



JUSTICE FORUM

BACKGROUND DOCUMENT

**JUSTICE FORUM MEETING ON
PROCEDURAL RIGHTS**

9 NOVEMBER 2009

1. INTRODUCTION

The Commission considers that the EU needs to have common minimum standards of procedural safeguards in criminal proceedings. It is important for the EU to get the balance right between measures that facilitate investigation and prosecution of crime and those that protect the rights of the accused. For mutual recognition to operate there must be measures promoting mutual trust, such as EU legislation on procedural rights. The Commission originally proposed a draft Framework Decision which covered five basic rights in 2004. After 3 years of discussion in Council, a German Presidency text was put to the June 2007 Justice Council but 6 Member States announced that they would not support it. Nonetheless there remained a high level of support for this in many Member States, the European Parliament and amongst practitioners and other experts.

The need for a measure of this sort was confirmed in the 2008 Université Libre de Bruxelles report on mutual recognition in which it is clear that most of the experts and practitioners interviewed stated that mutual recognition could not function without a higher level of trust and such trust can only be achieved if common standards are in place. The final report¹, published on 20 November 2008, found that mutual recognition instruments have tended to neglect the position of the defence. Procedures are rapid and based on limited information. Defence lawyers have no access to the file in the issuing State. Defence lawyers do not sufficiently benefit from training on new EU instruments. The report concludes that there should be EU legislation governing defence rights so as to set common minimum standards, and thus promote mutual trust. It also concluded that defence lawyers should be encouraged to organise themselves better. Networking between defence lawyers/Bar Associations should be promoted and financially supported by the EU; the Commission is already financing a project on cross border legal aid under this recommendation². The report also stated that inequality of arms in cross-border cases should be compensated by facilitating access to information for defence lawyers and that practitioners involved in judicial cooperation should be better supported e.g. by keeping the European Judicial Network website up to date and that defence lawyers should be given access to it.

The Swedish Presidency (July-December 2009) has made procedural rights a justice priority.

¹ "Analysis of the future of mutual recognition in criminal matters in the European Union" by Gisèle Vernimmen-Van Tiggelen and Laura Surano (*Call for tenders JLS/D3/2007/03 European Commission*) 20 November 2008

http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf

² Cross Border Legal Aid project – ECBA/CCBE

In early July 2009, it presented its draft Roadmap³ instructing the Commission to put forward proposals on a "step by step" basis, on 5 legislative measures as follows:

Measure A: the right to interpretation and translation,

Measure B: the right to information about rights (Letter of Rights),

Measure C: legal advice, before trial and at trial,

Measure D: the right for a detained person to communicate with family members, employers and consular authorities, and

Measure E: protection for vulnerable suspects.

The Commission is also asked to put forward a Green Paper on pre-trial detention ("Measure F").

The Commission was able to agree with the Swedish approach of putting forward proposals on a step-by-step basis. On 8 July 2009, the Commission presented a proposal for a Framework Decision on the right to interpretation and translation⁴ (Measure A). The Swedish Presidency put forward a draft Resolution containing recommendations for Best Practice⁵.

The three texts are before the Justice Council on 23 October 2009 for an agreement to adopt them.

One reason for devoting this Justice Forum to procedural rights was to consult experts and stakeholders in criminal justice systems in the Member States so as to have some feedback on Measure A, and to sound them out in preparation of the proposals for Measures B and C.

This document outlines the issues for discussion and poses some questions. Written submissions may also be sent to Peter Csonka, Head of the Criminal Justice Unit, DG-JLS, European Commission (marked ref: CM).

2. THE FIRST THREE ROADMAP MEASURES

2.1. Measure A - the right to interpretation and translation

In July 2009, the Commission put forward its draft proposal for a Framework Decision on the right to interpretation and translation in criminal proceedings⁶. On 15 July 2009,

³ Document 11457/09, DROIPEN 53 of 1 July 2009

⁴ COM (2009) 338 final of 8 July 2009.

⁵ Proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings, document n°.12116/09, DROIPEN 66 of 15 July 2009.

⁶ See footnote 3 above.

the Swedish Presidency put forward a draft Resolution fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings, designed to assist Member States, which was also discussed in Council Working Groups at the same time as the proposal for a Framework Decision and the Roadmap. On 23 October, the EU Justice Ministers agreed to adopt the Framework Decision, the Roadmap and the Resolution. The agreed texts are attached to this document (annexe 1).

