

Towards minimum procedural guarantees for the defence in criminal proceedings in the EU

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1 Introduction

A critical observer of EU policy law cannot deny that the practice of EU-policy making in the field of criminal law the last decade (since the implementation of the Tampere Programme) is mainly repressive and prosecution-oriented.¹ The idea of introducing a set of common (minimum) rules, guaranteeing the rights of defence at a EU-wide level, has not been accorded the same attention as the introduction of instruments aimed at improving the effectiveness of crime-fighting. What does this finding mean for the future of the EU's criminal policy? Will the EU succeed the coming years in developing an area where freedom, security and justice are truly balanced? According to several authors, the EU has up till now evolved in the opposite direction. As one observer put it: *“if Procedural Criminal Law arises from the application of Constitutional Law, or indeed if it may be described as ‘a seismograph of the constitutional system of a State’, then as a consequence the Procedural Criminal Law of the European Union shows the extent of the Democratic Rule of Law, of the existence of a true ‘Rechtsstaat’, within an integrated Europe. This situation may be qualified as lamentable, as the main plank of the EU’s criminal justice policy relates to the simplification and the speeding up of police and judicial cooperation – articles 30 and 31 of the Treaty of the EU – but without at the same time setting an acceptable standard for fundamental rights throughout a united Europe.”*²

In spite of this negative evaluation, there is still hope for effective results in this field in the coming years. Some important actions have already been taken. A first symbolic step was the signing of the Charter of Fundamental Rights in December 2000 by the European Commission, the Council and Parliament. Following the coming into force of the Lisbon Treaty in 2009, the provisions of the Charter now have binding legal force. Secondly, on 28 April 2004 an ambitious Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union was submitted by the European Commission. Although the Proposal was eventually abandoned in 2007 after years of (political) disagreement, the EU has recently renewed its ambition to strive for minimum procedural rights. In its Resolution of 30 November 2009³ the Council endorsed the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (hereinafter the Roadmap) as the basis for future action. The Resolution clearly states that action should be taken at the level of the EU in order to strengthen the rights of suspected or accused persons in criminal proceedings. Furthermore, the Resolution describes the rights included in the Roadmap⁴ as fundamental procedural rights to which absolute priority should be given.

¹ See, *inter alia*, M. ANDERSON, *Law enforcement cooperation in the EU and fundamental rights protection*, in M. MARTIN (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 105-120; E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe, procedural rights at the investigative stage of the criminal process in the European Union*, Intersentia, 2007, 2-3.

² K. AMBOS, *Mutual recognition versus procedural guarantees?*, in M. DE HOYOS SANCHO (ed.), *Criminal proceedings in the European Union: essential safeguards*, Lex Nova, Valladolid, 2008, 25.

³ COUNCIL OF THE EUROPEAN UNION, *Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295/1, 4 December 2009.

⁴ The Roadmap calls for action to be taken around 5 issues: Translation and Interpretation; Information on Rights and Information about the Charges; Legal Advice and Legal Aid; Communication with Relatives, Employers and Consular Activities; Special Safeguards for Suspected or Accused Persons who are Vulnerable; and a Green Paper on Pre-Trial Detention.

Against this background, the current article aims to offer an up-to-date overview of the topic of procedural rights for suspects and defendants in criminal proceedings in the EU. This overview is structured around three central questions. Firstly, why should the EU give attention to this issue? How come it is of such importance? Secondly, what are the existing levels of safeguards in the Member States? Are the fundamental procedural rights in criminal proceedings as provided for by the European Convention of Human Rights (ECHR) guaranteed in the criminal justice systems of the EU? Finally, if the answer to the previous questions were to call for EU action in this field, where does the EU stand at present? Which steps have already been taken and what does the future hold?

2 The importance of minimum procedural guarantees for the defence in criminal proceedings throughout the EU

An academic contribution to the debate on minimum procedural guarantees in criminal proceedings should start from the question whether such a debate is at all useful. Why is it that Member States should accord attention to this issue? Could it not suffice to refer to the ECHR as the main mechanism for preserving fundamental rights in Europe? Could the EU bring added value and, if so, in what way? Does the mutual recognition doctrine not imply a basic level of trust between EU's member states? The answer to these and related questions can, according to the authors, be centred among two central themes.

2.1 The inadequacy of the ECHR framework

Doubts about whether the ECHR and the European Court for Human Rights (ECtHR) are able to offer sufficient protection to suspects and defendants in criminal proceedings are not ill-founded. The ECHR is implemented to very differing standards in the member states and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded (articles 5 and 6 of the Convention are the most commonly cited in applications). Moreover, member states have not always amended their legislation to adapt them to the condemnatory judgements of the ECtHR, which - in essence - are not of an enforceable nature.

Further, the ECHR jurisprudence does not contain any explicit imperative on the rules of evidence.⁵ The admissibility of evidence is primarily governed by the rules of domestic law, provided that they respect the rights and freedoms guaranteed by the Convention. It often remains difficult to conclude from the ECHR's decisions whether or to what extent the use of illegally or unfairly obtained evidence constitutes a violation.

The fundamental question, however, relates to the fact whether the procedural rights provided for by the ECHR are effectively implemented in the EU member states. At this point, an important distinction should be made between the mere legal recognition of these rights in the criminal justice systems of the member states and their (effective) implementation in everyday practice. The results of a recent study into this issue raise serious doubts as to whether the practice in all member states is in line with the ECHR standard. These results will be discussed more in detail further on.

