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REFLECTION DOCUMENT FOR EXPERTS' MEETING TO BE HELD IN BRUSSELS ON 26 AND 27 MARCH 2009

PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS

The Commission is considering whether to table a proposal on procedural rights in criminal proceedings in 2009. The purpose of this experts' meeting is to consult experts and stakeholders in criminal justice systems in the Member States so as to take account of their views in the preparation of the proposal. This document outlines the issues for discussion and contains a section on questions. Participants should prepare replies to the questions to be given orally at the meeting. Written submissions may also be sent to Peter Csonka, Head of the Criminal Justice Unit, DG-JLS, European Commission (marked ref: CM).

1. INTRODUCTION

1.1. One of the essential components of mutual trust is that Member States' national criminal justice systems guarantee suspects and accused persons certain basic safeguards for fairness in criminal proceedings. This is all the more important in view of the commitment to mutual recognition as the primary form of judicial cooperation within the EU and in particular the context of the European Arrest Warrant whereby a Member State is expected to surrender its nationals for trial or to serve a custodial sentence in another Member State.

1.2. The Commission notes that although Member States support the principle of mutual recognition in criminal matters, a number of difficulties are encountered. The Commission therefore organised for a study to be carried out covering problems relating to the mutual recognition principle. The Justice Council expressed its support for this study at its informal meeting of 21/22 September 2006 in Tampere, Finland. The study was carried out by a research team based at the Université Libre de Bruxelles (ULB). The research team interviewed more than 150 experts and practitioners, including Ministry of Justice civil servants responsible for negotiation and transposition of mutual recognition instruments, judges, defence lawyers, liaison magistrates,

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: OR10 08/08. Telephone: direct line (32-2) 296.00.67. Fax: (32-2) 296.76.34.

prosecutors and others. The final report[1] was published on 20 November 2008. Amongst its findings were that so far, 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 working to implement this recommendation by launching a cross border legal aid project. 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 EJN website up to date and by adding new instruments and that defence lawyers should be given access to it.

1.3. The rights of the defence are not a new subject at EU level. They were explicitly mentioned in the Tampere Conclusions[2] and have always been an integral part of the EU's mutual recognition agenda. The introductory section of the 2001 Mutual Recognition Programme[3] points out that "*mutual recognition is very much dependent on a number of parameters which determine its effectiveness*". These parameters include "mechanisms for safeguarding the rights of [...] suspects" (parameter 3) and "the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition" (parameter 4). The Commission has acted so as to implement these parameters.

1.4. In February 2003, the Commission adopted a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union[4]. The Commission's approach was not to create new rights but to give a higher profile to the specific fair trial rights laid down in the

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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 Tampere Conclusion 30 invites the Council "to establish minimum standards ensuring an adequate level of legal aid in cross-border cases", Tampere Conclusion 31 refers to "multilingual forms or documents to be used in cross-border court cases" – the basis of Com's proposed "Letter of Rights". Tampere Conclusion 33 mentions facilitating "the judicial protection of individual rights". Tampere Conclusion 35 points out that the principle of a fair trial should not be prejudiced by fast track extradition procedures. Tampere Conclusion 40 seeks to develop measures against crime "while protecting the freedoms and legal rights of individuals".

3 OJ C12-15.01.2001

4 COM (2003) 75 of 19.02.2003

European Convention on Human Rights and other international conventions, in order to promote improved and unified compliance with that convention, and thus increase mutual trust. From the consultation exercise (*inter alia* Green Paper, experts' meetings and bi-lateral consultation of experts), it was clear that there was a high level of support for a Commission proposal in this area.

1.5. In 2004, the Commission adopted a proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union[5], focusing on "basic rights" identified in the Green Paper. The Commission relied on Article 31 (1) (c) TEU[6] as the legal basis.

1.6. The draft Framework Decision covered proposals in the following areas:

- access to legal representation, both before the trial and at trial, and legal aid for those who cannot afford to pay a lawyer,
- access to interpretation and translation,
- ensuring that vulnerable suspects and defendants were properly protected,
- consular assistance to foreign detainees,
- the right to communicate to a family member the fact of being in detention, and
- notifying suspects and defendants in writing of their rights in a document called the "Letter of Rights".

It also included a section on proposals for evaluation and monitoring of compliance.

Other rights, such as the right to silence, the presumption of innocence and a system for dealing with judgments rendered *in absentia*, were not included in

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5 COM(2004) 328 of 28.04.2004

6 *Art 31(1): "Common action on judicial cooperation in criminal matters shall include:*

(a)facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

(b) facilitating extradition between Member States;

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;

(d) preventing conflicts of jurisdiction between Member States;

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking."

the Commission's proposal, although they had been identified as priority areas for action in the Green Paper consultation[7].

