Report

PROCEDURAL RIGHTS

Brussels, 9 November 2009

Jacek Garstka (Head of the European Commission's General Justice Issues and e-Justice Unit (DG JLS E1)) gave a brief welcome speech.

A joint paper setting out the major ideas expressed in the meeting will be drafted after the meeting before being sent to the participants for their comments. Once agreed, the joint paper will be put on the Commission's Justice Freedom and Security (JLS) website.

Peter Csonka (Head of the European Commission's Criminal Justice Unit (DG JLS E3), chaired the meeting.

The aim of the meeting is to have Justice Forum participants' input on a Framework Decision (FD) on the right to interpretation and translation (Measure A of an EU Roadmap on procedural rights) as well as on Measure B (the right to information about rights (Letter of Rights)) and Measure C (the right to legal advice and legal aid) plus a Resolution on best practice. Three documents (the Roadmap, Measure A and the accompanying 'Best Practice' Resolution) were approved by the Council on 23 October. However, it is unlikely that Measure A will be adopted as a FD because of the ratification of the Lisbon Treaty. The Treaty is due to enter into force on 1 December. If so, the European Parliament will have no time to adopt a formal opinion on it. This means that the text will have to be transformed into a Directive, as per the rules of the Lisbon Treaty. Work has already begun on Measure B and the hope is to have Measure C agreed in 2011.

Stephen Cras (Council Secretariat)
The Commission made a five-measure proposal to strengthen procedural rights in criminal proceedings in May 2004 but Member States were unable to reach an agreement on it. The Swedish presidency of the EU revived the proposal in July 2009 by proposing to address each of the individual legislative measures in turn, starting with the right to interpretation and translation (A), followed by the right to information about rights (Letter of Rights) (B), the right to legal advice and legal aid (C), the right for a detained person to communicate with family members, employers and consular authorities (D) and the right to protection for vulnerable suspects (E). The Commission also plans to put forward a Green Paper on pre-trial detention (F).

The five measures are to be turned into Directives and may be accompanied by Resolutions on best practice. The Roadmap is not exhaustive, which means that other measures, e.g. the right to remain silent, could be added

subsequently. The order of rights is indicative, so the Commission can present them in the order that it wants although this probably will be the order.

With regard to the FD on measure A (DROIPEN 132), agreement was reached in only three months but the text is a fragile balance between the positions of Member States (MS).

There are tree main issues:

Costs – The interpreter/translator will need to be paid and the FD says that MS have to pay. Money is a sensitive issue because of the financial crisis.
Article 2(1) on the right to interpretation makes clear when interpretation must be provided and leaves open the possibility for MS to add other situations should it so wish.

Practicability – With regard to Article 3 (the right to translation of essential documents), a clause was added (3(6)) whereby an oral summary of documents could be provided instead of a written translation.

Compliance with the European Convention on Human Rights (ECHR)
Recital 10 points out that the ECHR is the *minimum* standard of protection and that MS can go beyond that.

The Resolution on best practice refers to the need for highly qualified interpreters and translators, for the training of judges, for MS to have a register of interpreters and translators accessible by other MS and for interpreters and translators preferably to be picked from this register.

Subject to France and Ireland lifting parliamentary reserves, the Roadmap is due to be adopted by the end of November and then published in the Official Journal. The FD on measure A will need to be transformed into a proposal for a Directive.

In the past, under the consultation procedure, not much was done in collaboration with the European Parliament but that will soon change as the EP has codecision under the Lisbon Treaty.

Professor Erik Hertog
Professor Erik Hertog stressed the importance of having qualified interpreters and translators. A Commission Reflection Forum has come up with a series of recommendations:

- Legal services and professionals should recognise the professional profile of the legal interpreter and translator (as they do with lawyers, bailiffs, policemen or judges) – recent example is a Dutch act passed on the profession of the sworn interpreter/translator.

- Training in MSs should be provided and a core curriculum agreed on.

- Training could be in an academic curriculum (e.g. BA or MA), in *ad hoc* courses or by professional associations.

- Training should lead to nationally recognised professional certification and be accredited by a recognised authority.

- A Code of Conduct and Guidelines on Good Practice should be an integral part of training.

- There should be training for legal professions on how to work with interpreters/translators.

- A national register of qualified interpreters/translators should be kept and the use of only registered legal interpreters/translators should be made mandatory.