During the discussions, two issues proved controversial, owing in particular, to the expected costs of implementing them. The Commission proposal included the right for the accused person to receive interpretation during all necessary meetings with his lawyer and to all legal advice received during the criminal proceedings. It laid down a right to translations of all essential procedural documents. These provisions proved the most controversial, with various Member States arguing that they would be too expensive to implement.

As regards interpretation, several Member States did not want any right to interpretation of meetings between the accused and the lawyer; one Member State in particular was vigorously opposed to this stating that there were numerous abuses of the system, with lawyers advising their clients to request additional interpretation "to frustrate proceedings". Given that unanimity is still required⁷ a compromise had to be reached to accommodate that one Member State's concerns. The ECHR case-law⁸ says that the accused should be able to "explain his version of events" to his lawyer and discuss any prosecution statements with which he disagrees, and the Commission's position was that this should be adequately reflected in the legislation. The text as finally agreed achieves a fine balance between the two different positions.

As regards translations, a number of Member States argued that an oral summary of a document can be given instead of a written translation. The key ECHR judgment on this is *Hermi v Italy* (18 October 2006, application n° 18114/02, Grand Chamber⁹). Some Member States interpret the *Hermi* judgment as meaning that "oral linguistic assistance"

⁷ But note the effect of the entry into force of the Lisbon Treaty.

⁸ *Timergaliyev v. Russia* (Application no. 40631/02), judgment of 14 October 2008, made final on 14/01/2009.

⁹ Paragraph **Error! Main Document Only.70** of *Hermi*: " However, paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention (see *Husain v. Italy* (dec.), no. 18913/03, 24 February 2005). The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events (see *Güngör v. Germany* (dec.), no. 31540/96, 17 May 2001). In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see *Kamasinski*, cited above, p. 35, § 74)."

is enough and that there is no need for translation. When *Hermi* says "*paragraph 3 (e) [ECHR] does not go so far as to require a written translation of all items of written evidence or official documents in the procedure*", should emphasis be on the "all items" - thus implying that the provision does require a written translation of some of the items or on the "does not go so far as to require a written translation"? Does "*This suggests that oral linguistic assistance may satisfy the requirements of the Convention*" mean that oral linguistic assistance may, and conversely, sometimes may not, satisfy the requirements of the Convention?

Questions:

A1) Should interpretation be provided free of charge by the State for meetings between the lawyer and accused that are necessary for the preparation of the defence case?

A2) Do you have experience of cases in which interpretation was not provided for meetings of this type? What were the consequences?

A3) Should the accused be provided with written translations of documents if he does not understand the language of the proceedings? If so which documents do you consider to be "essential"?

A4) Do you have experience of cases in which interpretation was not provided for meetings of this type? What were the consequences?

2.2. Measure B – Letter of Rights

The Commission will now start preparing a draft Directive covering the right to information. The Roadmap states:

"Measure B: Information on Rights and Information about the Charges

Short explanation:

A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings."

(a) Information about rights

The case law of the ECtHR has repeatedly stated that rights are not meant to be theoretical but also practical and effective. For rights to be "effective" the person who should have the benefit of them must be aware of them. It is important that both the person being investigated and the investigating authorities be fully aware of what rights exist. The Commission considers that the best way of achieving this is by way of a Letter of Rights, a short, simple statement of what rights the person being investigated has, to be given to that person, in a language they understand, as soon as possible. A Letter of Rights does not create new rights but is an efficient and low cost way of informing suspects of their rights. It is also helpful for investigating officers as it creates a situation of clarity. The Commission proposed a model Letter of Rights in its 2004 proposal for a Framework Decision.

This is attached to this Background Document (Annexe B).

(b) Information about the charges

Article 5(2) ECHR provides that anyone who is arrested has the right to know "the reasons for his arrest and of any charge against him". Article 6 (3)(a) ECHR states that "Everyone charged with a criminal offence has the following minimum rights: [...] to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him". Article 6(3)(b) stipulates that everyone charged with a criminal offence is entitled to have adequate time and facilities for the preparation of his defence.

These rights entail having access to all the information necessary for the preparation of the defence¹⁰, including exculpatory information (*à décharge*) held by the prosecutor¹¹. The right to full disclosure is not absolute and is subject to limitations (protection of national security - Public Interest Immunity-, vulnerable witnesses or sources of information)¹². Any such restriction on the rights of the defence should be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence. The need for disclosure or non disclosure must be under constant review by the trial judge.¹³

Questions:

B1) What information should go into a Letter of Rights?

B2) When should a Letter of Rights be given to the suspect?