1.7. Discussions in the DROIPEN Working Group started in September 2004 under Dutch Presidency. The 2005 Hague Programme instructed Member States to adopt a Framework Decision "by end December 2005". Most Member States supported the proposal, and indeed had declared themselves in favour of an EU instrument during the Green Paper consultation. However, some aspects of it were deemed unworkable by certain Member States. This included the evaluation and monitoring requirement which was deleted at an early stage. Other deletions included the obligation to record (by audio or video means) the interviews between the police and the suspect. The provisions on protection for vulnerable suspects, consular assistance and the right to communicate with a family member to inform them of the fact of being in detention were also subject to difficulties. Finally, a text, drawn up during the 2007 German Presidency and limited to 3 rights (legal advice, interpretation - and a limited right to translation of essential procedural documents and the right to information about rights, to be transmitted orally rather than through a Letter of Rights) was put to the June 2007 Justice Council (with variations, possibility of an opt-out, or an opt-in, a limited "cross-border" text). Agreement could not be reached and the text was shelved.

1.8. The Commission has not been inactive on this file since June 2007. In 2005, a Commission study, carried out by Maastricht University, was published showing to what standard procedural rights were applied in Member States[8] The study needed updating. In 2008, the Commission held an invitation to tender for an updating study which should be ready in May 2009. The updating study will consider each right and assess how well it is applied in each Member State. Maastricht and Ghent universities submitted a successful joint tender and are currently carrying out the updating study. Initial findings of the Maastricht/Ghent team will be discussed at the experts' meeting.

2. ISSUES THAT NEED ADDRESSING

2.1. Is EU legislation in this area necessary in view of Article 6 of the European Convention on Human Rights (ECHR)?

2.1.1. The ECHR, which was drawn up in 1950, was not designed with present day realities in mind, such as increased cross-border communication and travel, with the concomitant cross-border crime and judicial cooperation. It was not designed either for a judicial

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[7] COM issued a Green Paper on the Presumption of Innocence (COM (2006)174). A Framework Decision on *in absentia* judgments in mutual recognition cases was presented as a Member State initiative and a general agreement was reached on 6 June 2008.

[8] Taru Spronken and Marielle Attinger, *Procedural Rights in Criminal Proceedings: existing levels of safeguards in the European Union* http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/report_proc_safeguards_en.pdf

cooperation regime which will increasingly rely on mutual recognition (see 3.2 below).

2.1.2. The onus is on Member States to protect the rights of their nationals[9]. The case law of the European Court of Human Rights (ECtHR) shows that violations of rights set out in Article 6 ECHR occur in all Member States. It is difficult to assess how many breaches occur as so few actually end up before the ECtHR. There are two reasons for this. First, many potential applicants never submit an application. Second, the odds are stacked against the ECtHR applicant, not least because the Court is by its own admission "overloaded" and has been compelled to resort to mechanisms that serve to discourage and filter out applicants and therefore to reduce the chances of a successful application.

2.1.3. The ECtHR provides a remedy for violations after the event. What an EU instrument would do is oblige Member States to pass legislation in line with current ECHR standards so that rights would have a higher visibility and violations would be less likely to occur in the first place, and if they did, a remedy would exist at national level in all Member States. Additionally, it could provide a mechanism for referral of cases to the ECJ, something which would also serve to reduce the caseload of the ECtHR.

2.1.4. The European Arrest Warrant raises a specific problem. Extradition cases (and therefore by extension European Arrest Warrant cases) are excluded from the ambit of the ECHR and thus a person surrendered under a European Arrest Warrant who has not had the benefit of legal advice and/or interpretation in respect of the hearing in the executing State does not have a remedy at the ECtHR, but is left with the sole option of pursuing a domestic remedy in the country (and generally he no longer finds himself there since he has been surrendered to another country for the criminal proceedings proper). An EU instrument would extend rights to persons subject to a European Arrest Warrant (and could explicitly cover all mutual recognition instruments).

2.2. Mutual recognition and procedural rights

2.2.1. Mutual recognition presupposes mutual trust. It is clear from the 2001 Mutual Recognition Programme, and from the Tampere conclusions, that from the outset, a measure to promote mutual trust was envisaged. As seen in paragraph 1.3. above, the Preamble to the Programme explicitly refers to parameters or conditions for mutual trust to operate successfully, and these include "mechanisms for

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[9] Article 1 ECHR places responsibility to sanction breaches on national authorities: "*The High Contracting Parties shall ensure to everyone within their jurisdiction the rights and freedoms of this Convention*".

safeguarding the rights of [...] suspects" and "the definition of common minimum standards".

