

Justice Freedom and Security

**Study on Procedural Rights in Criminal
Proceedings:
Existing Level of Safeguards
in the European Union – 2008 Update**

Draft Chapter 1

Four Fundamental Procedural Rights in Criminal Proceedings
throughout the European Union

February 2009

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1 Four Fundamental Procedural Rights in Criminal Proceedings throughout the European Union ¹

Background and introduction

Even though all EU Member States are party to the ECHR (the principal treaty setting out the basic standards for suspects' procedural rights in the EU), divergent practices have hitherto hindered mutual trust and confidence, the principles put forward by the 1999 Tampere Conclusions. In order to counter this obstacle identified by European Commission research, the Commission has held in its 2003 Green Paper on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU"² that the EU is justified in taking action in this field. Indeed, higher visibility and transparency would improve understanding on the part of all actors in the criminal justice systems in the Member States. The ideas in the 2004 "Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union"³, where reiterated in The Hague Programme, which states that "the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceeding, based on the studies of the existing level of safeguards in Member States and with due respect for their legal traditions".

The assessment of the levels of provisions of procedural rights at the time afforded to suspected persons in criminal proceedings throughout the EU, became subject of a study carried out by Taru Spronken and Marelle Attinger. The Final Report in this study analysing the data gathered by the European Commission through a questionnaire sent to the Ministries of Justice and Home Affairs in the Member States, was delivered on 12 December 2005.

Unfortunately – even though the 2004 Proposal did not aim to create new rights or to monitor compliance with those rights that already exist under the ECHR or other international or European instruments, but rather aimed to ensure a reasonable level of protection for suspects and defendants in criminal proceedings (such as the introduction of a letter of rights) in order to comply with the principle of mutual recognition – no political agreement has been reached on the matter, inter alia because of the argument of some Member States that the ECHR adequately protects the rights of suspects and accused persons in the EU.

¹ This text is a draft chapter, which may be subject to further changes and amendments, that will be inserted in the final report of the "Study on Procedural Rights: Existing Level of Safeguards in Member-States 2008 Update", being carried out by Maastricht University (Prof. dr. Taru N.B.M. Spronken, project coordinator, and Dr. Dorris de Vocht) in partnership with the Institute for International Research on Criminal Policy (IRCP) of Ghent University (Prof. dr. Gert Vermeulen and Laurens Van Puyenbroeck). The chapter is a revision and update of the first chapter of the study performed by T.N.B.M. Spronken and M. Attinger, *Procedural Rights in criminal proceedings: Existing Level of Safeguards in the European Union*, funded and published by the European Commission, 12 December 2005 <<http://arno.unimaas.nl/show.cgi?fid=3891>>.

² Green Paper from the Commission 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', Brussels, 19 February 2003, COM (2003) 75 final.

³ Proposal for a 'Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union', Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS).

In light of the provisions in the Lisbon Treaty and taking into account the expressed disappointment of Member States towards the Commission, this follow up research is carried out, to obtain up to date information on the same subject that can provide a lead for a new Proposal for a Council Framework Decision.

This chapter provides a comprehensive overview of four fundamental rights. Each subparagraph deals with one fundamental right.

1.1 Right to information

1.1.1 Situations giving rise to the right to information

The right to information is considered to be a crucial aspect of the overall right to defend oneself. At the level of the ECHR both arrested and not arrested persons are entitled to become information on the nature and cause of the accusation against them.⁴ Additionally, in case of an arrest, the reasons for his arrest become subject of the right to information.⁵

1.1.2 Timing

Both article 5,3 and 6,3, a) require information to be delivered promptly. No further specification is made. Similarly, the Proposed Framework Decision referred in its article 14.1 to an immediate right.

1.1.3 Means

The ECHR does not give any indication as to the means to be used to provide the information. The EC prefers written to oral information and thus has suggested in its 2003 Green Paper that Member States should be required to inform suspects and defendants by means of a 'Letter of Rights'⁶. Subsequently a similar provision is found in the 2004 Proposed FD.

1.1.4 Content

- *Accusations and charges*

Even though both articles 5 and 6 ECHR are fairly specific in the information they require, they are limited to factual information of the case, being reasons for the arrest and the nature and cause of

⁴ Article 5, 3 and Article 6,3,a ECHR.