¹⁰ ECtHR, 14 December 1981, *Jespers* (8403/78)

¹¹ ECtHR, 16 December 1992, *Edwards* (13071/87), § 35-38

¹² ECtHR, 16 February 2000, *Jasper* (27052/95) § 43;

¹³ ECtHR, 16 February 2000, *Rowe and Davis* (28901/95), § 58.

B3) Should the failure to provide a Letter of Rights carry any penalty for the investigating or prosecuting authorities?

B4) How can the receipt or non-receipt of the Letter of Rights be verified?

B5) Would provision of a Letter of Rights create a financial burden for Member States? If so, how can this be quantified? Would it save money for Member States? If so, how?

B6) Should the accused have access to the case-file? If so, when and how should it be disclosed? Are there any limitations on this right?

B7) Should the Commission include provisions on disclosure of the case-file in the draft Directive for Measure B of the Roadmap?

2.3. Measure C - Legal advice, before trial and at trial; legal aid

(a) Legal advice

Article 6(3) lays down the “minimum rights” of “everyone charged with a criminal offence”:

“3. Everyone charged with a criminal offence has the following minimum rights:

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [...]”¹⁴

Article 47 of the Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial) provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

The ECHR right to legal representation arises on arrest¹⁵. Pre-trial proceedings are covered¹⁶. An important development in relation to access to legal advice is a run of recent cases from the ECtHR:

¹⁴ In the *Artico v. Italy* case the ECtHR held: “Article 6(3) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1)[...] When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots”.

¹⁵ In *John Murray v. UK* (Judgment of 8 February 1996, Series A 1996-I) a violation of the ECHR was found as the accused was arrested for terrorist offences and refused access to a lawyer for 48 hours.

Salduz v. Turkey (application no. 36391/02, judgment of 27 November 2008, *Panovits v. Cyprus* (application no. 4268/04), judgment of 11 December 2008, *Pishchalnikov v. Russia* (application no. 7025/04), judgment of 24 September 2009, and *Dayanan v. Turkey* (application n° 7377/03), judgment of 13 October 2009 (not yet final).

These cases imply that the right to a lawyer arises before any police questioning. Some Member States have legal systems that do not allow the suspect access to a lawyer at this early, and some are amending their procedures to bring this into line with the recent ECtHR case-law.

The accused, once charged with a criminal offence, has:

- the right to defend himself in person, if he so chooses, or
- by counsel of his own choosing, and
- if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Some Member States do not allow the accused to defend himself in certain circumstances (mandatory defence).

(b) Legal aid

Art. 6(3)(c)ECHR provides for the defendant's right to free legal representation "if he has not sufficient means to pay for legal assistance". The defendant does not have to prove "beyond all doubt" that he lacks the means to pay for his defence¹⁷.

The right to free legal representation is not unconditional. The ECHR provides that this right arises "when the interests of justice so require". In *Quaranta v. Switzerland*, the ECtHR indicated three factors which should be taken into account:

- the seriousness of the offence and the severity of the potential sentence,
- the complexity of the case, and
- the personal situation of the defendant¹⁸.

The right to free legal representation does not confer a right to a choice of lawyer, but Member States must ensure that the accused receives "effective assistance"¹⁹. In *Benham*

¹⁶ *Imbrioscia v. Switzerland* (Judgment of 24 November 1993, Series A, N°275, para. 36).

¹⁷ *Pakelli v. Germany*, judgment of 25 April 1983, Series A n° 64 para. 34

¹⁸ *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A n° 205, para. 35 describes Mr Quaranta as "a young adult of foreign origin from an underprivileged background...[having] no real occupational training and a long criminal record. He has taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit".

¹⁹ *Artico v. Italy* 1980.

v UK (1996) the ECtHR held that “*Where the deprivation of liberty is at stake, in principle the interests of justice call for legal representation*”. It is not enough that the State appoint a lawyer – the legal assistance provided must also be effective and the State is under a duty to ensure that the lawyer has the information necessary to conduct the defence²⁰.

Questions

3A) Should a suspect be entitled to have legal representation throughout the questioning and interview stages of the proceedings?

3B) Should an EU Directive lay down rules about when the accused is entitled to legal representation or is this a matter for national systems alone to decide? Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it? Should the EU attempt to regulate the use of mandatory defence in a Directive?

3C) Article 6(3)(c) of the ECHR provides that a person charged with a criminal offence be given free legal representation “when the interests of justice so require”. Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation? How can Member States establish whether the defendant “has not sufficient means to pay for his defence”?

3D) How can Member States establish "quality control" of lawyers? Should they do so?

3E) Art. 6(3)(b)ECHR confers on the accused the right “to have adequate time and facilities for the preparation of his defence”. What does this mean in practice?