- The necessary budget should be allocated for the provision of quality legal interpreting and translation in the legal services as well as for the fair and reasonable remuneration of legal interpreters and translators.

Professor Gert Vermeulen (Ghent University, Belgium) presented a study by Maastricht and Ghent universities on EU procedural rights in criminal proceedings.

The study looks at the rights available in formal legislation (and not what happens in daily practice). An online questionnaire was sent to all 27 MS (April to July 2009) and replies were received from all MS bar Malta.

The overall conclusion is that there are doubts about whether the rights are in line with the European Court of Human Rights in practice even if they are in line formally.

Debate about Measure A

Vito Monetti (Medel) was happy that there is a review clause (Article 2(4)) in Measure A.

Liese Katschinka (FIT Committee on Court Interpreting and Legal Translation) welcomed the agreement on Measure A but stressed that a lot still needed to be done to put it into practice.

It would be useful if a body was set up in every country bringing together stakeholders (judges, public prosecutors, police, interpreters, lawyers) to work together to implement what has been put in writing.

It is important that the qualifications of interpreters and translators are improved (covering language skills, interpreting skills, cultural competence and terminological competence). As for the *ad hoc* recruitment of interpreters/translators, guidance is needed for stakeholders (e.g. the police) on what to look for before they ask a non-professional to do the work. African languages are the problematic ones where attention is needed.
Training for other legal professionals (e.g. judges or police) is important too as they need to be aware of what is good interpreting/translating. Costs will rise in the early phase but will not be so high and the use of good interpreters/translators will help avoid miscarriages of justice.

Ilias Anagnostopoulos (Council of Bars and Law Societies of Europe (CCBE))
As a matter of principle, there should be interpretation for communication between lawyer and client.

A sensible approach is for interpretation to be provided following a request filed by the defendant's defence counsel.

As for sanctions where a right is not respected, this is something for national systems to regulate as there cannot be a strict general rule but there must be a sanction.

Margarete Gräfin von Galen (CCBE criminal law committee)
The accused should be provided with written translations of documents if he does not understand the language of the proceedings.

With regard to oral summaries (instead of a written translation), where interpreters must summarise legal texts, well trained interpreters would probably say that it is not their job. For translation, the essential documents are the ones in Article 3(2) (warrants, evidence that the prosecution has put forward and documents that the defence would like to receive).

In Germany, not all evidence is translated but the state can pay for an interpreter to go through documents in German with the accused. If documents cannot be translated, the conversation between the accused and the lawyer is a crucial issue. If there can be no interpretation of this discussion, one cannot proceed with the case.

Caroline Charpentier (Association des Magistrats de l'Union Européenne (AMUE))
Answering a questionnaire, members said that training, especially for less common languages, was a major concern. Judges and prosecutors complain that, during hearings, when interpreters are called at the last minute and are taken from the street, it is difficult to protect the rights of the accused.

As translation and interpreting takes time, when a hearing is scheduled, more time should be dedicated to allowing the lawyer to consult their client.

The essential documents that need to be translated are the summons to the person so he/she can understand the charges; the indictment; the expertise and the judgment (at least the enacting part).

The right to interpretation and translation should be extended to the post-trial phase.

Peter Csonka
MS were not very supportive of a proposal to extend the right to the post-trial phase.

MEP Baroness Ludford (European Parliament rapporteur on Measure A)
The European Parliament has backed the need for action on procedural rights ever since the European Arrest Warrant. The EP preferred the idea of

comprehensive procedural rights measure but welcomes Sweden restarting the debate.

Interpreting and translation have strong links with legal aid and assistance so it is important that there are no gaps in the Roadmap.

If the Council were to adopt the accompanying Resolution before the Lisbon Treaty comes into force (i.e. before the FD), this would not be seen as being in the spirit of loyal cooperation and may be illegal. Among the key points in a European Parliament report on the right to translation and interpreting:

- The right should cover the time spent in detention even after conviction but before sentencing.
- The suspect should be told in writing of his/her rights.
- The arbitrary test of necessity should be removed in favour of fairness.
- Interpretation and translation of legal advice should be on the request of the suspect or his/her lawyer.
- Interviews where an interpreter is used should be recorded in case there is a dispute about what was said.
- All the essential documents of the case should be translated in sufficient time.
- Court rules should take account of translation/interpreting in their scheduling of court time.
- Training is important.
- A register of translators and interpreters is needed.

The report was not voted on in committee but had cross-party support.