⁵ Article 5,3 ECHR

⁶ Green Paper, section 8.1

the accusation and the respective legal bases⁷. Information should be provided in a language the defendant understands. The amount of information available for the suspect or accused, is strongly dependant on the nature and complexity of the case.

- *Procedural rights*

Regrettably, there is no special provision nor case law that the suspect should be notified immediately of the other defence rights enlisted in the charter (e.g. the right to examine or have examined witnesses, the right to interpretation and translation). According to the EC however, it is important for both the investigating authorities and the persons being investigated to be fully aware of what rights exist. A Letter of Rights in a language the suspect understands, does not create new rights but is an efficient way of informing suspects of their rights, which, according to the case law of the ECtHR, are not meant to be only theoretical but also to be effective in practice. Therefore article 14.3 of the Proposed Framework Decision required all Member States to “ensure that police stations keep the text of the written notification in all the official Community languages so as to be able to offer an arrested person a copy in a language he understands.”

- *Information on the investigation*

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 the right to have access to all elements that are useful to prepare the defence⁸, including information à décharge, found by the prosecuting party⁹. Nevertheless, the European Court has excepted the *Public Interest Immunity* for certain elements: the right to full disclosure was not absolute and could, in pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information, be subject to limitations.¹⁰ Any such restriction on the rights of the defence should, however, 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 should at all times be under assessment by the trial judge.¹¹

1.2 Right to legal advice

1.2.1 Seek legal advice or defend oneself

⁷ ECtHR 18 March 2008, *Ladent*, (nr. 11036/03), § 66; ECtHR 19 December 1960, *Ofner* (nr. 524/59), § 5.

⁸ ECtHR, 14 December 1981, *Jespers* (8403/78)

⁹ ECtHR, 16 December 1992, *Edwards* (13071/87), § 35-38

¹⁰ ECtHR, 16 February 2000, *Jasper* (27052/95) § 43;

¹¹ ECtHR, 16 February 2000, *Rowe and Davis* (28901/95), § 58.

According to the European Commission, the right to legal advice is a second key issue in procedural rights for suspects. A suspect who is represented by a lawyer is in a far better position as regards enforcement of all his other rights, partly because he is better informed of those rights and partly because a lawyer will assist him in ensuring that his rights are respected.¹² The right to legal assistance is covered by other European and international treaties and charters as well; for instance the ICCPR¹³, the Universal Declaration of Human Rights¹⁴, the Charter on Fundamental Rights in the European Union¹⁵, the American Convention on Human Rights¹⁶, The African Charter on Human Rights and Peoples Rights¹⁷ and the 1990 UN-resolution on 'Basic Principles on the Role of Lawyers'.¹⁸

In the explanatory note on the Proposed FD, criminal proceedings were defined as 'all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence or to decide on the outcome following a guilty plea in respect of a criminal charge'.¹⁹ Legal advice before answering any questions in relation to the charge, should protect the suspect against making statements without understanding the legal implications that he (or she) subsequently regrets.²⁰

The right to legal advice/assistance is covered by art. 6 (§3, b and c) ECHR. Article 6 (§3 b) stipulates the right of every suspect to have the necessary time and facilities at his disposal to prepare his defence properly. The duration of this "necessary time" is not specified as it is strongly dependant on the complexity of each individual case. However, assigning a new duty lawyer only a few hours before the start of the trial, clearly violates the right to have the necessary time to prepare a defence.²¹ According to Article 6, §3, c, the suspect has the right to choose either to defend himself (however he cannot be coerced into waiving his right to counsel)²², to be assisted by a lawyer of his own choosing (therefore the denial of legal assistance constitutes a violation²³, as does the failure to allow confidential communication²⁴), or to have a lawyer assigned to him in case he does not have the means to pay for a lawyer himself. Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in

¹² Green Paper, section 4.1.

¹³ Art. 14 (§3, b and d) ICCPR which covers almost the same as Art. 6 ECHR, adding the right to be informed of his right to legal assistance.

¹⁴ In Art. 11 of the Universal Declaration on Human Rights is determined that everyone being accused of having committed a crime, has the right to have all the guarantees necessary for his defence at his disposal.

¹⁵ Art. 47 CFREU (Right to an effective remedy and to a fair trial).

¹⁶ Art. 8 (§ 2, c – e) of the American Convention on Human Rights covers the same guarantees as Art. 6 ECHR, but adds the right 'to communicate freely and privately with his counsel'.

