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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.7.2009  
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**COMMISSION STAFF WORKING DOCUMENT**

*Accompanying the*

Proposal for a

**COUNCIL FRAMEWORK DECISION**

**on the right to interpretation and to translation in criminal proceedings**

**SUMMARY OF THE IMPACT ASSESSMENT**

{COM(2009) 338 final}  
{SEC(2009) 915}

# COMMISSION STAFF WORKING DOCUMENT

## EXECUTIVE SUMMARY

### **1. BACKGROUND**

The right of accused persons and suspects to a fair trial is a fundamental right which the European Union respects as a general principle under Article 6(2) TEU. Legal practitioners and Member States (MS) agree that a prerequisite for mutual trust is that MS' national criminal justice systems guarantee suspects and accused persons, whatever their nationality, minimum safeguards. Action in this area was a priority under the Hague Programme. A new proposal is envisaged by the Commission's Legislative Work Programme for 2009. The impact assessment evaluates the options for this proposal.

### **2. POLITICAL MANDATE, LEGAL BASIS AND CONSULTATION OF INTERESTED PARTIES.**

The rights of the defence were explicitly mentioned in the Tampere Conclusions and have always been an integral part of the EU's mutual recognition agenda. Many instruments have been adopted to facilitate and expedite investigation and prosecution of cross border cases. Yet, to date no instrument exists to improve the legal position of those subject to cross-border proceedings. This lack of balance has a negative impact on mutual trust among the MS, which in turn calls for action by the EU.

Following a 2003 Green Paper on procedural safeguards, Commission adopted a proposal for a Framework Decision on the matter in April 2004. Agreement could not be reached and the text was shelved. The Commission's proposal was based on Article 31(1)(c) TEU. The Legal Service of the Council issued an opinion which confirmed that that was the appropriate legal base.

The Commission hosted an experts' meeting on 26/27 March 2009. Most responses favoured legislative action, to be accompanied by non-legislative measures. The overwhelming majority of participants opposed limiting the proposal to cross border cases. The IA was discussed in two Inter-Service Steering Group Meetings. In preparing this Impact Assessment, the Commission has drawn from a number of additional sources of information including 5 studies.

### **3. PROBLEM DEFINITION**

The problem, which has various legal and social aspects, can be summarised as follows:

- Increased movement within the EU, outdated provisions and inconsistent application of existing international standards (ECHR) at MS level.
- Arrests leading to transfers under the EAW are considered to fall outside the scope of Article 6 ECHR, because this is deemed to be an extradition.
- Mutual Recognition can only work effectively if MS are convinced that judicial decisions are taken fairly in other MS.

- There is a perception among citizens and practitioners that justice systems in MS other than their own are unfair and that they cannot obtain remedy at international level as the European Court of Human Rights (ECtHR) is swamped with complaints.
- An aspect of this problem is the fact that the accused is not guaranteed access to appropriate translation and interpretation services.

#### **4. THE NEED FOR EU ACTION**

A ULB study found that the efficiency of mutual recognition measures was hampered by inadequate levels of mutual trust. Without appropriate standards to protect the rights of suspects to understand proceedings there is a risk that the previously identified imbalance between prosecution and the accused could be further aggravated and ultimately run contrary to the interests of justice in the EU.

To date, the MS have complied to differing degrees with their fair trial obligations, deriving principally from national law and the ECHR, which has led to discrepancies in the levels of safeguards. The EU by way of legislation could clarify the legal obligation to guarantee the right to a fair trial in the context of EU criminal law.

#### **5. OBJECTIVES**

The general objective is to increase mutual trust to allow better application of mutual recognition. Through increased mutual trust, existing EU mutual recognition instruments can be expected to work better.

The general objective can be translated into the following specific objectives:

- 1) to provide common minimum standards for procedural rights in all proceedings, including extradition and the EAW;
- 2) to ensure that citizens are informed of how they can benefit from these common minimum standards wherever they are within the EU.

#### **6. POLICY OPTIONS**

##### **1: Status quo**

If no EU action is taken, the situation could be expected to evolve as set out in Section 4. This option is based on the assumption that MS are expected to comply with the ECHR and provide minimum safeguards in domestic legal proceedings.

##### **2: Promotion of non-legislative measures (best practice)**

Measures would be taken to exchange national best practice and develop EU guidelines. This option would seek better awareness of ECHR standards by disseminating and recommending practices which help compliance with the ECHR. It would not achieve further approximation of legal standards.