3F) How can Member States ensure that there are enough lawyers doing legal aid work? Should Member States ensure that remuneration is enough to make participation in a national legal aid scheme attractive for defence lawyers?

3. FINAL CONSIDERATIONS

Two final issues need to be considered.

When it comes to negotiating instruments about defence rights in the Council Working Groups, the Commission notes that several delegations include former prosecutors who are brought in as experts. During negotiations, this "prosecution based" experience is brought to bear on the discussions (anecdotes, examples, often illustrating the point under discussion from a prosecution point of view). It's in the nature of delegations that they cannot include defence lawyers since Member States appoint civil servants to

²⁰ In *Goddi v. Italy* (Judgment of 9 April 1984), failure on the part of the State to notify Mr Goddi's lawyer of the hearing date meant that he did not have the benefit of a “practical and effective” defence.

represent their interests in the Working Groups and whilst prosecutors (and judges) can be civil servants, defence lawyers cannot. This lack of the defence lawyer perspective is unfortunate in negotiations about fair trial rights.

Member States often bring up the cost of implementing rights (e.g. interpretation, translation, legal aid). The Commission, which is not responsible for a national budget, sees rights from a different perspective but is often discussing the provision of rights from a different point of view – that of "justice" rather than what is affordable. This presents a problem in negotiations. Justice Forum members are invited to consider this issue.

Questions

How can input from defence lawyers be taken into account in negotiating EU instruments covering fair trial rights? Should delegations include defence lawyers?

How far can financial considerations be taken into account when it comes to provision of rights?



Annexe A – texts agreed by the Justice Council on 23 October 2009.

**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 21 October 2009

14552/1/09 REV 1

**Interinstitutional File:
2009/0101 (CNS)**

**DROIPEN 125
COPEN 197**

REVISED NOTE

from :	Presidency
to :	Council
No Prev Doc :	14289/09 DROIPEN 122 COPEN 193
Subject :	Council meeting (Justice and Home Affairs) on 23 October 2009 1. Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2. Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings 3. Proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings - General approach

The Presidency on 1 July 2009 presented a ‘Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings’²¹.

Subsequently, it was decided to put the instrument in the form of a ‘Resolution’ and to modify the title into (draft) ‘Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’.

²¹ 11457/09 DROIPEN 53 COPEN 120.

On 8 July 2009 the Commission presented a proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings ²².

The Presidency, considering that guidelines should be given to Member States with a view to promoting the effective application of the rights contained in the proposal, submitted a draft Resolution to accompany the Framework Decision ²³.

The Friends of the Presidency, the Working Party on Substantive Criminal Law, the JHA Counsellors, the Article 36 Committee and the Permanent Representatives Committee (part 2) examined the texts during various meetings.

The situation as it stands can be described as follows:

ROADMAP:

FR, IE, NL and UK have a Parliamentary scrutiny reservation.
LV has a linguistic scrutiny reservation.

Modifications made / Remaining outstanding issues:

Reference is made to the text reproduced in Annex 1. There are no issues outstanding.

²² 11917/09 DROIPEN 60 COPEN 133 + ADD 1 + ADD 2.

²³ 12116/09 DROIPEN 66 COPEN 139.

FRAMEWORK DECISION:

CZ, DK, FR, IE, LT, MT, NL, SI and UK have a Parliamentary scrutiny reservation.
LV has a linguistic scrutiny reservation.

Modifications made / Remaining outstanding issues:

Reference is made to the text reproduced in Annex 2. There are no issues outstanding.

To be observed that SI suggested submitting the text as it results from the discussions in the Council bodies to the Secretariat of the Council of Europe, in order to verify whether this text is in conformity with the ECHR, as interpreted by the European Court of Human Rights ("Strasbourg-proof").

The Presidency notes that the Secretariat of the Council of Europe has been informally consulted on all three draft instruments (see 12394/09 and 12926/09), has taken a view on the initiatives and has submitted positive opinions on them. The comments of the Secretariat of the Council of Europe have been determinant for the Presidency's negotiations all along the procedure.

RESOLUTION:

DK, FR, IE, LT, MT, NL, SI and UK have a Parliamentary scrutiny reservation.
LV has a linguistic scrutiny reservation.

Modifications made / Remaining outstanding issues:

Reference is made to the text reproduced in Annex 3. There are no issues outstanding.