Professor Bernd Schuenemann (Eurodefensor)
There is interplay between the interpretation between the accused and the lawyer and the translation of documents as not a lot may need to be translated if there are comprehensive discussions (with an interpreter) between the accused and legal counsel. If it is not decided that these discussions involving interpreters should be compulsory, then the document should be fully translated or else the accused cannot take a full part in the case.

A rough and ready machine translation of documents could help the accused decide if a document needs to be properly translated. The defence lawyer

should be able to provide translated documents and the accused should be able to say that a certain number of documents should be translated.

Holger Matt (European Criminal Bar Association (ECBA))
The draft of the FD is a good example of how things should not be done, i.e. without the expertise of defence practitioners. If discussions take place about matters to do with defence lawyers, then defence lawyers should be involved.

Discussions between the defendant and the accused must be interpreted.

Paul Garlick (Furnival Chambers)
It is essential that the defence Bar is really consulted on the measures.

There is an issue regarding the disclosure of material the prosecution has decided not to use and whether it should be passed to the defence. Where many different languages are involved, the problem becomes more acute. Who decides what material is disclosed to the defence and on what basis? Judges may be able to order prosecutors to disclose based on a summary of the defence case if the information is material to the case. The documents would then need to be translated. This is a real problem requiring careful determination.
Lord Justice Thomas (European Network of the Councils for the Judiciary)
With regard to the written translation of documents, this is potentially a huge cost. Here, defence laywers must be sensible [in their requests for translations] or the state will not provide them.

Han Jahae (Dutch Bar Association)
There needs to be interpretation for contact between the client and lawyer and the interpreter during these meetings should be subject to legal privilege. The police should not be able to interview the interpreter afterwards.

On Article 3(7), the right to waive the translation of documents, it should be added that this can only be decided by the suspect after talking to a lawyer.

Johan Callewaert (Registry of the European Court of Human Rights)
The European Convention on Human Rights should be the minimum level for the FD. It is not so sure that the FD is "Strasbourg-proof".

Regarding Article 3(2), essential documents include detention orders, indictments and judgments and other documents where a request should be made.

As to whether an oral summary is enough in some situations, the test should not be mechanical but should be what is essential, i.e. that the defendant is able to defend him/herself. The ECtHR relies on three criteria – the complexity of the case, the seriousness of the offences and the severity of the penalty risked by the accused. Where these are met, documents beyond those listed in Article 3(2) may need to be provided.

Jean-Louis NADAL (Secretary-General of the Public Prosecutor at the Court of Cassation)
Judges expect the legislator to say what the EU rules are. The rules must respect the principles of the ECtHR. Judges expects a clear norm but it does not need to envisage all circumstances. Judges will know if a defendant has the right documents and if documents are appropriately translated. The EU FD should not go into too many details as a judge can do that with regard to the respect of fundamental freedoms.

Liese Katschinka (FIT)
On Article 3(6), an oral summary should not be made by the interpreter but by the lawyer or judge. The interpreter will then interpret that oral summary as the interpreter cannot take the responsibility for summarising a legal document.

We should stay away from machine translations for the next decade.

It is a matter of an interpreter's code of ethics that whatever they interpret is strictly for the purposes of that communication (e.g. between the lawyer and suspect) and not disclosed to any third party.

Signe Öhman (Swedish presidency of the EU / Ministry of Justice) is chairing the working group on procedural rights.

The Swedish Presidency thinks that the FD is "Strasbourg-proof" and that the FD gives added value. We are very happy with text as it was as far as it was possible to go. We hope that we will be able to adopt the new texts under the new Treaty as smoothly as possible.

Adrienne Boerwinkel (Ministry of Justice, Netherlands)
The Council worked hard to reach agreement on the right to interpretation and translation. We would like to see it adopted smoothly and quickly as it would be sending the wrong signal to citizens if discussions are reopened and take another year.

We consider it very important that all consequences, on capacity/costs/practical application, are taken into account when legislation is negotiated legislation. We should be able to commit ourselves to full implementation.

Vincenzo di Cerbo (Network of Presidents of European Supreme Courts)
Why not create an archive of procedural rights in all the possible languages? This could be downloaded in the right language and given to the person concerned.

Although translation machines are not an alternative to translators, they can give a quick and rough translation so that people can understand the gist of the case.

Peter Csonka
In the medium term, the e-Justice portal will contain information about lawyers who speak foreign languages, a glossary of terms, decisions taken by various courts and a translation facility giving a raw machine translation of documents.

