

Consultation Paper

Procedural safeguards for suspects and defendants in criminal proceedings

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1. INTRODUCTION

1. The purpose of this document is to set out the areas identified by the Commission where certain standards should apply in the treatment of suspects and defendants in criminal proceedings throughout the European Union and to invite interested parties to submit their comments. Comments from criminal law practitioners are particularly welcome. The Commission is considering how best to ensure that Member States comply with the required standards. One important reason for this is that in order to achieve the mutual trust and respect required for a true "area of freedom, security and justice"⁽¹⁾, standards of protection conferred on suspects and defendants in criminal proceedings must be adequate throughout the European Union. People travelling abroad should be confident that the existing standards offer equivalent protection whatever the Member State so as not to impede their free movement⁽²⁾ for fear of encountering a system operating lower standards.

2. At the 1993 Copenhagen European Council, the Member States laid down the accession criteria⁽³⁾ for candidate countries, including a guarantee that human rights will be respected. It is desirable to lay down specific standards so that candidate countries understand what is required of them before they can be admitted.

3. In order to create a true area of freedom, security and justice, it is essential to address the issue of standards necessary to safeguard individuals' rights and the Commission has been planning to cover this area for some time.

4. Article 6 of the Treaty on European Union provides:

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community Law. (...)"

The 2000 Charter of Fundamental Rights of the European Union⁽⁴⁾ is a declaration of civil, political, economic and fundamental social rights. Its "Justice" section sets out the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50).

5. The Commission Communication of 14 July 1998, Towards an Area of Freedom, Security and Justice⁽⁵⁾, referred to "respect for individual rights". This is part of the mutual recognition programme and the necessary counterbalance to judicial cooperation measures that enhance the powers of police officers, prosecutors, courts and investigating officers. The Conclusions of the Tampere European Council⁽⁶⁾ explicitly stated that "enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities **and the judicial protection of individual rights**". (point 33). The Commission Communication to the Council and the European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters⁽⁷⁾ provided, in its paragraph 10, entitled "Protection of Individual Rights" 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. The Council's Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters⁽⁸⁾ dated 15 January 2001 provides, in its preamble, that "Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights".

6. For simplicity's sake, the male pronoun "he" is used throughout. In this context, this should be taken as gender neutral, since all questions clearly apply equally to female suspects and defendants.

1.1. Objectives

7.The Commission intends to produce an initial Communication in June 2002 covering the standards to be applied throughout the European Union in criminal proceedings, from the moment an individual first become a suspect, throughout the investigation, trial and to the post-trial period (detention or other sanction, and any appeal).

8.The rights to be covered so far identified by the Commission are listed in paragraph 14 below. This list is not exhaustive.

9.The Communication will not only consider the standards to be achieved but, where possible, examine the existing safeguards and procedures in the Member States. The objective is to respect the equality of arms principle, achieving the correct balance between the rights of the defence and those of the prosecution. However, Member States will have budgetary constraints and objectives must therefore remain realistic. The aim must be to protect citizens properly and to avoid miscarriages of justice (which are after all costly for States both in financial terms and as regards the reputations of their legal systems, and additionally enable the true culprit to remain at large and reoffend), within an effective criminal justice system.

10.After this Communication is presented for consideration, it is intended to have as wide a consultation as possible with experts in the field. The second step, the final proposal, will depend in part on the outcome of the consultation, together, naturally, with the responses from the interested parties.

2. EXISTING RIGHTS AND HOW TO ENFORCE THEM

11.This review is designed to be of an examination of rights arising out of existing treaty obligations that the Member States have already signed up to ([Annex](#)). A feature of these treaty rights is often their lack of detail, since the intention was to lay down the principles and leave implementation to the signatory States. This has led to certain areas not being adequately covered and it is hoped to be more specific as regards mechanisms for enforcing existing rights rather than to establish new rights. For this reason, the approach will be to analyse the rights already in place, to consider how they may properly be enforced and how such enforcement can be assessed.

12.It is more constructive to set out the standards required of Member States to enforce those rights than to examine what provision currently exists with a view to pointing out the lacunae in Member States' current practices. All Member States will then be expected to ensure either that existing mechanisms meet the requirements or that they can put in place appropriate mechanisms within a reasonable time frame. Where it is unavoidable, existing mechanisms, or failures to comply with existing treaty obligations will be discussed; this is not for the purpose of making invidious comparisons between the Member States but rather to assist Member States in knowing the required standards and how best to meet them.