Draft

Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

The Council of the European Union,

Whereas:

- (1) In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, which for the purposes of this Resolution includes the pre-trial and the trial stage.
- (2) Furthermore, the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust. At the same time, there is room for further action of the European Union to ensure full implementation and respect of Convention standards, as well as, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.
- (3) The European Union has successfully established an area of freedom of movement and residence, which citizens benefit from by increasingly travelling, studying and working in other countries than that of their residence. However, the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have as an inevitable consequence that an increasing number of people are becoming involved in criminal proceedings in a Member State other than that of their residence. In those situations, the procedural rights of suspected or accused persons become particularly important in order to safeguard the right to a fair trial.

- (4) Indeed, whilst various measures have been taken at European Union level to guarantee a high level of safety for citizens, there is an equal need to address specific problems that can arise when a person is suspected or accused in criminal proceedings.
- (5) This calls for specific action on procedural rights, in order to ensure the fairness of the criminal proceedings. Such action, which can comprise legislation as well as other measures, will enhance citizens' confidence that the European Union and its Member States will protect and guarantee their rights.
- (6) The 1999 Tampere European Council concluded that in the context of implementing the principle of mutual recognition, work should also be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States (Conclusion 37).
- (7) Also, the 2004 Hague Programme states that further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards of procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions (point 3.3.1.).
- (8) Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.

- (9) Recent studies show that there is wide support among experts for European Union action on procedural rights, through legislation and other measures, and that there is a need for enhanced mutual trust between the judicial authorities in the Member States²⁴. These sentiments are echoed by the European Parliament²⁵. In its Communication for the Stockholm programme²⁶, the European Commission observes that strengthening the rights of the defence is vital in order to maintain mutual trust between the Member States and public confidence in the European Union.
- (10) Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual. Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union.
- (11) Bearing in mind the importance and complexity of these issues, it seems appropriate to address them in a step-by-step-approach, whilst ensuring overall consistency. By addressing future actions one area at a time, focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure.
- (12) In view of the non-exhaustive nature of the catalogue of measures laid down in the Annex, the Council should also consider the possibility of addressing the question of protection of procedural rights other than those listed in that catalogue.

²⁴ See inter alia the "*Analysis of the future of mutual recognition in criminal matters in the European Union*", report of 20 November 2008 by the *Université Libre de Bruxelles*.

²⁵ See e.g. the "*European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area*", 2009/2012(INI), point 1 a).

²⁶ "*An area of freedom, security and justice serving the citizen*", COM (2009) 262/4 (point 4.2.2.).

(13) Any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights,

Hereby adopts the following Resolution:

1. Action should be taken at the level of the European Union in order to strengthen the rights of suspected or accused persons in criminal proceedings. Such action can comprise legislation as well as other measures.
2. The Council endorses the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings", set out in the Annex to this Resolution, as the basis for future action. The rights included in this roadmap, which could be complemented by other rights, are considered to be fundamental procedural rights and action in respect of these rights should be given priority at this stage.
3. The Commission is invited to submit proposals regarding the measures set out in the roadmap, and consider presenting the Green Paper mentioned under point F.
4. The Council will examine all proposals presented in the context of the roadmap and pledges to deal with them as matters of priority.
5. The Council will act in full cooperation with the European Parliament, in accordance with the applicable rules, and duly collaborate with the Council of Europe.

Roadmap for strengthening procedural rights of suspected or accused persons
in criminal proceedings

The order of the rights indicated in this roadmap is indicative. It is emphasised that the explanations provided below merely serve to give an indication of the proposed action, and do not aim to regulate the precise scope and content of the measures concerned in advance.

Measure A: Translation and Interpretation

Short explanation:

The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

Measure B: Information on Rights and Information about the Charges

Short explanation:

A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.

Measure C: Legal Advice and Legal Aid

Short explanation:

The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.

Measure D: Communication with Relatives, Employers and Consular Authorities

Short explanation:

A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable

Short explanation:

In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing e.g. to their age, mental or physical condition.

Measure F: A Green Paper on Pre-Trial Detention

Short explanation:

The time that a person can spend in detention before being tried in court and during the court proceedings varies a lot between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.

COUNCIL FRAMEWORK DECISION

on the right to interpretation and to translation in criminal proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(1)(c) and 34(2)(b) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:²⁷

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union.
- (2) On 29 November 2000 the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition in criminal matters²⁸. The introduction to the programme of measures states that mutual recognition is "designed to strengthen cooperation between Member States but also to enhance the protection of individual rights".

²⁷ The recitals have not yet all been discussed; examination will follow after the Council has reached a general approach. The following recitals, however, form part of the package that is submitted to Council for approval: 8, 10, 11, 12, 19.

²⁸ OJ C 12, 15.1.2001, p. 10.