Francesco Samperi (Union des Avocats Européens)
After the Lisbon Treaty comes into force on 1 December, the European Parliament will have a new role. One hopes that the EP bases its action on what has been consolidated so far by the European Commission and Council. If not, there may be a risk that a lot more time is needed to come up with new text.

When someone does not understand the language, everything should be recorded (police plus the interpreter) and it is important to have access to that so that a check can be made that everything has been properly translated. Judges should check that the translation and interpreting has been done effectively and precisely.

The use of the wording 'shall decide' in Article 3(2) is very dangerous.

Measure B – Letter of Rights

Professor Taru Spronken (University of Maastricht) (project run by the German Ministry of Justice and Maastricht University)
The Letter of Rights document is the first one where more than one procedural right is dealt with so this could be of importance for the combination of rights.

Research by Maastricht University looked into how far suspects are informed of their rights in writing and if it is possible to develop a model Letter of Rights in the EU.

Although ECHR Article 6(3) stipulates the right to be informed on the nature and cause of accusation and states a preference for a written notification of this right, a large number of MS provide information on rights orally at the moment.

During the ensuing debate, there was general agreement that the Letter of Rights document needs to be a clear text that is easy to understand, that it needs to be handed to the suspect at an early stage (i.e. at the police station) and that the rights to be included are the ones directly relevant for the suspect at that stage of the pretrial procedure.

Ilias Anagnostopoulos (CCBE)
The Austrian Letter of Rights is drafted in such a way that it is almost threatening to the defendant – 'you have the right to silence but watch out if you do use it'.

It should include the rights that suspects have when they are first in contact with police and be given to them before the start of questioning. We need to monitor this so that rights are respected in practice.

Austria
In Austria, there are two Letters of Rights – one for those arrested and in custody and one for the lawyer. There are oral instructions and a Letter of Rights outlining what has already been said to the accused orally. If someone is being interviewed and has not been arrested, that person receives oral legal clarification but no written Letter of Rights.

We support the Letter of Rights project and are flexible as to which rights should be included.

Access to documents in the case-file should not be included in the legislation as it varies greatly between different countries.

Fair Trials International
There are many cases where a Letter of Rights would have made a difference in avoiding injustice. In one, a woman arrested for drugs offences thought that she was giving evidence against someone else when in fact she was a codefendant.

As for content, Annex B is a good start. The Letter of Rights should be handed over at the start of questioning and certainly once a person is told that they are a suspect.

Liese Katschinka (FIT) With reference to the Austrian Letter of Rights, can drafters of the Letter of Rights please not use words such as 'extenuating' as it is difficult for people to understand them?

Jaap Smit (Victim Support Europe)
Whether accused or a victim, we are talking about laypeople who need committed people who want to advise them so the attitude of policemen, judges and prosecutors is key. The Letter of Rights should be in normal, lay language. The EU should think about proposing a Letter of Rights for victims.

Germany
Germany has a Letter of Rights on the Ministry of Justice website (in six languages and to be translated into 43 languages).

In Germany, sanctions are imposed, on a case by case basis, if the Letter of Rights is not handed over. A tick box is used to say that if the Letter has been received or not.

France
Suspects should be given the Letter of Rights immediately after their arrest.
The content should be information on rights that are immediately applicable (e.g. if they can see a doctor or a lawyer) and practical. The information should be easily understandable.

France does not agree with the idea of having a single EU-wide Letter of Rights document valid throughout the EU.

With regard to access to files, this must be dealt with in future legal instruments. We need to think hard about issues such as whether it should be direct access or indirect via counsel.

Peter Csonka
The idea is for the Letter of Rights to contain the minimum content at EU level and then it can be added to in national forms.

Margarete Gräfin von Galen (CCBE)
As there are different standards in different MS, it would be difficult to have a single EU model Letter of Rights.

One idea for a penalty if the Letter of Rights was not received by the suspect would be for evidence obtained not to be admissible. It is up to each MS to deal with what is in the Letter of Rights.

Professor Taru Spronken
The idea of the project is not to regulate or harmonise rights in the Letter of Rights but to provide a model that could be used based on the minimum level or rights established in ECtHR case law.

Professor Bernd Schuenemann (Eurodefensor)
A written and simple Letter of Rights could help people arrested understand their situation and help them out of any possible state of confusion. It should be handed out before any extensive questioning is done.