##### **3: New instrument covering all rights**

For this option to succeed, a new treaty with an explicit legal base and a different (ordinary community law) legislative procedure would be required. If legislation is successfully adopted, its subsequent implementation by MS, monitoring by the Commission and ultimate recourse to the ECJ will help overcome the differences in compliance with the ECHR. Practical measures may be necessary to enhance mutual trust in practice.

#### **4: A measure restricted to cross-border cases**

This option would clearly constitute a first step only but, if successful, it would contribute to enhancing mutual trust and help overcome resistance to further legislation. However, 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.

#### **5: Step-by-step approach beginning with measures on access to interpretation and translation**

This would involve a new FD requiring MS to provide minimum standards only for access to interpretation and translation. The rights should apply to any person suspected or accused of having committed a criminal offence from the time when he is informed by the competent authorities that he is suspected of having committed a criminal offence until finally judged. This option could vary in its scope and provide for these 2 rights to apply either in (a) cross-border cases only or (b) all cases.

### **7. ANALYSIS OF IMPACTS OF POLICY OPTIONS**

#### **1 Status quo**

Lack of EU action in this area may ultimately contribute to slowing down the progress achieved in the area of judicial cooperation in criminal matters and thus the construction of a common area of freedom, security and justice.

#### **2 Best practice**

Positive impacts: recommendations for best practice could result in some improvements if MS chose to follow the recommendations. Negative impacts: much of this proposal echo what the Council of Europe includes in Recommendations and what other experts have advised, but which has not been carried out. This option may also disappoint the EP, stakeholders and a number of MS who want a binding instrument.

#### **3 New instrument covering all rights**

Positive Impacts: a FD of this sort would increase the level of legal certainty among MS. It would be a binding instrument improving compliance with ECHR standards to ensure a fair trial. However tackling rights together as part of a package means that there is less time to devote to each right and that watering down occurs with trade-offs. If the Lisbon Treaty comes into force, unanimity will no longer be required.

#### **4 Cross border cases only**

There is no established definition of a "cross border" case. There is reluctance on the part of MS to define a cross border case or to adopt legislation which necessitates a definition.

The economic impact of this option would be twofold: (1) the cost of putting services in place to provide rights and (2) the gain in reduced costs of appeals. The possible risk of this option could be a reduction in mutual trust since the impression could be given that there is a two-tier system of justice – one for national cases and one for cross border. Positive impact: this would satisfy the MS that have been asking for a measure limited to cross border cases. Negative impact: a measure which attempted to restrict its scope could lead to confusion since the same case can be described or classified as cross-border or as domestic by different MS. Compliance: MS could have difficulty in practice in classifying cases so mistakes/disputes would occur naturally.

## **5 Step-by-step approach**

The economic impacts of this option would be twofold as above for the cross border option. Positive impacts: a measure of this type would result in an improvement in the quality and provision of interpretation and translation. It would contribute to the development of mutual trust. It would ensure a fair trial in cases where the suspect does not understand the criminal proceedings, his rights or the full charges against him. Negative impacts: it would place a financial and administrative burden on MS that currently do not offer training to legal interpreters and translators. Evaluation/monitoring of compliance would be required which would also be burdensome.

Experts at the March 2009 experts' meeting, including MS delegates, greeted with enthusiasm the suggestion of working on this right alone as a starting point. In March 2009 a Report was published by DG Interpretation: the Final Report of the Reflection Forum on Multilingualism and Interpreter Training. The Recommendations could contribute to a future document on best practice.

## 8. COMPARING THE OPTIONS

+++ Indicates high positive impact

0 Indicates zero impact

--- Indicates high negative impact

Option	Effectiveness against the objectives and coherence with other EU policies in place		Impact on society and fundamental rights	Efficiency	Political feasibility
	Provide minimum standards for procedural rights in criminal proceedings	Ensure citizens are informed of how they can benefit from minimum standards			
1. Status Quo – no further action at EU level	0 None of the objectives would be met without any EU action		0 Continuing imbalance between rights and judicial cooperation may damage justice and mutual trust in EU.	0 No cost to MS	EP and most MS expect EU action.
2. Non-binding/non legislative measure setting out 'EU best practice'	+	++	+	-	All MS agree on need for some non-legislative measures. Experience suggests non-binding guidance will not be followed consistently.
3. Reintroduce 2004 instrument covering all rights	+++	+	+++	---	Would be rejected again by the 6 MS who opposed the proposal in 2006. Lisbon Treaty may enable