2.1 Stages of proceedings where different rights apply

13.The nature of the rights to be protected is different according to the different phases of the criminal proceedings. These can be broadly broken down into four or five components according to different legal systems: investigation prior to arrest, investigation post-arrest but prior to charge, after the charge but pre-trial, the trial and the post-trial period, including any appeal. The right to a fair trial, a concept enshrined in Article 6 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union, covers both the pre-trial phase and the trial itself. When being questioned, without having been arrested, suspects have certain rights, which may be a little difficult to ascertain, since they have not been charged with any offence (e.g. to know about what they are being questioned, to have matters explained to them in a language they understand and in certain circumstances to legal advice). After charge, the first consideration will be of pre-trial detention or provisional release. Other rights will also need to be considered. Finally, there are certain rights attaching to the post-trial period, primarily the right to appeal and certain limited aspects of detention conditions.

2.2. Existing Rights

2.2.1. Informing the suspect – the "letter of rights"

14. Numerous international and European instruments exist conferring rights on suspects, in addition to safeguards already present in each Member State's domestic legislation. Yet, in many cases, it would seem that these rights are ignored or flouted. In some cases, the suspect is unaware of those rights, and a simple, inexpensive remedy exists: the Member States could produce a "letter of rights" to be given in every case to a suspect, on arrival at the police station or place of questioning. In the case of vulnerable suspects and defendants (see paragraph 15 below), a statement of their additional rights should be included and if the suspect is vulnerable owing to illiteracy, special arrangements should be made to ensure that that person is aware of his rights.

2.2.2. Proper protection for vulnerable groups

15. The Commission considers it desirable for a particularly high degree of protection to be afforded to vulnerable suspects and defendants. It is essential that vulnerable suspects are recognised as such at the earliest possible stage and that the duty of care applicable to them is respected. A "vulnerable" suspect or defendant is one who, owing to specific personal circumstances, may be unable to act in his best interests, may be more easily influenced by investigating officers and others and needs additional assistance. The Member States should ensure that their police and judicial authorities are able to identify such groups and that they conduct themselves in an appropriate manner. Vulnerable suspects include:

(a) foreign nationals, especially but not limited to those who do not speak the language and residents of a different linguistic region in the case of Member States divided into regions where different languages are spoken,

(b) minors,

(c) the mentally handicapped, those suffering from a psychiatric condition (such as schizophrenia), or those of subnormal IQ,

(d) the physically handicapped, including

- the deaf

- those with illnesses such as diabetes, epilepsy, pacemakers etc

- those with speech impediments

as well as more obviously physically handicapped suspects. This group also includes suspects with very serious medical conditions such as HIV/AIDS, necessitating frequent medication and/or monitoring,

(e) mothers of young children, especially single mothers, and, where the father has sole charge of young children, single fathers,

(f) those who cannot read or write,

(g) those with refugee status under the 1951 Convention.

2.2.3. A summary of the rights

16. The following areas are being considered:

a. The right to be presumed innocent until proved guilty

This right is laid down in Article 6(2) of the ECHR and Article 48 of the Charter of Fundamental Rights of the European Union. A problem arises with this right where the burden of proof has been reversed in the definition of offences. The European Court of Human Rights has said that rebuttable presumptions do not violate this right but that they must be defined by law and reasonably limited. It is necessary to consider how well the legal systems of the Member States currently comply with this requirement.

b. The right to have someone informed of the detention

This is the right to have someone (other than a lawyer) such as a family member or friend informed of the arrest. As far as persons falling into the vulnerable categories are concerned, this right should be automatic for arrested suspects and should be granted within a clearly defined period (to be determined) of the arrest. For other categories, there should be a presumption that the right will be granted within a clearly defined period (to be determined) of the arrest except where the interests of justice require the fact of the arrest not to be known (e.g.; where the investigating authorities fear that evidence will be destroyed).

c. The right to legal advice and assistance

The commitment to respect this right arises under several international and European instruments. The main problem is one of compliance in that some Member States do not have either the mechanisms or the budget to implement it fully. Another difficulty is ascertaining when in the proceedings this right actually arises (i.e. does it arise on arrest or can it be relied upon before, in simple questioning?).

