

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.7.2009
COM(2009) 338 final

2009/0101 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on the right to interpretation and to translation in criminal proceedings

{SEC(2009) 915}
{SEC(2009) 916}

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1. This proposal for a Council Framework Decision aims to set common minimum standards as regards the right to interpretation and translation in criminal proceedings throughout the European Union. The proposal is envisaged as a first step in a series of measures designed to replace the Commission's 2004 proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union - COM(2004) 328, 28.4.2004 - which is withdrawn after due notification to the Council and the European Parliament. Agreement could not be reached on that proposal, despite 3 years' discussions in the Council Working Group, and it was effectively abandoned in June 2007, after a fruitless discussion in the Justice Council. Adopting a step-by-step approach is now seen as a generally acceptable way to proceed; it will also gradually help build confidence and contribute to enhancing mutual trust. This proposal should therefore be considered as part of a comprehensive package of legislation which will seek to provide a minimum set of procedural rights in criminal proceedings in the European Union. Rights covered in the 2004 proposal were, besides the right to free interpretation and translation, the right to legal advice, the right to information about rights (Letter of Rights), the right to specific attention for vulnerable defendants, the right to communicate with consular authorities and the right to communicate with the family. For this proposal, the Commission has decided to concentrate on the right to interpretation and translation as it was the least controversial right in the discussions of the 2004 proposal and there was information and research available on this right.
2. This proposal seeks to improve the rights of suspects who do not understand and speak the language of the proceedings. Having common minimum standards in relation to these rights should facilitate the application of the principle of mutual recognition.
3. As regards the legal basis, the proposal is based on Article 31(1) of the Treaty on European Union. Article 31(1)(c) envisages that the EU may develop "common action" so as to ensure compatibility in rules where necessary to improve cooperation. For judicial cooperation, in particular mutual recognition, it is necessary to have mutual trust. A certain degree of compatibility is necessary to improve mutual trust and hence, co-operation.
4. The right to interpretation and translation, which stems from the European Convention on Human Rights (ECHR), is fundamental for a person facing a criminal charge who does not understand the language of the proceedings so that the suspect knows the charges against him and understands the procedure. The suspect must be in a position to understand of what he is accused. Translations should be provided of essential procedural documents. In accordance with the ECHR, interpretation and translation must be provided free of charge.
5. Impact Assessment

The proposal was subject to an Impact Assessment which is contained in document SEC(2009) 915. The Impact Assessment was examined, and subsequently approved, by the Impact Assessment Board on 27 May 2009. The Board's recommendations and how these were accommodated can be found at paragraph 25 of the Impact Assessment (http://ec.europa.eu/governance/impact/practice_en.htm). The options set out were as follows:

(a) Maintaining the status quo would entail no EU action. The current situation whereby Member States are expected to comply with their ECHR obligations could be expected to continue as now with the perceived imbalance between prosecution and the accused which has hitherto hampered mutual recognition. This would have negligible economic consequences.

(b) Non-legislative measures such as recommendations would encourage exchanges between Member States and help to identify best practice. This option would lead to better awareness of ECHR standards by disseminating and recommending practices which help compliance. It would not achieve further approximation of legal standards.

(c) New instrument covering all rights along the lines of the 2004 proposal. Its implementation by Member States, monitoring by the Commission and ultimate recourse to the ECJ would help overcome differences in compliance with the ECHR and promote mutual trust. The economic impact would be twofold, first the cost of putting services in place to ensure rights are respected, and second, the gain in reduced costs of appeals.

(d) A measure restricted to cross-border cases would constitute a first step. It would need careful consideration so that any potential issue of discrimination between categories of suspects involved in cross-border versus domestic proceedings is addressed appropriately. As with the previous option, the economic impact would be twofold, first the cost of putting services in place to ensure rights are respected, and second, the gain in reduced costs of appeals, but to a lesser extent than above since it is less ambitious in scope.

(e) A step-by-step approach, beginning with measures on access to interpretation and translation, involving a new Framework Decision requiring Member States to provide minimum standards only for access to interpretation and translation is the favoured option. The economic impact would be twofold, first the cost of putting services in place to ensure rights are respected, and second, the gain in reduced costs of appeals.