Option	Effectiveness against the objectives and coherence with other EU policies in place		Impact on society and fundamental rights	Efficiency	Political feasibility
	Provide minimum standards for procedural rights in criminal proceedings	Ensure citizens are informed of how they can benefit from minimum standards			
		not raise public awareness, but it would draw the attention of national media to more controversial elements.	for mutual trust across the EU. Perception of standards of justice could help encourage more citizens to exercise right to freedom of movement.	do not currently provide it.	current (2004) proposal to be passed by QMV with possibility for opt-outs.
4. Instrument on all rights but limited to cross-border cases	++ Would provide limited common standards but not for all citizens who are accused of an offence.	- Again, without flanking measures this would not raise public awareness. Attention of national media, possibly hostile to guaranteeing of rights for only those involved in cross-border cases, whose reports could be misleading.	- Accused persons would be guaranteed same rights wherever in EU they are arrested.  Risk of creation of 2 tiers of accused – those in cross border and those in domestic cases – leading to discrimination which may outweigh benefits.	-- Will depend on the proportion of cases which will be deemed 'cross-border' and will vary between MS – for which statistics are not available. But costs still expected to be high.	Definition of 'cross-border case' likely to be disputed, especially as it may lead to fundamental rights concerns of positive discrimination.  Unlikely to be any more acceptable than option 3.
5a. Framework Decision limited to the right to translation and interpretation in cross border cases only	+ Limited common standards in the area where considered to be most urgent but not for all citizens who are accused of an offence. Would demonstrate progress and incremental approach.	- As above, hostile media interest could be misleading.	- Accused persons would be guaranteed same rights to translation and interpretation wherever in EU they are arrested.  Risk of creation of 2 tiers of accused – those in cross border and those in domestic	- Costs will depend on the proportion of cases which will be deemed 'cross-border' and will vary between MS. Statistics are not available.	Most or all MS expected to support if definition of 'cross-border' agreed. It would meet the proportionality test, as action would not go beyond what is necessary to meet the objectives of the Treaty. It would also observe the subsidiarity principle, as it



Option	Effectiveness against the objectives and coherence with other EU policies in place		Impact on society and fundamental rights	Efficiency	Political feasibility
	Provide minimum standards for procedural rights in criminal proceedings	Ensure citizens are informed of how they can benefit from minimum standards			
			cases – leading to discrimination which may outweigh benefits.		would not interfere with purely domestic cases.
5b. Framework Decision limited to the right to translation and interpretation in all cases	++ Limited common standards in the area where considered to be most urgent.	0 Unlikely to have any effect on awareness without flanking measures.	+ Would provide greater equality of access to justice by enshrining the right to understand the charge and proceedings.	-- Large member state (source UK) cost of access to adequate interpretation estimated about €40m per year. Cost of translation varies according to the price scheme prevalent in individual member states.	Most MS would support action in this area.

Summary of the *step by step* option

Relevance to objectives	Impact on society and fundamental rights	Costs	Political feasibility and stakeholder views
Fully meets objectives if MS implement guidance	Limited common standards in the area where considered to be most urgent. Would demonstrate progress and incremental approach.	Costs will depend on the proportion of cases which will be deemed 'cross-border' and will vary between MS.  Cost of access to adequate interpretation for large MS (UK) is about €40m per year.	As above – most MS expect legislative action with flanking measures.

		<p>Cost of translation varies according to the price scheme prevalent in individual member states.</p> <p>Cost of flanking measures will depend on how implemented. Main cost will be training which could be borne by students. UK Govt provided grants of about €5000 to each college.</p>	
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## **9. THE STEP BY STEP APPROACH IN MORE DETAIL**

This option would enable a progressive, step-by-step approach would provide scope for a long term action plan for the progressive approximation of laws in the area of procedural rights. This approach would not be as dependent on the Lisbon Treaty as option 3.

This option would result in an improvement in the quality and provision of interpretation and translation, which would contribute to building mutual trust. It would ensure a fairer trial in cases where the suspect does not understand the proceedings, his rights or the full charges before him. The option would place an additional financial and administrative burden on MS that currently do not offer training to legal interpreters and translators.

Respect for the right to translation and interpretation is essential, but not sufficient, for mutual trust. It is, however, an essential right in that it enables exercising other rights, such as the right to legal aid or the right to receive information about one's own rights. Understanding the proceedings is a pre-condition for asserting one's other rights to a fair trial.

## **10. MONITORING AND EVALUATION**

Any Commission proposal would lay down an obligation for MS to communicate implementing legislation and a correlation table to the Commission within a specified time. The Commission would then prepare an implementation report recording which MS had complied with their obligations to transpose the FD. Indicators which can be used to assess compliance would be whether training courses were on offer, whether a register was in place and whether numbers of certified interpreters and translators could be provided. A Eurobarometer survey could be used to monitor improvement in public opinion's assessment of the fairness of justice in the EU.