As far as persons falling into the vulnerable categories are concerned, questioning should not begin until a lawyer is present. For others, it is important to lay down guidelines covering the suspect's entitlement to have a lawyer present if he wishes, even if he has not yet been formally arrested, and whether questioning should be allowed before the lawyer arrives and subsequently in the absence of the lawyer unless the suspect consents.

d. The right to a competent, qualified (or certified) interpreter and/or translator so that the accused knows the charges against him and understands the procedure

This commitment to respect this right arises under several international and European instruments. The main problem is one of compliance.

A first step may be for each Member State to appoint a national institution that would issue a diploma or certificate of competence in legal/criminal translation and/or interpreting. The institution could work in tandem with the Ministry of Justice of the Member State to ensure that the standards were sufficiently high. The system should also extend to the mutual recognition of the diplomas of other Member State where the language requirement of the State issuing the diploma/certificate is met.

All oral interpretation, together with the suspect's replies, should be recorded and a transcript provided so that any subsequent challenges can be verified.

A translation should ideally be provided to the suspect of all written procedural documents.

e. The right to bail (provisional release) where appropriate

This right is covered by numerous international and European conventions.

Provisional release will form the subject of a specific study during 2002 and consequently it will only be covered in a general manner at this stage.

Whilst the rules governing provisional release remain within the ambit of domestic legislation, it may be desirable to have uniform criteria and conditions applicable throughout the European Union.

It is appropriate to consider whether there should be a presumption in favour of granting provisional release to suspects in the vulnerable groups.

f. The right against self-incrimination

The Member States have different rules regarding disclosure of documents and the right to silence. The case law of the European Court of Human Rights enables each Member State to draw up its own rules. It may be desirable to have uniform criteria and conditions governing self-incrimination throughout the European Union.

g. The right to consular assistance (if not a national of the State of prosecution)

The 1963 Vienna Convention on Consular Relations⁽⁹⁾ provides that if the person detained is a national of a State other than the State in which he is detained, he has the right to have his Consulate informed and he must be informed of this right "without delay". Of the Member States, only Ireland has ratified this Convention; the other Member States have all signed it, except Portugal, Spain, Greece and the Netherlands. If the Member States were all to ratify and implement the Vienna Convention (e.g. by having a designated person in each consulate), this would be a considerable step forward. Consulates should then be encouraged to appoint an official in each location charged specifically with looking after the interests of detainees of his nationality in the Host State.

h. Fairness in obtaining and handling evidence (including the prosecution's duty of disclosure),

There is a need to ensure that the rules on the means of obtaining and handling evidence and the inadmissibility of improper evidence are equivalent throughout the European Union. This is particularly important as regards jurisdiction in cross-border crime cases. Ideally, the duty of disclosure should also be the same.

The Commission is also preparing a separate proposal for a Council framework decision on mutual recognition of pre-trial orders to obtain evidence (including for cybercrime investigation) which will cover search and seizure orders and production orders.

i. The right to review of decisions and/or appeal proceedings

This commitment to respect this right arises under several international and European instruments.

j. Specific guarantees covering detention, either pre- or post-sentence

There are international minimum standards covering detention and European Court of Human Rights case law on the subject. Additionally, where bilateral agreements exist, nationals of other Member States may be allowed to serve any periods of detention in their own Member States. There is scope for development of this right, possibly to non-custodial sentences.

k. Ne bis in idem

This right is also known as the rule against double jeopardy and provides that a person may not be tried twice for the same offence. It is enshrined in Article 4 of Protocol 7 to the ECHR and Article 50 of the Charter of Fundamental Rights of the European Union.

2.2.4. In absentia proceedings

17. Careful consideration should be given to *in absentia* proceedings, which occur in some Member States. Article 14(3)(d) of the 1966 International Covenant on Civil and Political Rights, which has been ratified by all 15 Member States, provides that the accused must be present at his trial and the question of *in absentia* proceedings is a controversial one. The United Nations Human Rights Committee has concluded that they are permitted in "exceptional circumstances" as long as the defendant has been given the opportunity to appear in court and to prepare a defence. The 1978 Second Additional Protocol to the 1957 European Convention on Extradition addressed this concern⁽¹⁰⁾ and provided for extradition to be refused if the court was not satisfied that the rights of the defence had been adequately protected. The Commission also recognised the problem when drawing up the proposal for the European arrest warrant and included a safeguard provision⁽¹¹⁾.