- (3) Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of the mutual recognition exercise is very much dependent on a number of parameters, which include "mechanisms for safeguarding the rights of [...] suspects"²⁹ and common minimum standards necessary to facilitate the application of the principle of mutual recognition
- (4) Mutual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own, implying "not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied"³⁰.
- (5) Although all Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (6) Article 31(1) of the Treaty on European Union provides for "ensuring compatibility in rules applicable in the Member States as may be necessary to improve [judicial co-operation in criminal matters]". Common minimum standards should lead to increased confidence in the criminal justice systems of all Member States which in turn should lead to more efficient judicial cooperation in a climate of mutual trust.
- (7) Such common standards should be applied in the fields of interpretation and translation in criminal proceedings. In order to enhance the necessary confidence among Member States, this Framework Decision provides for basic common standards with regard to interpretation and translation in criminal proceedings in the European Union which reflect the traditions of the Member States in applying the relevant provisions of the ECHR.

²⁹ OJ C 12, 15.1.2001, p. 10.

³⁰ COM(2000) 495, 26.7.2000, p. 4.

- (8) The right to interpretation and translation for those who do not understand the language of the proceedings are enshrined in Article 6 of the ECHR, as interpreted by the case law of the European Court of Human Rights. The provisions of this Framework Decision facilitate the application of those rights in practice. To this end, this Framework Decision intends to ensure the right for an accused or suspected person to have interpretation and translation in criminal proceedings with a view to safeguarding his/her rights to fair proceedings.
- (9) (...)
- (10) The rights provided for in this Framework Decision should also apply to proceedings for the execution of a European Arrest Warrant within the limits provided for by this Framework Decision. Executing Members States should provide, and bear the costs for, interpretation and translation in favour of the requested person who does not understand or speak the language of the proceedings.
- (11) The provisions of this Framework Decision should ensure that the rights of the suspected or accused person who does not speak or understand the language of the proceedings to understand the suspicions or accusations brought against him/her and to understand the proceedings in order to be able to exercise his/her rights are protected by providing free and accurate linguistic assistance. The suspected or accused person should be able, inter alia, to explain to his/her legal counsel his/her version of the events, point out any statements to which he/she disagrees and make his/her legal counsel aware of any facts that should be put forward in his/her defence. It is recalled in this connection that the provisions of this Framework Decision set minimum rules. Member States may extend the rights set out in this Framework Decision in order to provide a higher level of protection also in situations not explicitly dealt with in this Framework Decision. The level of protection should never go below the standards provided by the ECHR, as interpreted in the case-law of the European Court of Human Rights.

- (12) Member States should not be obliged to ensure interpretation of communication between the suspected or accused person and his/her legal counsel in cases where they can effectively communicate in the same language. Neither should the Member States be obliged to ensure interpretation of such communication where the right to interpretation is clearly used for purposes other than exercising fair trial rights in the proceedings concerned.
- (13) The finding that there is no need for interpretation or translation should be subject to the possibility of review, in accordance with national law. Such review may be carried out, for example, through a specific complaint procedure, or in the context of an ordinary appeal procedure against decisions on the merits.
- (14) Appropriate assistance should be provided also to suspected or accused persons suffering from hearing or speech impediments.
- (15) The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that these persons are able to exercise effectively the rights provided for under this Framework Decision, e.g. by paying attention to any potential vulnerability that affect their ability to follow the proceedings and make themselves understood and by taking appropriate steps to ensure these rights.
- (16) The safeguard of the fairness of the proceedings requires that essential documents, or at least the important passages of such documents, should be translated for the benefit of the suspected or accused person. It is up to the authorities of the Member States to decide which documents should be translated, in accordance with national law. Some documents should always be considered essential documents that should be translated, such as the decision depriving a person of his/her liberty, the charge/indictment and any judgment.

- (17) A waiver of the right to written translation of documents should be unequivocal, with minimum safeguards, and should not run counter to any important public interest.
- (18) This Framework Decision respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Framework Decision seeks to promote the right to liberty, the right to a fair trial and the rights of the defence.
- (19) Member States should ensure that the provisions of Articles 2 to 5 of this Framework Decision, where they correspond to rights guaranteed by the ECHR are implemented consistently with those of the ECHR and as developed by the relevant case-law of the European Court of Human Rights.
- (20) Since the aim of achieving common minimum standards cannot be achieved by Member States acting unilaterally and can only be achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and defined in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Scope

1. This Framework Decision lays down rules concerning the rights to interpretation and translation in criminal proceedings and proceedings for the execution of a European Arrest Warrant.
2. Those rights apply to any person from the time that person is made aware by the competent authorities of a Member State that he or she is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence.
3. This Framework Decision shall not apply to proceedings which may lead to sanctions being imposed by an authority other than a criminal court, as long as those proceedings are not pending before a court having jurisdiction in criminal matters.