2.2.2. Ideally, there should be mutual trust not only between legal professionals who use the criminal justice system and who will be in touch with their counterparts in other Member States in the course of judicial cooperation or owing to their involvement in cross border cases, but also between ordinary citizens. Citizens' perceptions of the European Union should include the confidence that anywhere within the EU's territory, fairness prevails in criminal proceedings and that respect for established rights, such as those laid down in the ECHR, is the foundation of our common values.

2.2.3. The ULB study (see paragraph 1.2. above) provides up-to-date evidence of the need for common minimum standards. The ULB researchers found that the call for common minimum standards came from all legal professionals – judges and prosecutors as well as defence lawyers. Many Ministry of Justice officials also echoed this point.

2.2.4. Mutual recognition instruments operate in a specific way which involves reducing both the grounds for refusal and the time to execute requests. Both these characteristics, whilst facilitating speedy investigations and prosecutions, create risks that defence rights will not be fully respected. Ten Framework Decisions relating to the principle of recognition are now either in force, adopted and waiting to come into force or subject to a general agreement and awaiting adoption. An EU instrument laying down common minimum standards of procedural rights is needed so as to enhance confidence in other EU justice systems and to facilitate the application of these mutual recognition instruments. Professionals who work with judicial cooperation and mutual recognition instruments in their daily lives need to have the necessary confidence in the systems of other Member States from whom they are receiving requests for assistance in order to feel comfortable with using them.

2.3. Should an EU instrument on rights be limited to cross-border cases? Is there a legal basis for an instrument covering domestic cases as well as cross border ones?

2.3.1. The Commission relies upon Article 31 TEU as the legal basis for work in this area (see footnote 6). "Judicial cooperation" now and in the future will increasingly mean using a mutual recognition instrument. As discussed above, it is now widely recognised that an EU instrument on rights is an essential concomitant of mutual recognition.

2.3.2. In the discussions in the Council working group, some Member States raised the question whether Article 31 (c) TEU provided an adequate legal base. The Council Legal Service was asked for its

Opinion on the question; it gave a positive Opinion endorsing the Commission's approach[10]. However, some Member States argue that the TEU limits the potential scope of any EU instrument to cross border cases. The Commission does not share this view. The goal is to promote mutual trust. An instrument conferring rights on a limited category of suspects and defendants, namely those involved in cross border cases, would lead to a dual standard. This would have the opposite of the desired effect since certain accused persons would have more rights than others within a single Member State.

2.3.3. A further complication in using the limited, "cross-border", approach is how to define a cross-border case. There is no definition of a cross-border case, although various approaches exist. One way could be to refer to the mutual recognition instruments themselves and to say that a "cross-border" case is one in which a mutual recognition instrument is used. However, in some cases the need to use a mutual recognition instrument might arise only *after* the proceedings have taken place. A second way is by reference to the Eurojust decision[11] which gives the objectives of Eurojust as cooperation in *"investigations and prosecutions of [...] computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime, environmental crime, participation in a criminal organisation, in relation to serious crime, particularly when it is organised,* ***concerning two or more Member States".*** Eurojust's competences have now been broadened to include other offences such as terrorism. The Eurojust Decision approach is generally to limit its competence to serious offences, and to apply the somewhat vague notion of "concerning two or more Member States". A third, broader approach could be simply to say that a case is a cross-border one if any aspect of the case involves two or more Member States, including the foreign nationality of the accused (or even the victim for a very broad approach).

2.3.4. The Commission's position is that it is unwieldy and counterproductive to try to limit any EU instrument on procedural rights to cross-border cases. Article 31(c) TEU provides an adequate legal basis for a proposal covering domestic cases as well. It should be noted that Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, covers domestic as well as cross-border cases, and creates a precedent for using Article 31 as a legal basis for this type of harmonising measure.

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[10] Doc 12902/04

[11] Decision 2002/187/JHA

3. QUESTIONS:

Issue 1: Need

1. Is EU legislation in this area necessary?

2. If you are a practitioner, do you have experience of cases in which EU legislation of the sort proposed by the Commission would have assisted your client?

Issue 2: Mutual recognition:

1. The ULB report stressed that defence lawyers should be better organised to facilitate continuity in assistance and legal aid in cross-border cases. The Commission seeks input from participants as to how this might be achieved.

2. In your experience, does the absence of EU legislation in this area affect the application of mutual recognition instruments (only the European Arrest Warrant now, but others in future)?

Issue 3: Legal basis, cross-border v. domestic cases

1. Should EU legislation on procedural rights be limited to cross border cases?

2. If so, how should a "cross border case" be defined?