It would seem appropriate in the context of this consideration of minimum standards to solicit the views of interested parties.

2.3. Whose conduct do these rights cover?

18. All officials with the power of arrest, stop and search, seizure and detention must comply with these rights. This includes police officers of all categories, immigration officers, customs officers, bailiffs, court detention facility officials, prison officers and any other officials with the above powers. The rights must be respected at all times when the official is acting in an official capacity.

3. QUESTIONS

19. As part of a wider consultation, involving a set of questions to be put to national experts in the Member States and a study of provisional release (bail), and prior to the Commission's forthcoming Communication, interested

parties, and especially practitioners, are invited to submit their views on the foregoing and on the following questions:

- Are there any areas or categories of rights which have not been covered above?
- Where appropriate, what should the time limits be for the above rights (what should be the maximum time before a suspect is allowed to have someone informed of the detention)?
- Which rights are most commonly not respected at present?
- What are the principal causes of miscarriages of justice?
- Should legal aid be offered for all offences to those who cannot afford to pay for the services of a lawyer?
- Should any criteria other than ability to pay (e.g. seriousness of the offence) affect the decision to grant legal aid?
- For practitioners: have you had occasion to refer a case to the European Court of Human Rights in Strasbourg? If so, what was your experience?
- For practitioners: have you had experience of *in absentia* proceedings that have led to your having a view about their conduct?
- Are there any categories of official exercising the rights of detention, questioning, investigation etc not mentioned in the list in paragraph 18?

20. Responses should **be sent by 15 April 2002** to:

Caroline MORGAN

DG Justice and Home Affairs – B3: [Judicial co-operation in criminal matters](#)

46 rue du Luxembourg

Brussels B-1000

Belgium

Fax: +32 (02) 2.95.81.06

Telephone: +32 (02) 2.96.00.67

Email: caroline.morgan@cec.eu.int

Annex:

Treaties and instruments include:

1) The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms

(as amended by Protocols n°11) and Protocols 1, 4 and 7 thereto ("the ECHR")

- all Member States are parties,

2) The 1945 Charter of the United Nations

- all Member States are parties,

3) The 1966 International Covenant on Civil and Political Rights

- all Member States are parties,

4) The 1966 International Convention on the Elimination of All Forms of Racial Discrimination

- all Member States are parties,

5) The 1979 Convention on the Elimination of All Forms of Discrimination Against Women

- all Member States are parties,

6) The 1963 Vienna Convention on Consular Relations

- Ireland has ratified, Portugal, Spain, Greece and the Netherlands have not signed and the other Member States have signed but not ratified,

7) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

-all Member States are parties,

8) The 1989 Convention on the Rights of the Child

- all Member States are parties,

9) The 1993 Statute of the International Criminal Tribunal for the former Yugoslavia,

- all Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations,

10) The 1994 Statute of the International Criminal Tribunal for Rwanda,

- all Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations,

11) The 1998 Rome Statute for an International Criminal Court,

- all Member States are signatories, 12 have ratified the Rome Statute but the EU is committed to ratification so that all Member States will become parties,

12) On 7 December 2000, the Presidents of the European Parliament, the Council and the Commission signed the 2000 Charter of Fundamental Rights of the European Union

(1) Article 29 of the Treaty on European Union lays down the Union's objective "to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member

States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia".

⁽²⁾ Freedom of movement is one of the principles laid down in the Treaty Establishing the European Community.

⁽³⁾ "Membership requires that the candidate country has achieved *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities*, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."

⁽⁴⁾ (OJ C 364/1 of 18.1.2000)

⁽⁵⁾ COM(1998) 459 final.

⁽⁶⁾ Presidency Conclusions, Tampere European Council 15 and 16 October 1999.

⁽⁷⁾ COM(2000) 495 final.

⁽⁸⁾ 2001/C 12/02.

⁽⁹⁾ Article 36 (1).

⁽¹⁰⁾ Article 3 provides: "*Judgments in absentia*

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.
2....".

⁽¹¹⁾ Article 5(1) of the European Arrest Warrant provides: "Where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia, and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to lodge an appeal or opposition in the issuing State and to be present at the judgment."