¹⁷ The African Charter on Human Rights and Peoples Rights also guarantees in Art. 7 (§ 1, c) the right to legal advice, including the right to be advised by a lawyer of his own choice.

¹⁸ In this respect the UN-resolution on 'Basic Principles on the Role of Lawyers' - adopted by the Eight Crime Congress, Havana, 7 September 1990, ratified by Resolution 45/121 of the General Assembly of the UN dated 14 December 1990 - is also of great importance. The ground rules of the rights and duties of lawyers are prescribed in this resolution, emphasising the obligation of the government to guarantee the independence of the legal profession. Freedom of speech and association and assembly of lawyers should be respected and governments have to recognise that the communication between lawyers and clients is confidential. The government also has to guarantee that lawyers have access to the file and information at the earliest possible stage in the proceedings.

¹⁹ Proposed FD, section 32.

²⁰ Proposed FD, section 55.

²¹ ECtHR 7 October 2008, *Bogumil*, (nr. 35228/03), § 48; ECtHR 9 Juni 1998, *Twalib*, Recueil/Reports, 1998.

²² ECtHR 12 June 2008, *Yaromenko*, (nr. 32092/02), § 81.

²³ ECtHR 22 July 2008, *Panasenko*, (nr. 10418/03), § 54; ECtHR 26 June 2008, *Shulepov* (15435/03), § 39;

²⁴ ECtHR 27 November 2007, *Zagaria*, (nr. 58295/00), § 36.

their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.²⁵

The right to seek legal representation does not constitute a waiver of the right to personal participation during the trial.

The guarantees laid down in Art. 6 (§3) ECHR are not an end in themselves, but must be interpreted in the light of their function in the overall context of the proceedings.²⁶

1.2.2 Obligation to provide legal assistance

Notwithstanding the fact that the suspect is entitled to defend himself, obligatory legal representation can be prescribed under certain circumstances, for example when an appeal is lodged.²⁷ Other circumstances, which are not mentioned in ECtHR case law in relation to obligatory legal advice, were cited in Art. 3 of the Proposed FD. The obligation to provide legal advice when the suspect is the subject of an European Arrest Warrant, extradition request or other surrender proceedings is an extension of existing provisions.

1.2.3 Effective legal advice

One of the basic obligations of a lawyer is to assist his client, not only in the preparation of the trial itself, but also in the control of the legality of any measures taken in the course of the investigation proceedings.²⁸ Additionally, this legal assistance has to be effective and the State is under the obligation to ensure that the lawyer has the information necessary to conduct a proper defence.²⁹ If legal representation is ineffective, the State is obliged to provide the suspect with another lawyer.³⁰

Yet the ECtHR has clearly held that the lawyer's conduct is essentially an affair between the lawyer and his client. This is an important recognition by the ECtHR of the independence of the lawyer.³¹ This independence is threatened when the State is held responsible for every lawyer's

²⁵ ECtHR 27 April 2006, *Sannino* (nr. 30961/03) § 48.

²⁶ ECtHR 12 July 1984, *Can* (B 79), § 48. "The court sees it as its task to ascertain whether the proceedings considered as a whole were fair", which is standard case law of the ECtHR, see for example ECtHR 20 November 1989, *Kostovski*, A 166, § 39 and ECtHR 16 December 1992, *Edwards* (A 247-B), § 34.

²⁷ ECtHR 24 November 1986, *Gillow* (A 109); ECtHR 25 September 1992, *Croissant* (A 237-B); ECtHR 14 January 2003, *Lagerblom* (no. 26891/95).

²⁸ ECtHR 12 July 1984, *Can* (B 79); ECtHR 4 March 2003, *Öcalan*, (no. 63486/00).

²⁹ ECtHR 9 April 1984, *Goddi* (A 76); ECtHR 4 March 2003, *Öcalan*, (no. 63486/00).

³⁰ ECtHR 13 May 1980, *Artico* (A 37).

³¹ ECtHR 24 November 1993, *Imbrioscia*, (A 275), § 41: "However that may be, the applicant did not at the outset have the necessary legal support, but 'a state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal purposes'. (...) Owing to the legal professions' independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Art. 6 (§3c) the contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention".

shortcomings. The suspect should not be burdened with the risk of ineffective legal representation. Therefore the ECtHR has held that 'States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention'.³² The suspect does not have to prove that he has been prejudiced due to lack of effective legal assistance³³, nor is it necessary that damages have arisen.³⁴

The suspect cannot be expected to assess the effectiveness of his legal representation himself; hence the need for Member States to introduce a monitoring system.³⁵ This last provision is not stipulated in the ECHR, although the right to effective legal assistance can be deduced from ECtHR case law.