The Impact Assessment identified the combination of options (b) and (e) as the preferred approach maximising synergies between legislative and non-legislative action. Therefore this Framework Decision should be followed up by a document on best practice.

2. BACKGROUND

6. Article 6 of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to Member States. Moreover, in December 2000, the European Parliament, the Council and Commission jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union.
7. The Presidency Conclusions of the Tampere European Council¹ stated that mutual recognition should become the cornerstone of judicial cooperation, but makes the point that mutual recognition "...and the necessary approximation of legislation would facilitate [...] the judicial protection of individual rights"².

¹ 15 and 16 October 1999.

² Conclusion 33.

8. The Commission Communication to the Council and the European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters³ stated that “it must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process”.
9. This was endorsed in the Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters⁴ ("Programme of Measures"), adopted by the Council and the Commission. It pointed out that “mutual recognition is very much dependent on a number of parameters which determine its effectiveness”.
10. These parameters include mechanisms for safeguarding the rights of suspects (parameter 3) and the definition of common minimum standards necessary to facilitate application of the principle of mutual recognition (parameter 4). This proposal for a Framework Decision represents an embodiment of the stated aim of enhancing the protection of individual rights.

3. THE RIGHT TO TRANSLATION AND INTERPRETATION AS ESTABLISHED UNDER THE ECHR

11. Article 5 ECHR – Right to liberty and security - stipulates that:

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...)

(f) the lawful arrest or detention of a person ...with a view to ...extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

(...)

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

And Article 6 – Right to a fair trial – stipulates that:

"(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(...)

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

³ COM(2000) 495, 29.7.2000.

⁴ OJ C 12, 15.1.2001, p. 10.

The Charter of Fundamental Rights of the European Union reflects these rights in its Articles 6 and 47 to 50.

12. The European Court of Human Rights (ECtHR) has held on Article 6 ECHR that the accused has the right to interpretation free of charge, even in the event of his conviction, that he has a right to receive the documents setting out the charge in a language that he understands, that the interpretation must be sufficient to allow the person charged to understand the proceedings and that the interpreter must be competent. That the accused has the right to interpretation free of charge, even in the event of his conviction was established in *Luedicke, Belkacem and Koç v. Germany*⁵. In *Kamasinski v. Austria*⁶, it was established that the interpretation provided should be of a high enough standard to enable the defendant to have knowledge of the case against him and to defend himself. The right applies to documentary material and the pre-trial proceedings. The ECtHR held that the standard of interpretation must be "adequate" and that details of the charge must be given to the person in a language that he understands (*Brozicek v. Italy*⁷). It is for the judicial authorities to prove that the defendant speaks the language of the court adequately and not for the defendant to prove he does not⁸. The interpreter must be competent and the judge must safeguard the fairness of the proceedings (*Cuscani v. UK*⁹).

4. SPECIFIC PROVISIONS

13. The proposal for a draft Framework Decision sets out basic obligations and builds on the ECHR and the case-law of the ECtHR. The Reflection Forum on Multilingualism and Interpreter Training¹⁰ produced a report with recommendations on the quality of interpretation and translation. This Report was the fruit of meetings of the Reflection Forum convened by the Commission's Directorate-General for Interpretation during 2008 to identify whether there is a need for action and if so, what action could be taken. The Forum concluded that there was a need and set out Recommendations as to how to improve the provision of competent and qualified interpreters in criminal proceedings. The Recommendations included having a Curriculum in Legal Interpreting and a system of accreditation, certification and registration for legal interpreters.

Article 1 - Scope of application

14. The scope covers all persons suspected in respect of a criminal offence until final conviction (including any appeal). Here, the term "suspect" is used to cover such persons.

⁵ 28 November 1978, *Series A N° 29*. "46. The Court thus finds that the ordinary meaning of the term [...] "free" in Article 6 para. 3(e) [...] is confirmed by the object and purpose of Article 6. The Court concludes that the right protected by Article 6 para. 3(e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred."

⁶ 19 December 1989, *A Series N° 168*.

⁷ 19 December 1989, (10964/84) [1989] ECHR 23.