Article 2

Right to interpretation

1. Member States shall ensure that a suspected or accused person who does not understand or speak the language of the criminal proceedings concerned is provided with interpretation in his/her mother tongue or in another language that he/she understands, in order to safeguard his/her rights to fair proceedings. Interpretation, including of communication between the suspected or accused person and his/her legal counsel, shall be provided during criminal proceedings before investigative and judicial authorities, including during police questioning, during all court hearings and during any necessary interim hearings, and may be provided in other situations. This provision does not affect rules of national law concerning the presence of a legal counsel during any stage of the criminal proceedings.

2. Member States shall ensure that a person with a hearing impediment receives interpretation assistance, if appropriate for that person.
3. Member States shall ensure that it is verified in any appropriate manner, including by consulting the suspected or accused person, whether he/she understands and speaks the language of the criminal proceedings and needs the assistance of an interpreter.
4. Member States shall ensure that at a stage in the proceedings, in accordance with national law, there is the possibility of a review of a finding that there is no need for interpretation. Such review does not entail the obligation for Member States to provide for a separate mechanism in which the sole ground for review is the challenging of such finding.
5. In proceedings for the execution of a European Arrest Warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand or speak the language of the proceedings, with interpretation in accordance with this Article.

Article 3

Right to translation of essential documents

1. Member States shall ensure that a suspected or accused person who does not understand the language of the proceedings concerned is provided with a translation, into his/her mother tongue or into another language that he/she understands, of all documents which are essential in order to safeguard his/her rights to fair proceedings, or at least the important passages of such documents, provided that the person concerned has the right of access to the documents concerned under national law.

2. The competent authorities shall decide which are the essential documents to be translated under paragraph 1. The essential documents to be translated, in whole or the important passages thereof, shall include at least detention orders or equivalent decisions depriving the person of his/her liberty, the charge/indictment and any judgment, where such documents exist.
3. The suspected or accused person, or his/her legal counsel, may submit a reasoned request for translation of further documents which are necessary for the effective exercise of the right of defence.
4. Member States shall ensure that at a stage in the proceedings, in accordance with national law, there is the possibility of a review if translation of a document referred to in paragraphs 2 and 3 is not provided. Such review does not entail the obligation for Member States to provide for a separate mechanism in which the sole ground for review is the challenging of such finding.
5. In proceedings for the execution of a European Arrest Warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European Arrest Warrant is drawn up, or into which it has been translated by the issuing Member State, with a translation of that document.
6. Provided that this does not affect the fairness of the proceedings, an oral translation or an oral summary of the documents referred to in this Article may, where appropriate, be provided instead of a written translation.
7. A person who has a right under this Article to translation of documents may, at any time, waive this right.

Article 4

Costs of interpretation and translation

Member States shall cover the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Article 5

Quality of the interpretation and translation

Member States shall take concrete measures to ensure that the interpretation and translation provided shall be of adequate quality so that the suspected or accused person, as well as a person subject to the execution of a European Arrest Warrant, is fully able to exercise his or her rights.

Article 6

Non-regression clause

Nothing in this Framework Decision shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, under other relevant provisions of international law or under the laws of any Member States which provide a higher level of protection.

Article 7

Implementation

Member States shall take the necessary measures to comply with the provisions of this Framework Decision by at the latest ³¹.

By the same date Member States shall transmit to the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

Article 8

Report

The Commission shall, by ³², submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.

Article 9

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, [...]

For the Council

The President

³¹ 30 months after publication of this Framework Decision in the *Official Journal*.

³² 42 months after publication of this Framework Decision in the *Official Journal*.

Draft
Resolution of the Council and of the Governments of the
Member States meeting within the Council
fostering the implementation by Member States of the right to interpretation and to
translation in criminal proceedings

THE COUNCIL OF THE EUROPEAN UNION AND THE GOVERNMENTS OF THE
MEMBER STATES MEETING WITHIN THE COUNCIL,

Whereas:

Council Framework Decision 2009/XXX/JHA on the right to interpretation and to translation in criminal proceedings sets out certain requirements regarding the rights, for persons suspected or accused of a criminal offence and for persons subject to proceedings for the execution of a European Arrest Warrant, who do not understand or speak the language of the proceedings, to be assisted by an interpreter and to receive translations of essential documents.