⁵ S. GLESS, *Mutual recognition, judicial inquiries, due process and fundamental rights*, in J. VERVAELE (ed.), *European evidence warrant: transnational judicial enquiries in the EU*, Intersentia, 2005, 124.

The preamble to the 2009 Council Resolution endorsing the Roadmap on procedural rights seems to confirm this concern, although in a more subtle way: *'the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust. At the same time, there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards'*.

2.2 Mutual recognition and minimum procedural guarantees

The preamble to the 2009 Council Resolution endorsing the Roadmap on procedural rights states: *'Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.'*

The concept of *mutual recognition* of judicial decisions has been known, since the European Council of Tampere in 1999,⁶ as the future 'cornerstone' of judicial cooperation in – civil as well as – criminal matters and has in that context fulfilled the role of catalyst in the development of harmonisation of the criminal law of the EU member states. It implies that while another state may not deal with a certain matter in the same or even similar way as one's own state, the results are accepted as equivalent to decisions of one's own state.

Finding its practical rendering in a well-structured 24-measure programme,⁷ the realisation of the concept has featured high on the EU's justice and home affairs agenda for the past six years. Aimed at the elimination of all exequatur procedures applicable between the EU member states, the mutual recognition principle requires mutual trust between these states in the sense that they feel confident relying on each other's decisions in criminal matters and executing them without further requirements or conformity control vis-à-vis their own substantive and procedural criminal law standards.⁸ So far, several steps have been taken to accomplish mutual recognition of certain decisions in criminal matters.⁹

⁶ European Council, *Presidency Conclusions*, 15-16 October 1999.

⁷ Council of the EU, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, *OJ C* 12, of 15.1.2001.

⁸ For this analysis, see earlier: G. VERMEULEN, 'Mutual recognition, harmonisation and fundamental (procedural) rights protection', in M. MARTIN (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 89-104.

⁹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L* 190/1 of 18.7.2002; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ L* 196 of 2.8.2003; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ L* 76 of 22.3.2005; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ L* 328 of 24.11.2006; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, *OJ L* 220 of 15.8.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ L* 327 of 5.12.2008; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *OJ L* 337, 16.12.2008; Council Framework Decision 2008/978/JHA of 18 December 2008 on the

The principle of mutual recognition has been known and applied in the context of Europe's internal market for decades (by establishing free movement of goods and mutually recognising product standards).¹⁰ Transferring this principle to the setting of criminal proceedings is not a simple matter though. The free movement of goods cannot be compared to the free movement of evidence or data in the context of a criminal prosecution. This is not only due to the fact that evidence or data to be used in criminal proceedings cannot be extracted or 'exported' as a 'final product' from the general context of its legal order, with its respective particularities relating to the way it is gathered, without bringing about changes or loss of probative value.¹¹ At least as crucial is the fact that the personal freedoms of the EU's citizens are at stake in this field. This requires a specific approach.

The Tampere version of the mutual recognition principle was something of a *novum*, in that it requires the recognition and execution of judicial decisions from other member states without a national, judicial test of their lawfulness or legitimacy.¹² The logical implication of this is mutual recognition *a priori* that the foreign process in question meets all of the requirements that flow from the rule of law, as understood by the executing state.

It is a logical conclusion therefore that, given the sensitivities surrounding sovereignty and feelings of superiority with regard to one's own national criminal procedures, mutual recognition in the field of judicial cooperation in criminal matters is only feasible if all states can rely on decisions taken abroad meeting at least the minimum safeguards that their own procedures provide.¹³ Hence the undisputable fact that effective judicial cooperation in criminal proceedings according to the mutual recognition doctrine is partly dependent on a commonly accepted level of trust between the competent national authorities which in turn requires the presence of a common set of minimum procedural guarantees for the defence.

The former is all the more so given the latest evolution in the field of judicial cooperation in criminal proceedings in the EU. In the view of the Commission, traditional judicial cooperation in criminal matters will eventually be replaced (entirely) by the mutual recognition principle, which should smooth the way for inter-state assistance and remove superfluous formalities from all methods of cooperation. Combined with the continuing shift from the traditional '*locus regit actum*' rule to the '*forum regit actum*' principle, this would imply that the execution of these mutually recognised warrants would be increasingly determined by the procedural rules of the issuing/requesting state. This evolution implies that the EU is a considerable step closer towards a genuine *free movement of evidence* between its member states.¹⁴ The link with the respect for procedural safeguards at a minimum level

European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 31.12.2008.

In addition the Commission produced a green paper on the principle of mutual recognition: *Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*, COM (2005) 195, 19 May 2005.

¹⁰ ECJ, 20 February 1979 (case 120/78).

¹¹ K. AMBOS, *l.c.*, 31.

¹² CH. BRANTS, *Procedural safeguards in the European Union: too little, too late?*, in J. VERVAELE (ed.), *o.c.*, 106.

¹³ *Ibid.*

¹⁴ It should be noted in this respect that there are already legal instruments in place that provide extensive possibilities such as the Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations (Napels II Convention), OJ C 24/1, 23.01.1998. This Convention - which can be applied between judicial authorities in criminal investigations (article 3) - not only provides that "*the requested authority shall agree to comply a particular procedure in response to a request, provided that that procedure is not in conflict with the legal and administrative provisions of the requested Member State*" (article 9, 6°) but also

throughout the EU is evident. The evolution towards a free movement of evidence would be detrimental for the legal position of suspects and defendants throughout the EU, if no adequate level of procedural protection were to be guaranteed. Furthermore, the effectiveness of the system (i.e. a smooth execution of the ‘warrants’) would be seriously hindered if the current differences between members in regard of procedural rights were to be maintained. The executing member state would have to make a case by case comparison between the procedural rules of the issuing member state and its own fundamental principles of law. It cannot be predicted how member state would deal with such an exercise. One thing is sure though. A minimum standard of procedural safeguards, taking into account both the ECHR (and its case law) and the fundamental principles of each member state, would hugely diminish potential obstacles in applying the ‘forum rule’.