⁸ "41[...] the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6 § 3 (a) (art. 6-3-a), unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him. No such evidence appears from the documents in the file or the statements of the witnesses heard on 23 April 1989. On this point there has therefore been a violation of Article 6 § 3 (a) (art. 6-3-a)."

⁹ 24 September 2002 - No.3277/96.

¹⁰ http://ec.europa.eu/commission_barroso/orban/docs/FinalL_Reflection_Forum_Report_en.pdf

This is intended as an autonomous term, irrespective of the designation of such persons in national proceedings.

15. Since the case-law of the ECtHR has clarified that persons being questioned in relation to offences, whether or not formally charged, should be covered by Article 6 ECHR, persons arrested or detained in connection with a criminal charge also come within the ambit of this provision. These rights start to apply from the time when the person is informed that he is suspected of having committed an offence (e.g. on arrest or when the suspected person is no longer free to leave police custody).

The Article clarifies that the proposal also applies to European Arrest Warrant cases. It is an important point that European Arrest Warrant cases are covered since the Framework Decision concerning the European Arrest Warrant only addresses these rights in general terms. In this respect, the proposal is a further development of Article 5 ECHR.

Article 2 - The right to interpretation

16. This Article lays down the basic principle that interpretation should be provided during the investigative and judicial phases of the proceedings, i.e. during police questioning, at trial and at any interim hearings or appeals. The right is also extended to legal advice given to the suspect if his lawyer speaks a language that he does not understand.

Article 3 - The right to translation of essential documents

17. The suspect has the right to translation of essential documents in order to safeguard the fairness of the proceedings. In *Kamasinski v. Austria*¹¹, the ECtHR stated that the right to interpretation applied to "documentary material" and that the accused should have sufficient knowledge of the case against him to enable him to defend himself¹². The essential documents for the criminal proceedings should therefore include the charge sheet or indictment and any relevant documentary material such as key witness statements needed in order to understand "in detail, the nature and cause of the accusation against him" in accordance with Article 6(3)(a) of the ECHR. Translation should also be provided of any detention order or order depriving the person of his liberty and the judgment, which is necessary for the person to exercise his right of appeal (ECHR Protocol 7, Article 2).

In respect of proceedings for the execution of a European Arrest Warrant, the European Arrest Warrant should be translated.

¹¹ 19 December 1989, A Series N° 168.

¹² "74. The right [...] to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Paragraph 3 (e) (art. 6-3-e) signifies that a person "charged with a criminal offence" who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial. [...] However, paragraph 3 (e) (art. 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. 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. In view of the need for the right guaranteed by paragraph 3 (e) (art. 6-3-e) 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 the Artico judgment)."

Article 4 - Member States to meet the costs of interpretation and translation

18. This Article provides that the costs of interpretation and translation are to be met by the Member State. That the accused has the right to interpretation free of charge, even in the event of his conviction was established in *Luedicke, Belkacem and Koç v. Germany*¹³.

Article 5 - Quality of the interpretation and translation

19. This Article sets out the basic requirement to safeguard the quality of interpretation and translation. Recommendations in this respect can be found in the Report of the Reflection Forum on Multilingualism and Interpreter Training¹⁴.

Article 6 - Non-regression clause

20. The purpose of this Article is to ensure that setting common minimum standards in accordance with this Framework Decision does not have the effect of lowering standards in certain Member States and that the standards set in the ECHR are maintained. Member States remain entirely at liberty to set standards higher than those agreed in this Framework Decision.

Article 7 – Implementation

21. This Article requires that Member States must implement the Framework Decision by **x**/**xx**/20**xx** and, by the same date, send the text of the provisions transposing it into national law to the Council and the Commission.

Article 8 – Report

22. **XX** months after implementation, the Commission must 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

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

5. SUBSIDIARITY PRINCIPLE

24. The objective of the proposal cannot be sufficiently achieved by Member States alone, since the aim of the proposal is to promote trust between them and it is therefore important to agree on a common minimum standard that applies throughout the whole of the European Union. The proposal will approximate Member States' substantive procedural

¹³ “46.The Court thus finds that the ordinary meaning of the term [...] “free” in Article 6 para. 3(e) [...] is confirmed by the object and purpose of Article 6. The Court concludes that the right protected by Article 6 para. 3(e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.”