1.2.4 Contact and Consultation

The right to legal representation – and thus to contact a legal advisor – arises immediately upon arrest, although a reasonable time is allowed for the lawyer to arrive.³⁶ With regard to the moment the right arises, the proposed Framework Decision had stipulated in its article 2 that "a suspected person had the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it."

No specification is made as to the circumstances in which consultation should be possible. The latter is not included *expressis verbis* in ECHR, but is considered to be a part of the right in article 6.³⁷ The ECtHR has elaborated on the consultation circumstances in its case law. It has ruled that fair trial was compromised when the consultation could only take place in the presence of a prison guard.³⁸ Nevertheless, certain security measures could be allowed if proven truly necessary.³⁹

1.2.5 Legal advice during police interrogation

The physical presence of a lawyer can provide the necessary counterbalance against pressure used by the police during interviews.⁴⁰ When the suspect has to make decisions during police

³² ECtHR 24 November 1993, *Imbrioscia* (A 275), § 41, ECtHR 10 October 2002, *Czekalla*, Recueil/Reports 2002, § 65; ECtHR 7 October 2008, *Bogumil*, (nr. 35228/03)

³³ ECtHR 13 May 1980, *Artico* (A 37).

³⁴ ECtHR 19 February 1991, *Alimena* (A 195-D).

³⁵ Proposed FD, section 59.

³⁶ ECtHR 8 February 1996, *John Murray* (Reports 1996-I).

³⁷ Commission, 12 June 1984, *Can v Austria* (no 9300/82)

³⁸ ECtHR 29 November 1991, *S. v Switzerland*, (no 13965/88)

³⁹ ECtHR 31 January 2002, *Lanz* (no 24430/94)

⁴⁰ ECtHR 6 June 2000, *Magee* (no. 28135/95) and ECtHR 2 May 2000, *Codron* (no. 35718/97): "The fact that an accused person who is questioned under caution is assured access to legal advice, and in the applicants' case the physical presence of a solicitor during police interview must be considered a particularly important safeguard for dispelling any compulsion to speak which may be inherent in the terms of the caution. For the court, particular caution is required when a domestic

interrogations that may be decisive for the further course of the proceedings, he has the right to consult a lawyer prior to these interrogations.⁴¹

Nevertheless, for years the ECtHR held that the right to have a lawyer present during police interrogation could in general not be derived from Art. 6 (§3) ECHR.⁴² In contradiction to that initial view of the ECtHR, both the Yugoslavia Tribunal⁴³ and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)⁴⁴ acknowledged that the right to have a lawyer present during police interrogation is one of the fundamental safeguards against ill-treatment of detained persons. Subsequently this consideration was acknowledged in Art. 2 (§2) of the Proposed FD.

However, in two recent judgments the ECtHR has underlined the importance of the investigation stage for the preparation of the criminal proceedings, and referred to the recommendations of the CPT. “The Court finds that in order for the right to a fair trial to remain sufficiently ‘practical and effective’ Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.” The ECtHR further indicates that even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction may not unduly prejudice the rights of the accused. As a consequence the ECtHR considers that the lack of legal assistance during a suspect’s interrogation would constitute a restriction of his defence rights and that these rights will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.⁴⁵

1.3 Right to legal assistance free of charge

The right to free legal aid is not unconditional. Art. 6 (§3c) ECRM stipulates that a suspect has the right to free legal aid on two conditions, namely if (1) he has not sufficient means to pay for legal assistance and (2) when the interests of justice so require. The ECtHR holds that the suspect does not have to prove ‘beyond all doubt’ that he lacks the means to pay for his defence.⁴⁶ The Proposed Framework Decision stipulated in article 5 that the costs of legal advice should be

court seeks to attach weight to the fact that a person who is arrested in connection with a criminal offence and who has not been given access to a lawyer does not provide detailed responses when confronted with questions the answers to which may be incriminating.” (§ 60)

⁴¹ ECtHR 6 June 2000, *Averill* (no. 36408/97).