While fully respecting the national budgetary procedures, guidelines should be given to Member States with a view to promoting the effective implementation of these rights,

HAVE ADOPTED THIS RESOLUTION:

Scope and objectives

- (1) This Resolution aims to foster the rights set out in Framework Decision 2009/XXX/JHA on the right to interpretation and to translation in criminal proceedings.
- (2) Building further on the principles laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Member States, while ensuring implementation of Framework Decision 2009/XXX/JHA, are encouraged to promote actively the measures set out below.
- (3) The aim of the measures taken should be to develop suitable, effective practice in the Member States for interpretation and translation in the course of criminal proceedings. The measures set out below also apply to interpretation and translation provided by the executing Member State in proceedings for the execution of a European Arrest Warrant.

Measures

Representation of professionals

- (4) Representatives of the interpreters' and translators' professions should be invited to be involved, where appropriate, in the practical implementation of the measures set out below, as well as in achieving the objectives of this Resolution.

Qualification

- (5) Member States should strive for a high level of qualification for interpreters and translators employed in criminal proceedings for the purpose of having an adequate standard of interpretation and translation in order to ensure the fairness of proceedings. In addition to general language skills, these translators and interpreters should have specialist knowledge of legal terminology.
- (6) Interpreters and translators should be encouraged to develop their professional skills through continuous training and professional development.

- (7) The qualification of interpreters and translators employed in criminal proceedings should be verified by a formal degree or any similar proof of proficiency, for example through accreditation or certification, in the language concerned.
- (8) Member States should strive for a high level of qualification for interpreters assisting suspected or accused persons with a hearing impediment.
- (9) It should be verified that interpreters and translators employed in criminal proceedings are persons of integrity.

Training

- (10) Without prejudice to judicial independence or different judicial organisations in the European Union, Member States should encourage those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to give special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Registration

- (11) Member States should ensure that there is a national register, or registers, of qualified interpreters and translators to be employed in criminal proceedings.
- (12) The register or registers should be kept up to date so as to reflect, *inter alia*, the status of the interpreter's or translator's qualifications, without prejudice to the application of rules on the protection of individuals with regard to the processing of personal data.
- (13) Member States are encouraged to make their national registers accessible to competent authorities of other Member States.

- (14) In this context, particular attention should be paid to the aim of facilitating the interconnection of databases for legal translators and interpreters, as envisaged in the European e-Justice action plan of 27 November 2008.

Engagement of registered interpreters and translators

- (15) Member States should ensure that, insofar as possible, only registered interpreters and translators are employed in criminal proceedings. The services of a non-registered interpreter or translator should be used only if it is not reasonably possible to employ a registered interpreter or translator. In such cases, the competent authorities should pay particular attention to the quality of the interpretation or translation.

Remote access to interpretation

- (16) In situations where it is appropriate, distance interpretation could be provided, for example by using multiple-party telephone calls or videoconferencing facilities.

Codes of Conduct and Guidelines on Best Practice

- (17) The adoption of Codes of Conduct, as well as Guidelines on Best Practice, for interpreters and translators, should be encouraged. These should include provisions on, *inter alia*, professional integrity and confidentiality.
- (18) In order to ensure that the quality of the service provided in criminal proceedings by interpreters and translators keeps on improving, Member States should regularly exchange information about experiences and practices in this field. The Commission is invited to organise regular consultations among Member States and representatives of the professional bodies engaged in interpretation and translation, in order to facilitate the exchange of experiences outlined above.
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Annex B

suspect's copy/custody record copy
Notification of Rights in the [insert language] language

You, [insert name], are a suspected person in connection with [X criminal offence].

A. Notification of rights pursuant to Council Framework Decision .../.../JAI of ...

European Union law requires all Member States of the Union to guarantee common minimum standards in respect of certain rights. These rights are listed below, together with the national rules which apply these rights and in some cases guarantee additional protection.

1. **Legal advice** [See footnote³³]
2. **Right to an interpreter** [See footnote]
3. **Right to translations of relevant documents** [See footnote]
4. **Specific attention** [See footnote]
5. **Communication** [See footnote]

B. Other rights

The following rights are guaranteed to you under the national law of the Member State where you are.

[This section is for other rights than those set out in Box A. Member States should insert their own text in this section]

Signed: the custody officer
..... arrested person

date:

This letter is produced in duplicate, one copy is to be given to the suspect and one copy kept in the custody record.

³³ Member States should insert their own text covering the provisions of their national law on this right, including the provisions implementing the common minimum standard under the Framework Decision and any provisions going beyond that minimum standard.