3 Procedural safeguards in criminal proceedings throughout the EU: the current state of affairs¹⁵

In 2005, the Commission arranged for a study to be carried out on procedural rights in the EU, in order to comply with the The Hague Programme’s call for studies on the existing levels of safeguards in the Member States.¹⁶ In 2008-09 a new study was carried out as a follow-up report to the 2005 study. The goal of the new study was to obtain up to date information on the level of provision of procedural rights in the Member States that can provide a lead for a possible new Commission legal initiative on the matter. The report aimed at providing an overview of the *status quo* of 4 fundamental procedural rights in criminal proceedings in the EU Member States: *the right to information; the right to legal advice; the right to legal assistance free of charge; and the right to translation and interpretation of documents.*¹⁷

The current chapter first offers an analysis of these procedural rights which the ECHR provides for, as dealt with in recent case law of the ECtHR. Secondly, an overview is given of the extent to which these procedural rights are guaranteed in the formal legislation of each EU Member State. This overview was obtained through an extensive questionnaire which was sent out to all 27 EU Member States. The questionnaire also included questions on how the examined procedural rights are dealt with in the Member States within procedures concerning the European Arrest Warrant (EAW) and other mutual recognition instruments. The right to information was dealt with in the questionnaire as an overarching horizontal issue and not as a separate right, as is the case for the analysis of the ECtHR-case law. The conclusions drawn in the study are based on the answers as provided for by the representatives of the Ministries of

foresees a far-reaching framework for using information in a broad sense (“...*findings, certificates, information documents, certified true copies and other papers...*”) acquired in the requested state as evidence in accordance with national law of the requesting state (article 14).

¹⁵ This part is based exclusively on the publication: T. SPRONKEN, G. VERMEULEN, D. DE VOCHT and L. VAN PUYENBROECK, *EU Procedural Rights in Criminal Proceedings*, Maklu, Antwerp-Apeldoorn-Portland, 2009, 116 p.

¹⁶ 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>>

¹⁷ Each of these rights is included in the Roadmap on procedural rights and has been identified as a fundamental procedural right in the Council Resolution of November 2009 endorsing the Roadmap.

Justice of the Member States. It is important to note that the project team did not carry out any research on the accuracy of these answers.¹⁸

3.1 Analysis of the ECHR case law

This chapter provides a comprehensive overview of ECtHR case law on the 4 fundamental rights that are the subject of this study.¹⁹

3.1.1 Right to information

3.1.1.1 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 receive information on the nature and cause of the accusation against them.²⁰ Additionally, in case of an arrest, the reasons for his arrest become subject to the right to information.²¹

3.1.1.2 Timing

Articles 5, 3 and 6, 3, a) ECHR require information to be delivered promptly. No further specification is made. Similarly, the Proposed Framework Decision of 2004 referred in its Art. 14.1 to an immediate right.

3.1.1.3 Means

The ECHR does not give any indication as to the means to be used to provide the information. The ECHR 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'²². Subsequently a similar provision is found in the 2004 proposal.

3.1.1.4 Content

- *Accusations and charges*

Even though both Art. 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 the accusation and the respective legal bases²³. 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*

¹⁸ All Member States replied to the questionnaire except for Malta, so the conclusions are based on the information given by 26 Member States.

¹⁹ This 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>>.

²⁰ Art. 5, 3 and Art. 6, 3, a) ECHR.

²¹ Art. 5, 3 ECHR.

²² Green Paper, section 8.1.

²³ ECtHR 18 March 2008, *Ladent*, (no. 11036/03), § 66; ECtHR 19 December 1960, *Ofner* (no. 524/59), § 5.

Regrettably, there is no special provision in the ECHR that the suspect should be notified immediately of the other defence rights enlisted in the Convention (e.g. the right to consult a lawyer, 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 Art. 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.” From recent case law of the ECtHR can be derived that the state has a duty to take all reasonable steps to make a suspect fully aware of his rights of defence and that domestic authorities have to ensure actively that a suspect understands these rights.²⁴

- *Information on the investigation*

Art. 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 defence²⁵, including information *à décharge* (exculpatory), found by the prosecuting party²⁶. Nevertheless, the European Court has accepted 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.²⁷ 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.²⁸

3.1.2 *Right to legal advice*

3.1.2.1 Seek legal advice or defend oneself

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 with regards to the 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.²⁹ The right to legal assistance is covered by other European and international treaties and charters as well: for instance the ICCPR³⁰, the Universal Declaration of Human Rights³¹, the Charter on Fundamental Rights in the European Union³², the

²⁴ ECtHR 11 December 2008, *Panovits* (no. 4268/04), § 68 and § 72; ECtHR 27 March 2007, *Talat Tunç* (no. 32432/96), § 61; ECtHR 10 August 2006, *Padalov* (no. 54784/00), § 52-54.

²⁵ ECtHR, 14 December 1981, *Jespers* (no. 8403/78).

²⁶ ECtHR, 16 December 1992, *Edwards* (no. 13071/87), § 35-38.

²⁷ ECtHR, 16 February 2000, *Jasper* (no. 27052/95) § 43.

²⁸ ECtHR, 16 February 2000, *Rowe and Davis* (no. 28901/95), § 58.