⁴² In *Dougan* (ECtHR 14 December 1999, no 44738/98) the ECtHR held: “Before the Court of Appeal they argued for the first time that the statements made by the applicant to the police should have been declared inadmissible on account of the absence of a solicitor during interview. However the merits of that argument must be tested against the circumstances of the case. Quite apart from the consideration that this line of defence should have been used at first instance, the Court considers that an applicant cannot rely on Article 6 to claim the right to have a solicitor physically present during interview.” See also ECtHR 16 October 2001, *Brennan* (nr. 39846/98).

⁴³ Art. 18 (§3) Statute of the International Tribunal for the former Yugoslavia (ICTY). Decision on the Defence Motion to Exclude Evidence van het Joegoslavië Tribunaal in Zdravko Mucic, 2 September 1997, Case No. IT-96-21-T, Trial Chamber II

⁴⁴ 2nd General report (CPT/Inf (92) 3), sections 36-38.

⁴⁵ ECtHR, Grand Chamber, 27 November 2008, *Salduz* (36391/02), §54-55 and ECtHR 11 december 2008, *Panovits* (4268/04), § 66 and 70-73.

⁴⁶ ECtHR 25 April 1983, *Pakelli* (A, 64, § 34).

borne in whole or in part by the Member States if these costs would cause undue financial hardship to the suspected person or his dependents. The ECtHR indicates three factors which should be taken into account⁴⁷:

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

The right to free legal aid exists whenever the deprivation of liberty is at stake⁴⁸, narrowing down the definition of 'interests of justice'. Denying free legal aid for a period during which procedural acts, including questioning of the applicants and their medical examinations are carried out is unacceptable according to the ECtHR.⁴⁹

Member States are free to operate the system that appears to them to be the most effective as long as free legal advice remains available where the interests of justice demands it.⁵⁰

1.4 Right to interpretation and translation

Suspects who do not speak or understand the language of the proceedings are clearly at a disadvantage. They are especially vulnerable, whatever their circumstances. Consequently, the right to interpretation and translation strikes the Commission as particularly important.⁵¹

1.4.1 The scope of the right to interpretation and translation

- *All parts of criminal proceedings*

The right to free interpretation is derived from articles 5,2 and 6,3,a-e ECHR⁵² and established in ECtHR case law.⁵³ It extends to all parts of the criminal proceedings, which means that Member States have to provide an interpreter as soon as possible after it has come to light that the suspect is in need of an interpreter⁵⁴. The fact that no "registered" interpreter was present during an initial police interrogation does not compromise the right to a fair trial and interpretation, as long as the interpretation was sufficient in quality and scope.⁵⁵ The ultimate duty

⁴⁷ ECtHR 24 May 1991, *Quaranta* (A, 205, § 35).

⁴⁸ ECtHR 10 June 1996, *Benham* (Reports 1996-III).

⁴⁹ ECtHR 20 June 2002, *Berlinski* (no. 27715/95 and 30209/96).

⁵⁰ Proposed FD, section 60-61.

⁵¹ Green Paper, section 5.2.

⁵² This is also covered by Art. 14 (§3, a and f) ICCPR and Art. 55 and 67 of the Rome Statute. The Rome Statute provides in Art. 55 the right to an interpreter and a translator for persons under investigation. Art. 67 of the Rome Statute provides for interpretation and translation at trial

⁵³ ECtHR 28 November 1978, *Luedicke, Belkacem and Koç* (A 29).

⁵⁴ Proposed FD, section 63.

⁵⁵ ECtHR 19 December 1989, *Kamasinski* (A 168) §76-77; See also Proposed FD, section 67.

to ensure fairness of the proceedings rests with the trial judge⁵⁶, since he is the ultimate guardian of the fairness of the proceedings.⁵⁷ The Proposed FD referred to a competent authority being in charge of the decision regarding which documents need to be translated.

- *Translation of written documents*

The right to free translation of documents is not explicitly mentioned in Art. 6 ECHR. It is, however, established in ECtHR case law and incorporated by the EC in the Proposed FD. The ECtHR held that only those documents, which the defendant 'needs to understand in order to have a fair trial' need to be translated:

The right, stated in paragraph 3 (e) of Article 6 (art. 6-3-e), 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 (see the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, p. 20, § 48).