¹⁴ See footnote 10 above.

rules in respect of interpretation and translation in criminal proceedings in order to build mutual trust. The proposal therefore complies with the subsidiarity principle.

6. PROPORTIONALITY PRINCIPLE

25. The proposal complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose.

Proposal for a

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 Article 31(1)(c) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (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 matters¹⁵. 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".
- (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"¹⁶ 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 partner's rules, but also trust that these rules are correctly applied"¹⁷.

¹⁵ OJ C 12, 15.1.2001, p. 10.

¹⁶ OJ C 12, 15.1.2001, p. 10.

¹⁷ COM(2000) 495, 26.7.2000, p. 4.

- (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.
- (8) The right to interpretation and translation for those who do not understand the language of the proceedings are enshrined in Articles 5 and 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.
- (9) The provisions of this Framework Decision should ensure that the rights of the suspect who does not speak and understand the language of the proceedings to understand the accusations brought against him and to understand the proceedings in order to be able to exercise his rights are protected by providing free and accurate linguistic assistance. This assistance should be extended, if necessary, to relations between the suspect and his defence counsel.
- (10) Appropriate assistance should be provided also to suspects suffering from hearing or speech impediments.
- (11) The duty of care towards suspects unable to understand or follow the proceedings underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that suspects in a potentially weak position are able to exercise effectively their rights. Those authorities should be aware of any potential vulnerability and take appropriate steps to ensure these rights. This should always be the case where a suspect is a minor or suffers from disabilities which impair his active participation in proceedings.
- (12) Member States should be under a duty to provide training to judges, lawyers and other relevant court personnel in order to ensure the quality of the interpretation and translation.
- (13) 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.

- (14) 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 informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until the conclusion of the proceedings (the “suspect”).

Article 2

The right to interpretation

1. Member States shall ensure that a suspect who does not understand and speak the language of the criminal proceedings concerned is provided with interpretation, in order to safeguard the fairness of the criminal proceedings. Interpretation shall be provided during those proceedings before investigative and judicial authorities, including during police questioning, during all necessary meetings between the suspect and his lawyer, during all court hearings and during any necessary interim hearings.
2. Member States shall ensure that, where necessary, legal advice received throughout the criminal proceedings is interpreted for the suspect.
3. Member States shall ensure that a procedure is in place to ascertain whether the suspect understands and speaks the language of the criminal proceedings.
4. Member States shall ensure that there is a right of appeal against a decision finding that there is no need for interpretation.
5. The right to interpretation includes assistance of persons with hearing or speech impediments.
6. With regard to proceedings for the execution of a European Arrest Warrant, Member States shall ensure that any person subject to such proceedings who does not understand and speak the language of the proceedings shall be provided with interpretation during those proceedings.

Article 3

The right to translation of essential documents

1. Member States shall ensure that a suspect who does not understand the language of the criminal proceedings concerned is provided with translations of all essential documents in order to safeguard the fairness of the criminal proceedings.
2. The essential documents to be translated shall include the detention order depriving the person of his liberty, the charge/indictment, essential documentary evidence and the judgment.
3. The suspect or his lawyer may submit a reasoned request for translation of further documents, including written legal advice from the suspect's lawyer.
4. Member States shall ensure that there is a right of appeal against a decision to refuse translation of any documents referred to in paragraph 2.
5. With regard to proceedings for the execution of a European Arrest Warrant, Member States shall ensure that any person subject to such proceedings who does not understand the language in which the European Arrest Warrant is drawn up, shall be provided with a translation of the said document.

Article 4

Member States to meet the costs of interpretation and translation

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

Article 5

Quality of the interpretation and translation

1. Interpretation and translation shall be provided in such a way as to ensure that the suspect is fully able to exercise his rights.
2. Member States shall offer training to judges, lawyers and other relevant court personnel in order to ensure the suspect's ability to understand the proceedings.

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 or 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 latest¹⁸.

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, by¹⁹, 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

¹⁸ 24 months after publication of this Framework Decision in the *Official Journal*.

¹⁹ 36 months after publication of this Framework Decision in the *Official Journal*.