²⁹ Green Paper, section 4.1.

³⁰ 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.

³¹ In Art. 11 of the Universal Declaration on Human Rights it 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.

American Convention on Human Rights³³, the African Charter on Human Rights and Peoples Rights³⁴ and the 1990 UN-resolution on Basic Principles on the Role of Lawyers.³⁵

In the explanatory note on the 2004 proposal, 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’.³⁶ 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.³⁷

The right to legal advice/assistance is covered by Art. 6 (§ 3, b and c) ECHR. Art. 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.³⁸ According to Art. 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)³⁹, to be assisted by a lawyer of his own choosing (therefore the denial of legal assistance constitutes a violation⁴⁰, as does the failure to allow confidential communication⁴¹), or to have a lawyer assigned to him in case he does not have the means to pay for a lawyer himself.⁴² Art. 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 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.⁴³

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

³² Art. 47 CFREU (Right to an effective remedy and to a fair trial).

³³ 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’.

³⁴ 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.

³⁵ 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.

³⁶ The 2004 proposal, section 32.

³⁷ The 2004 proposal, section 55; also ECtHR, Grand Chamber, 27 November 2008, *Salduz* (no. 36391/02), § 54.

³⁸ ECtHR 7 October 2008, *Bogumil*, (no. 35228/03), § 48; ECtHR 9 June 1998, *Twalib*, Reports, 1998.

³⁹ ECtHR 12 June 2008, *Yaremenko*, (no. 32092/02), § 81.

⁴⁰ ECtHR 22 July 2008, *Panasenko*, (no. 10418/03), § 54; ECtHR 26 June 2008, *Shulepov* (no. 15435/03), § 39.

⁴¹ ECtHR 27 November 2007, *Zagaria*, (no. 58295/00), § 36.

⁴² ECtHR 11 November 2008, *Timergaliyev*, (no. 40631/02), § 59; ECtHR 10 August 2006, *Padalov* (no. 54784/00), § 53-54.

⁴³ ECtHR 27 April 2006, *Sannino* (no. 30961/03), § 48.

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.⁴⁴

3.1.2.2 *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.⁴⁵ Other circumstances, which are not mentioned in ECtHR case law in relation to obligatory legal advice, were cited in Art. 3 of the 2004 proposal. The obligation to provide legal advice when the suspect is the subject of a European Arrest Warrant, extradition request or other surrender proceedings is an extension of existing provisions.

3.1.2.3 *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.⁴⁶ 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.⁴⁷ If legal representation is ineffective, the State is obliged to provide the suspect with another lawyer.⁴⁸

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.⁴⁹ This independence is threatened when the State is held responsible for every lawyer's 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'.⁵⁰ The suspect does not have to prove that he has been prejudiced due to lack of effective legal assistance⁵¹, nor is it necessary that damages have arisen.⁵²

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.⁵³ This last provision is

⁴⁴ 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.

⁴⁵ ECtHR 24 November 1986, *Gillow* (A 109); ECtHR 25 September 1992, *Croissant* (A 237-B); ECtHR 14 January 2003, *Lagerblom* (no. 26891/95).

⁴⁶ ECtHR 12 July 1984, *Can* (B 79); ECtHR 4 March 2003, *Öcalan*, (no. 63486/00).

⁴⁷ ECtHR 9 April 1984, *Goddi* (A 76); ECtHR 4 March 2003, *Öcalan*, (no. 63486/00).

⁴⁸ ECtHR 13 May 1980, *Artico* (A 37).

⁴⁹ 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".

⁵⁰ ECtHR 24 November 1993, *Imbrioscia* (A 275), § 41, ECtHR 10 October 2002, *Czekalla*, Recueil/Reports 2002, § 65; ECtHR 7 October 2008, *Bogumil*, (no. 35228/03).

⁵¹ ECtHR 13 May 1980, *Artico* (A 37).

⁵² ECtHR 19 February 1991, *Alimena* (A 195-D).

⁵³ Proposed FD, section 59.

not stipulated in the ECHR, although the right to effective legal assistance can be deduced from ECtHR case law.

3.1.2.4 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.⁵⁴ With regard to the moment the right arises, the proposed Framework Decision had stipulated in its Art. 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 the ECHR, but is considered to be a part of the right in Art. 6.⁵⁵ 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 guard⁵⁶, in the presence of police officers⁵⁷ or if a suspect can only communicate with his lawyer separated by a glass partition.⁵⁸ Nevertheless, certain security measures could be allowed if proven truly necessary.⁵⁹

3.1.2.5 Legal advice during police interrogation

The physical presence of a lawyer can provide the necessary counterbalance against pressure used by the police during interviews.⁶⁰ When the suspect has to make decisions during police interrogations that may be decisive for the further course of the proceedings, he has the right to consult a lawyer prior to these interrogations.⁶¹ 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.⁶² In contradiction to that initial view of the ECtHR, both the Yugoslavia Tribunal⁶³ and the European Committee for the Prevention of Torture and

⁵⁴ ECtHR 8 February 1996, *John Murray* (Reports 1996-I).

⁵⁵ Commission, 12 June 1984, *Can v Austria* (no. 9300/82).

⁵⁶ ECtHR 29 November 1991, *S. v Switzerland*, (no. 13965/88).

⁵⁷ ECtHR 13 January 2009, *Rybacki* (no. 52479/99, § 53-62).

⁵⁸ ECtHR 19 December 2006, *Oferta Plus SRL* (no. 14385/04), § 145-156; ECtHR 13 March 2007, *Castravet*, (no. 23393/05), § 59-60.