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.⁵⁸

The rules on how much material is to be translated vary according to the Member State and also in accordance with the nature of the case. According to the EC, this variation is acceptable as long as the proceedings remain 'fair'.⁵⁹ The onus should be on the defence lawyer to ask for translations of any documents he considers necessary over and above what is provided by the prosecution.⁶⁰

An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him. A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands. The fact that only the titles of the crimes alleged are translated, but not the material substance upon which the charges were grounded, does not necessarily constitute a breach of the right to information and interpretation, when the facts are not so complicated and an oral explanation sufficiently informs the accused of "the nature and cause of the accusation against him", for the purposes of paragraph 3 (a) of Article 6 (art. 6-3-a).⁶¹

- *Hearing or speech impairment*

⁵⁶ Green Paper, section 5.2.1 (a).

⁵⁷ ECtHR 24 September 2002, *Cusani* (nr. 32771/96).

⁵⁸ ECtHR 19 December 1989, *Kamasinski* (A 168); see also ECtHR 14 January 2003, *Lagerblom* (no. 26891/95).

⁵⁹ Green Paper, section 5.2.1 (c).

⁶⁰ Proposed FD, section 66.

⁶¹ ECtHR 19 December 1989, *Kamasinski* (A 168) § 81.

The rights granted in article 6 can also require hearing aid during trial, when a persons' hearing impairment significantly reduces the ability to follow the proceedings.⁶²

1.4.2 Free interpretation and translation

Both article 5, 2 and 6,3 combine to the importance of the information being provided in a language the accused understands, with a right to free translation and interpretation. Similarly, article 6 and 7 of the Proposed FD entailed the right to free interpretation and the right to free translation of all relevant documents.

1.4.3 Accuracy of the translation and interpretation

The interpretation should enable the defendant's "effective participation" in the proceedings. The proceedings should be recorded as a method of verifying that the interpretation was accurate. Recordings should not be used to challenge the proceedings from any other point of view.⁶³

Whilst Member States are conscious of these obligations in theory, these are not complied with in full in reality.⁶⁴ The difficulty, however, is not one of acceptance on the part of the Member States, but one of levels and means of provision, and perhaps most importantly, costs of implementation.⁶⁵

- *Registers of translators and interpreters*

In order to comply with the provision on accurate translation and interpretation, research⁶⁶ has shown that a training system for translators is essential. The training system should focus on general practice of interpretation and translation and specific practice of the legal system. According to this study, Member States which currently do not have any training system should be required to develop one. As guaranteeing the quality of the training is of real importance, according to the study, standards should be governed and accredited by an independent body. This accreditation must be renewed on a regular basis, to maintain skills and continuous professional development. Furthermore, a register should be made, listing all accredited interpreters and translators, and should be easily accessible to courts and legal practitioners. In this regard, it is important to

⁶² ECtHR 14 October 2008, *Timergaliyev*, (nr. 40631/02), § 60.

⁶³ Proposed FD, section 69 and 70.

⁶⁴ Proposed FD, section 36 - In some cases even a prisoner's cellmate is used as an interpreter.

⁶⁵ Green Paper, section 5.2.

⁶⁶ The research was carried out by the Lessius Hogeschool with the aid of a European Commission 'Grotius' subsidy (Grotius II project 2001/GRP/015); see also Heleen Keijzer-Lambooy, Willem Jan Gasille, (eds.) *Instruments for Lifting Language Barriers in Intercultural Legal Proceedings* EU project JAI/2003/AGIS/048, ITV Hogeschool voor Tolken en Vertalers 2005

stress that interpretation and translation are two different professions which should be treated accordingly. Consequently two different registers are required.⁶⁷

- *Special attention for uncommon languages*

Another difficulty is the translation and interpretation of uncommon languages. It is for the Member States to make arrangements to cover such languages.⁶⁸ Member States must make funds available to make court interpretation and translation a more attractive career option to language graduates. Also law graduates with excellent language skills should be encouraged to join the profession and offered appropriate training.⁶⁹ Member States should also make an effort to recruit a sufficient number of translators and interpreters.⁷⁰

⁶⁷ C. Morgan, 'The Commission's draft proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union' in: Heleen Keijzer-Lambooy, Willem Jan Gasille, (eds.) Instruments for Lifting Language Barriers in Intercultural Legal Proceedings, p. 27 – 28. See also the Green Paper, section 5.2.2 (a).

⁶⁸ Green Paper, section 5.2.2 (c).

⁶⁹ Green Paper, section 5.2.2 (d).

⁷⁰ Green Paper, section 5.2.2 (e).

