In MS where the accused has the right of access to the files, this right should be described in the letter of rights. It would be advantageous for the accused to know at the outset that he/she will be allowed to see the documents at a certain stage of the procedure.

Qudsi Rasheed (Justice) mentioned that the information in the letter of rights may depend on the negotiations regarding the rest of the minimum procedural safeguards; either the letter of rights comes at the end of the process, or there should be a procedure for continuing amendment of the standard letter of rights.

Netherlands prefer an active attitude on behalf of their police which can come about by providing information orally; therefore the letter of rights needs to have flexibility.

Taru Spronken mentioned that the goal of the Project is to establish a "model" Letter of Rights, which could be the basis for the Letters of Rights in the MS.

Measure C - Right to legal advice and legal assistance

Han Jahae stressed that without access to a lawyer, the other rights are useless. Rich defendants do not need help, because they have lawyers. Legal aid is necessary in order to make legal advice work. We cannot leave legal aid to the MS, it is an EU responsibility, it needs to be directed at EU level. Trust is the basis of the working of criminal law at the EU level; a client will not have trust unless there is a lawyer in the other MS to help him, who has been in contact with his "home-lawyer". There will not be a great cost to this, and expenditure will be countered by greater efficiency and justice.

John Spencer (expert) recommended tape-recording of conversations between police and suspects, following the UK example.

Paul Garlick (expert) raised issues relating to the provision of defence lawyers – who chooses the lawyer? The defendant or the authorities? He said that the ECtHR is not a final appeal court but a judge of systemic failure, and so legislators should not leave decisions to be made by this court. A letter of rights may need to be translated into more than just the official EU languages in order to be in compliance with the ECHR.

Jozef Maria Rammelt (expert) said that if quality is wanted, it is necessary to pay for it. Therefore, it is difficult to find good lawyers to do this kind of criminal defence work. For quality control, it is necessary to harmonise payments for legal aid lawyers. Private paying clients are always secured by high-profile lawyers, but legal aid clients often have inexperienced lawyers.

Ilias Anagnostopoulos, speaking as an expert, agreed that the right to counsel should be combined with taping interviews. He cited the case of a UK national charged with murder in Greece, where the statements of witnesses, who were foreigners assisted by a police officer as an *ad hoc* interpreter, all had the same wording. Regarding costs of interpretation and legal aid, he asked rhetorically whether cost was raised as a major issue in respect of initiatives aiming at strengthening prosecution of criminal acts such as EAW or Europol.

Holger Matt said how one of the clear issues arising from the current joint CCBE-ECBA project on criminal defence networks was that legal aid was one of the most important issues in cross-border criminal cases.

Peter Csonka concluded by saying that it had been an extremely useful debate. Regarding Measures B and C, there had clearly been very strong support for Measure B and for taking it next (it was not as difficult as Measure C, and is the basis of subsequent rights). He invited written contributions from the participants to enable the Commission to produce convincing arguments. Measure C is due in 2011 and not before. He hoped to have further opportunities at the Justice Forum to discuss Measures B and C.

Report by Vânia Costa Ramos