⁵⁹ ECtHR 31 January 2002, *Lanz* (no. 24430/94).

⁶⁰ 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 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).

⁶¹ ECtHR 6 June 2000, *Averill* (no. 36408/97).

⁶² 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 Art. 6 to claim the right to have a solicitor physically present during interview.” See also ECtHR 16 October 2001, *Brennan* (no. 39846/98).

⁶³ Art. 18 (§ 3) Statute of the International Tribunal for the former Yugoslavia (ICTY). Decision on the Defence Motion to Exclude Evidence from ICTY in Zdravko Mucic, 2 September 1997, Case No. IT-96-21-T, Trial Chamber II.

Inhuman or Degrading Treatment or Punishment (CPT)⁶⁴ 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 2004 proposal.

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’ Art. 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.⁶⁵

This new interpretation of Art. 6 § 3 (c), also referred to as the ‘Salduz doctrine’, has been confirmed in several judgments. In this (post-Salduz) case law the ECtHR has convicted the defending States (often Turkey) by merely referring to the Salduz principle and adding that no exceptional circumstances were present that could justify an exception to this jurisprudence.⁶⁶ Moreover, in the case of *Shabelnik v. Ukraine* of 19 February 2009 the ECtHR has made a clear stance as regards the interpretation that should be given to its new jurisprudence: *“...the applicant, having been warned about criminal liability for refusal to testify and at the same time having been informed about his right not to testify against himself, could have been confused, as he alleged, about his liability for refusal to testify, especially in the absence of legal advice during that interview”*.⁶⁷

3.1.3 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 2 conditions, namely if (1) he does not have 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.⁶⁸ The Proposed Framework Decision stipulated in Art. 5 that the costs of legal advice should be 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 3 factors which should be taken into account⁶⁹:

⁶⁴ 2nd General report (CPT/Inf (92) 3), sections 36-38.

⁶⁵ ECtHR, Grand Chamber, 27 November 2008, *Salduz* (no. 36391/02), § 54-55 and ECtHR 11 December 2008, *Panovits* (no. 4268/04), § 66 and 70-73.

⁶⁶ ECtHR, 10 March 2009, *Böke and Kandemir* (71912/01; 26968/02 and 36397/03); ECtHR, 3 March 2009, *Aba* (no. 7638/02 and 24146/04); ECtHR, 17 February 2009, *Aslan and Demir* (no. 38940/02 and 5197/03); ECtHR, 17 February 2009, *Oztürk* (no. 16500/04).

⁶⁷ ECtHR 19 February 2009, *Shabelnik* (application number 16404/03).

⁶⁸ ECtHR 25 April 1983, *Pakelli* (A, 64, § 34).

⁶⁹ ECtHR 24 May 1991, *Quaranta* (A, 205, § 35).

- 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 stake⁷⁰, 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.⁷¹

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 demand it.⁷²

3.1.4 *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.⁷³

3.1.4.1 *The scope of the right to interpretation and translation*

- *All parts of criminal proceedings*

The right to free interpretation is derived from Art. 5,2 and 6,3,a-e ECHR⁷⁴ and established in ECtHR case law.⁷⁵ 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 interpreter⁷⁶. 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.⁷⁷ The ultimate duty to ensure fairness of the proceedings rests with the trial judge⁷⁸, since he is the ultimate guardian of the fairness of the proceedings.⁷⁹ The 2004 proposal 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 2004 proposal. The

⁷⁰ ECtHR 10 June 1996, *Benham (Reports 1996-III)*.

⁷¹ ECtHR 20 June 2002, *Berlinski* (no. 27715/95 and 30209/96).

⁷² The 2004 proposal, section 60-61.

⁷³ Green Paper, section 5.2.

⁷⁴ 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.

⁷⁵ ECtHR 28 November 1978, *Luedicke, Belkacem and Koç* (A 29).

⁷⁶ The 2004 proposal, section 63.

⁷⁷ ECtHR 19 December 1989, *Kamasinski* (A 168) § 76-77; See also the 2004 proposal, section 67.

⁷⁸ Green Paper, section 5.2.1 (a).

⁷⁹ ECtHR 24 September 2002, *Cuscani* (no. 32771/96); ECtHR 18 October 2006, *Hermi* (no. 18114/02), § 69-71.

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 Art. 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.*⁸⁰

The rules on how much material is to be translated vary according to the Member State and the nature of the case. According to the EC, this variation is acceptable as long as the proceedings remain ‘fair’.⁸¹ 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.⁸²

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 Art. 6 (Art. 6-3-a).⁸³

- *Hearing or speech impairment*

The rights granted in Art. 6 can also require hearing aid during trial, when a persons' hearing impairment significantly reduces the ability to follow the proceedings.⁸⁴

3.1.4.2 *Free interpretation and translation*

Both Art. 5, 2 and 6,3 ECHR combine to the importance of the information being provided in a language the accused understands, with a right to free translation and interpretation.

⁸⁰ ECtHR 19 December 1989, *Kamasinski* (A 168); see also ECtHR 14 January 2003, *Lagerblom* (no. 26891/95).

⁸¹ Green Paper, section 5.2.1 (c).

⁸² The 2004 proposal, section 66.

⁸³ ECtHR 19 December 1989, *Kamasinski* (A 168) § 81.

⁸⁴ ECtHR 14 October 2008, *Timergaliyev*, (no. 40631/02), § 60.