JUSTICE
The content of the Letter of Rights may depend on the rest of the measures. Either the Letter of Rights should come at the end of the process or we should build in a process whereby it can be continually amended. Police say that they would prefer the certainty that they can give an individual a Letter of Rights.

Netherlands
There is no Letter of Rights in the Netherlands but we are open to the idea of introducing it. Letters of Rights should not make police and prosecutors feel that they can just hand over a piece of paper and consider that their job is done. Sometimes it is better if the information is passed on orally.

Specific information could be added to the Letter of Rights on how the suspect can apply those rights in that MS.

Sanctions where the suspect does not receive the Letter of Rights should be dealt with by national law. There will be a financial burden as it will need to be drafted and translated.

We need to ensure that all police in all police stations are aware of the obligation to provide this Letter of Rights.

UK
The UK's Letter of Rights is in 43 languages, is in audio form and a video format is also being piloted.

The Letter of Rights should cover information such as getting a solicitor to help, practical information on how you are treated, on questioning and information specifically for people under 17 or people with mental problems.

The receipt can be verified through the suspect signing a custody record.

Medel
In terms of access to the file, under Article 6 of the ECHR, what is known to the prosecutor must be handed to the defence.

Germany
The cost of translating Germany's Letter of Rights will be around 45 languages multiplied by 500 euro per translation, i.e. 25,000 euro. It will then be put on the internet so that it can be downloaded on a case by case basis. This should lead to savings in terms of delays and misunderstandings. The form must be handed over by police authorities.

Professor Taru Spronken
The model Letter of Rights should be as flexible as possible so that it can be adapted to any criminal law system. It would be a big achievement if all the defendants were to get the information from the start at the police station.

Measure C – the right to legal advice and legal aid

Han Jahae (Dutch Bar Association)
The right to legal advice is absolutely necessary for others rights to stick. The right to legal aid is needed to make the right to legal advice work. Legal aid will make justice run more smoothly.

Professor John Spencer (Cambridge University)
Legal advice and legal aid are needed from when the suspect arrives at the police station to avoid miscarriages of justice (e.g. the 'Birmingham six', who were convicted for a terrorist bombing on the basis of evidence fabricated by the police.

Three safeguards have been in place in the UK for those detained for questioning since 1984.

1) Mandatory tape recording of interviews.
2) The right to the presence of a solicitor free of charge.
3) Detailed regulations on how the police can treat you (e.g. length of questioning and time for which one can be detained).

Under section 78 of the Police and Criminal Evidence Act, the court has discretionary power to suppress evidence which, if admitted, could make the the trial unfair.

Paul Garlick (Furnival Chambers)

Suspects have a right to legal representation on arrest and before any police questioning.
A summary of the evidence against the suspect is an automatic right for the defence.

There are issues arising in connection with the provision of defence lawyers:

- Who chooses the lawyers – the defendant or the authorities?
- Who decides who has the right to be a defence lawyer?
- Who pays the defence lawyer?

Other issues include:

- Policing of the measure and sanctions.
- A tape recording of the interview is needed.

- Dealing with this right should not be left to the ECtHR as it is not an appeal court but a court for a systemic failure of a country.

Jozef Maria Rammelt (Keizer Advocaten)
Legal aid needs to be paid at a reasonable rate or else lawyers will not be very enthusiastic about taking up such cases.

The European Commission should look at the possibility of making arrangements for legal aid in both States in European Arrest Warrant cases ("double defence"). If they can engage a lawyer at an early stage, in many cases, the case can be settled before the person is surrendered. If a case can be resolved at an early stage, then costs will be reduced.

Professor Karoly Bard (Central European University, Hungary)
If a defence counsel is denied at an early stage or delayed, equality of arms is in jeopardy.

No negative inferences should be drawn from suspects deciding to take up a right to silence.

As per the *Salduz* judgment, there can be no deviation from the standards of fairness of a trial (i.e. a lawyer must be present) regardless of the nature of the crime.

Ilias Anagnostopoulos (CCBE)
The right to counsel must be combined with the taping of interviews at police stations. The argument can be made that effective legal assistance can be done via recording as this ensures that there are no problems later.

Holger Matt (ECBA)
Legal aid is the real issue and not just legal advice on its own.

Liese Katschinka (FIT)
Recording evidence from suspects and witnesses can prevent cases of abuse. This could go in a Resolution on best practice.