Similarly, Art. 6 and 7 of the 2004 proposal entailed the right to free interpretation and the right to free translation of all relevant documents.⁸⁵

3.1.4.3 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.⁸⁶

Whilst Member States are conscious of these obligations in theory, these are not complied with in full in practice.⁸⁷ 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.⁸⁸

- Registers of translators and interpreters

In order to comply with the provision on accurate translation and interpretation, research⁸⁹ 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 stress that interpretation and translation are 2 different professions which should be treated accordingly. Consequently 2 different registers are required.⁹⁰

- 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.⁹¹ 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

⁸⁵ ECtHR 28 November 1978, *Luedicke* (no. 6210/73).

⁸⁶ The 2004 proposal, section 69 and 70.

⁸⁷ The 2004 proposal, section 36 - In some cases even a prisoner's cellmate is used as an interpreter. See also Reflection Forum on Multilingualism and Interpreter Training March 2009 <http://ec.europa.eu/commission_barosso/orban/docs/FinalL_Reflection_Forum_Report_en.pdf>.

⁸⁸ Green Paper, section 5.2.

⁸⁹ 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.

⁹⁰ 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).

⁹¹ Green Paper, section 5.2.2 (c).

encouraged to join the profession and be offered appropriate training.⁹² Member States should also make an effort to recruit a sufficient number of translators and interpreters.⁹³

3.2 Compliance with the ECHR in the EU Member States

3.2.1 *The right to information*

In the study “the right to information” is dealt with as an overarching horizontal issue that is highly relevant for procedural rights being practical and effective. Two dimensions are distinguished. First, the right of anyone charged with a criminal offence to be informed on the nature and cause of the accusations against him and to have access to the evidence on which these accusations are based as guaranteed by Art. 5 and 6 ECHR). Secondly, the right to information in the sense of being informed on fundamental procedural rights, which as such is not covered by the ECHR.

A notable finding of the study is the fact that the right to remain silent is no statutory right in France and Luxembourg and the right to have access to the file is not provided for on behalf of the suspect in legislation in Estonia, France, Germany and Spain, both being basic requirements of a fair trial in the ECHR.

A remark applicable to all the rights that are the subject of the study (including the right to be informed on the charge) is the substantial divergence in the way suspects are informed as well as the absence of legal obligations for the authorities to inform the suspect on these fundamental procedural rights.

With regards to the right to contact a lawyer after arrest, all Member States have a legal obligation to inform the suspect on this right, but this information is not always given immediately after arrest. Also, the moment at which the obligation to inform the suspect of his right to have a lawyer present during police interrogation varies from promptly after arrest until a later stage in the investigation or proceedings. This right is obviously only effective when the suspect is timely informed on it and if he is offered the opportunity to contact a lawyer before the first police interrogation. In many Member States where there is a right to legal assistance during police interrogation, there are no provisions to secure the effectuation of this right.

The same applies to information on the right to legal aid. In 4 Member States there is no legal obligation to inform the suspect of the right to legal assistance (partially) free of charge and in the remainder of the Member States where a legal obligation to inform the suspect does exist, the moment at which the duty arises varies considerably as well as the manner in which the information is given. In the majority of the countries the information is given orally and in only 4 countries this information is provided in a letter of rights.

A similar picture can be drawn with regard to information on the right to interpretation and translation. In 8 Member States there is no legal obligation to inform the suspect on his right to interpretation and in 9 Member States there is no obligation to inform the suspect on his right to translation.

⁹² Green Paper, section 5.2.2 (d).

⁹³ Green Paper, section 5.2.2 (e).

Striking is that in Belgium and Finland there is no legal obligation to inform the suspect of his right to remain silent and in 6 Member States there is no obligation to inform the suspect of his right to call and examine witnesses.

In 10 Member States the suspect is informed about (one or more of) his rights by means of a Letter of rights (Austria, Czech Republic, England and Wales, Italy, Latvia, Luxemburg, Poland, Slovak Republic, Spain and Sweden). However, there are great differences between these EU Member States as to which rights are included. Many Letters of Rights do not mention the right to remain silent or the right to translation or interpretation and sometimes there is no letter of rights available in the language the suspect understands.

3.2.2 *The right to legal assistance*

According to the case law of the ECtHR the right to contact a legal advisor – as part of the general right to legal assistance which is covered by Art. 6 § 3 b and c ECHR – arises immediately upon arrest. The study shows that the right to contact a lawyer after arrest exists in most Member States. However, there is a great divergence as to the moment at which the right to contact a lawyer can be effected. For example, in a considerable number of countries this is not possible immediately after arrest – as required by the ECHR – but only at a given stage of the investigation or the proceedings.

Also, it follows from recent judgments of the ECtHR that access to a lawyer should as a rule 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 the case that there are compelling reasons to restrict this right. Furthermore, the ECtHR has held 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.

It can be concluded from the study that the basic rules mentioned above are not common practice throughout the EU: in 4 Member States the right to consult a lawyer before questioning is not guaranteed⁹⁴ and in 5 Member States there is no right for the lawyer to be present at interrogations carried out by the police. In almost all countries where the lawyer is allowed to be present, authorities are obliged to inform the suspect of this right but there are considerable differences among Member States as to the moment at which the obligation to inform the suspect of this right arises and the way in which the information is provided to the suspect. Furthermore, in several countries there is no possibility for the defence to deliberate in private during questioning. Finally, the study shows that the presence of a lawyer at the interrogation is not deemed indispensable: only in 3 Member States it is not allowed to use the confession of a suspect made in the absence of his lawyer as evidence in court.

⁹⁴ In the Netherlands this has changed as a result of the *Salduz* judgment of the ECtHR Grand Chamber, 27 November 2008, *Salduz* (no. 36391/02). Requested to give an interpretation of the consequences of this judgment for the Dutch practice the Supreme Court of the Netherlands ruled on 30 June 2009 that a suspect has the right to consult a lawyer before the first police interrogation, but that only a juvenile suspect has the right to also have a lawyer present during police interrogation (HR 30 June 2009, no. 2411.08 J, NbSr 2009, 249).

3.2.3 The right to legal assistance (partially) free of charge

With respect to the right to legal assistance (partially) free of charge – as guaranteed by Art. 6 § 3 c ECHR – it follows from the case law of the ECtHR that Member States have a certain margin of appreciation in choosing a system that appears to them to be most effective. However, free legal assistance should always be available where the interests of justice demands it. The study shows that although the right to legal assistance (partially) free of charge exists in all Member States (with the exception of one) there are considerable differences in the implementation of this right. Especially striking is the wide variety in merits and/or means tests. Also important is the fact that in a small number of countries there is no legal obligation to inform the suspect of his right to legal assistance (partially) free of charge.

Where this obligation does exist, there is considerable variation as to the scope of this obligation. Besides the differences in the applicable legal frameworks regulating the right to legal assistance free of charge, the study also shows enormous differences in financial recourses available for legal aid. The remarkable low budgets of some countries raise the question whether despite existing guarantees in the applicable legal framework, it is in – in everyday practice – in fact possible to effectuate the right to free legal assistance whenever the interest of justice demands it.

3.2.4 Quality of legal assistance (partially) free of charge

The study allows making some remarks as to the quality of the legal assistance (partially) free of charge and the responsibilities of the State in this respect. Although it is clear from the case law of the ECtHR that the lawyer's conduct is essentially an affair between the lawyer and his client, the State is under the obligation to ensure that legal assistance is actually effective. As a result, the Member States need to foresee in some sort of monitoring system. The study shows that in a considerable number of countries there are no mechanisms to control the quality of legal assistance free of charge and – in other Member States – the authorities carrying out this kind of control vary widely. Consequently, there seems to be a substantial divergence in the way the quality of free legal assistance is controlled and ensured. Also, the 'special' requirements for the lawyer providing legal assistance free of charge are, in many cases, of a rather general nature and not limited to providing legal assistance free of charge. Moreover, in the majority of countries the specialisation and the availability of the lawyer are not taken into account when deciding on which lawyer to appoint to a case.

These findings raise the question whether the quality of legal assistance (partially) free of charge is in fact sufficiently guaranteed throughout the EU.

3.2.5 The right to interpretation and translation

Although the right to interpretation exists in all Member States, the right to translation of documents is guaranteed in all but 5 Member States. The analysis shows a great divergence regarding the implementation of these rights. This divergence specifically applies to the fact whether there is a legal obligation to be informed on these rights and to the scope of the rights. In 5 Member States there is no provision for interpretation at the consultation of the suspect with his lawyer and some Member States have no provisions for suspects who are visually impaired or hearing impaired. There is also a considerable variety in what documents have to be provided to the suspect, and what documents are translated. It appears from the study that only a slight majority of the Member States provides a written translation of the

charge, the detention order, or the final judgment. A letter of rights is only translated in 4 of the 10 countries that provide for a letter of rights. The results of the study show that on the level of practical implementation of the right to interpretation and translation there is a divergence with the requirements that derive from the case law of the ECtHR as summarised in § 2.4.

3.2.6 *Procedural rights in the mutual recognition instruments*

When comparing the results of the analysis between the various mutual recognition instruments, some main findings can be distinguished quite easily. First, the European Arrest Warrant (EAW) clearly is the instrument that is treated the most as being equal to the domestic proceedings. The right to legal advice, for example, is applied to EAW proceedings in all Member States in the same way as for domestic cases. Secondly, conclusions as to the ‘partial’ application of certain rights with regards to mutual recognition instruments should be made with caution since some Member States have responded in this way when the particular instrument has not yet been implemented into national law. Thirdly, those Member States not applying certain rights with regards to the various mutual recognition instruments are often the same. Finally, the great majority of Member States applies the right to information on fundamental procedural guarantees to the mutual recognition proceedings equally as for domestic proceedings.

4 The EU’s policy on procedural rights in criminal proceedings

The current basic framework of the EU regarding procedural rights in criminal proceedings consists of article 6 of the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights. Both documents explicitly refer to the *acquis* of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe.

Article 6 TEU provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States.

In December 2000, The European Commission, The Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union.⁹⁵ The Charter includes several rights applicable to criminal proceedings such as the ‘right to an effective remedy and a fair trial’ (article 47) and ‘the presumption of innocence and right of defence’ (article 48). Moreover, article 53 states that *“in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”* The Treaty of Lisbon has accorded the Charter legally binding force.⁹⁶

The Commission stated in 2000 in a Communication to the Council and the European Parliament that *“it must therefore be ensured that the treatment of suspects and the rights of the defence would not only suffer from the implementation of the principle (of mutual*

⁹⁵ OJ., 18 December 2000, C.346/1

⁹⁶ Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, signed on 13 December 2007 (OJ., 9 May 2008, C.115/337).

recognition) but that the safeguards would even be improved through the process”.⁹⁷ This was endorsed in the Programme of Measures to implement the Principle of Mutual Recognition of Decisions in Criminal Matters, adopted by the Council and the Commission. It pointed out that “mutual recognition is very much dependent on a number of parameters which determine its effectiveness” and that 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).⁹⁸

This conviction led to the drafting by the Commission in 2004 of a ‘Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union’.⁹⁹ Emerging from the consultation process preceding the drafting of this proposal were five areas of priority rights: legal aid for suspects and defendants; the development of a ‘letter of rights’ to inform suspects which rights they could exercise; extra protection for ‘vulnerable groups’; consular assistance; and translators and interpreters. Other subjects (such as bail, the principles of *nemo tenetur* and *ne bis in idem*, fairness in the handling of evidence, appeal and trial *in absentia*) were reserved for ‘further research’.

As negotiations developed, increasing opposition to the proposal emerged. Probably the main dividing line was the question whether the EU was competent to legislate on purely domestic proceedings or whether the legislation should be devoted only to cross-border cases.¹⁰⁰ It is striking to note in this respect that this element did not prevent member states to adopt a wide range of measures in the fight against crime, which also have direct implications for domestic law and domestic proceedings (e.g. common definitions on terrorist offences¹⁰¹ or minimum standards on maximum sentences for certain types of trafficking in persons¹⁰²). Nor was it an obstacle in 2001 for improving the standing of victims in criminal proceedings.¹⁰³ In this context reference should also be made to article 82 of the Treaty on the Functioning of the European Union (TFEU).¹⁰⁴ According to this article, directives establishing minimum rules should aim at facilitating mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters. These minimum rules should concern, *inter alia*, mutual admissibility of evidence between member states, the rights of individuals in criminal procedure and the rights of victims of crime. This competence of the EU is new, in the sense that criminal procedure had so far been left out of the scope of harmonisation (cf. the wordings of article 31 TEU). Another common critique to the proposed framework decision was that the rights were too vague and set at too low a threshold or that the proposal would have added little value to the existing protections under the ECHR.

⁹⁷ Communication to the Council and the European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters (COM(2000) 495 final, 29.7.2000).

⁹⁸ OJ, 15 January 2001, C.12, p. 10.

⁹⁹ COM(2004) 328 final.

¹⁰⁰ Press release on the 2807th Session of the Council on the 12th and 13th of June 2007.

¹⁰¹ Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164/3, 22.6.2002.

¹⁰² Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203/1, 1.8.2002.

¹⁰³ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22.03.2001.

¹⁰⁴ OJ. 9 May 2008, C 115, 47. With the coming into force of the Lisbon Treaty in 2009, the former Treaty establishing the European Community has been renamed as Treaty on the Functioning of the European Union (TFEU). Together with the new Treaty on the European Union (TEU), the TFEU constitutes the new foundation of the EU.

Eventually, no political agreement could be reached.¹⁰⁵ The Commission however remained convinced of the need for EU action on this point. A Study carried out for the Commission by the Université Libre de Bruxelles (ULB) between 2007 and 2009 showed that almost all practitioners involved in cross-border proceedings consider an instrument of this sort to be essential.¹⁰⁶

Finally, on 8 July 2009 the European Commission presented a new and much more limited draft for a Council Framework Decision on procedural rights.¹⁰⁷ Unlike the previous proposal, this new draft only focuses on one set of rights, namely those relating to interpretation and translation. This new proposal is part of the new approach endorsed by the EU in the field of minimum procedural guarantees in criminal proceedings. The preamble to the 2009 Council Resolution endorsing the Roadmap on procedural rights justifies this as follows: *'Bearing in mind the importance and complexity of these issues, it seems appropriate to address them in a step-by-step approach, whilst ensuring overall consistency.'* In other words, the EU will follow a right-by-right approach, addressing future actions one area at a time.

Although the priority measures listed in the Roadmap are defined in a rather general way and seem to leave substantial room for interpretation, the preamble to the Resolution endorsing the Roadmap expressly states that any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the ECtHR. The significance hereof cannot be underestimated. It can be expected that the pressure on Member States to align their national rules with the ECtHR case law (cf. for example the new jurisprudence on legal assistance before the first police interrogation) will be sensibly increased.

¹⁰⁵ Even on a diluted version, Justice Ministers could not find any agreement at the Justice and Home Affairs Council on 19 to 20 April 2007. The proposal was discussed again by the Council on 13 June 2007. The Council was unable to agree and there the matter has lain since.

¹⁰⁶ G. VERNIMMEN-VAN TIGGELEN and L. SURANO, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union*, 20th November 2008, EC DG JLS.

¹⁰⁷ COM (2009) 338.

5 Conclusion

The realisation of minimum procedural rights for the defence in criminal proceedings throughout the EU is of high importance. This would not only increase mutual trust and confidence between Member States and thus pave the way for smoother judicial cooperation in criminal matters in the EU. It would also help to meet the obvious need to strengthen (and complement) the basic ECHR acquis. The results of a recent study clearly underline the need for EU action in this field. Although the four procedural rights that were subject of the research – the right to information, the right to legal advice, the right to legal assistance (partially) free of charge and the right to interpretation and translation – seem to be guaranteed by law more or less in accordance with the ECHR in the criminal justice systems of the EU, a more in-depth look at the implementation of these rights raises doubts as to whether in all Member States everyday practice is in line with the Strasbourg standard. Particularly striking is the finding that fundamental rights such as the right to remain silent, to have access to the file and to call and/or examine witnesses or experts - all being basic requirements of a fair trial in the ECHR - are not provided for in legislations of all Member States. Although discussions on procedural rights in criminal proceedings within the context of the EU over the last few years have not led to any concrete results, the topic has recently received increased attention. The new (legally binding) status of the EU Charter of Fundamental Rights and the endorsement of the Roadmap on Procedural Rights by the Council in November 2009 as the basis for future action, are both important steps in the right direction. It now has to be awaited if this renewed ambition will prove a lasting one.