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Subject : Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings

Delegations will find in the Annex observations by the Council of Europe Secretariat on the above-mentioned Commission proposal.

Observations by the Council of Europe Secretariat on the Commission proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings

I. Introduction

On 16 July 2009, the Swedish EU Presidency requested comments from the Council of Europe Secretariat on the proposal for the Framework Decision, adopted by the Commission on 8 July. The following observations respond to this request.

The Council of Europe Secretariat is grateful for this opportunity to give comments on a draft legal instrument of the European Union that will directly affect the way in which the European Convention on Human Rights is applied by EU member states.

It fully recognises the importance of common minimum standards in procedural rights as a necessary precondition for mutual trust in the legal systems of EU member states. It is indeed our common goal to ensure the fairness of criminal proceedings all over Europe.

The Council of Europe's interest is to seek to ensure that new legal instruments by the European Union are fully consistent with ECHR standards and provide real added value in respect of the rights guaranteed under existing Council of Europe instruments. Efforts aiming at improving standards are to be warmly welcomed.

The Council of Europe Secretariat welcomes the very constructive cooperation on this subject which has developed over the last few years with successive Council Presidencies. We refer to the comments which the Council of Europe Secretariat submitted earlier on various drafts for a Framework Decision on procedural rights (see, for example, EU Council document 13759/06 DROIPEN 62).

These comments have been prepared in cooperation with the Registry of the European Court of Human Rights.

II. Scope of the FD

EU instruments on fundamental rights should use the existing Convention standards and follow their wording as closely as possible, including, wherever appropriate, principles established in the Court's case-law. Following the example of the EU Charter of Fundamental Rights, the framework decision should enunciate the principle that, insofar as rights contained therein correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. This is even more important since the framework decision will not cover procedural rights exhaustively.

In previous Council of Europe comments of 30 March 2007 on the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, it was stated that “where the Framework Decision departs from the European Convention on Human Rights, it should be clearly stated whether its provisions are intended to set a higher standard than the European Convention on Human Rights, either in meaning or scope of application, or to merely set out ways of complying with existing ECHR standards”. While the last sentence of preambular paragraph 8 suggests that the FD merely aims at facilitating the application of the rights enshrined in Article 6 of the Convention, a more in depth examination would be necessary to determine to what extent the FD might go beyond the ECHR standards. Indeed, it is important that the Explanatory Memorandum indicates in which respects the FD would go beyond the ECHR.

a. Ratione materiae

According to its Article 1, the FD is intended to lay down rules concerning the rights to interpretation and translation in criminal proceedings and proceedings for the execution of a European Arrest Warrant (EAW). The notion of “criminal proceedings” seems to suggest that the framework decision is designed to apply only to proceedings for the determination of a criminal charge (within the meaning of Article 6 of the Convention), in addition to proceedings for the execution of a EAW. This would appear to be confirmed by § 14 of the Explanatory Memorandum as well as by the references to the “fairness of the proceedings” (Art. 2 § 1 and 3 § 1) which is a key notion under Article 6 of the Convention.

If this assumption is correct and the scope of the FD is indeed limited to proceedings for the determination of a criminal charge or the execution of a EAW, any reference to Article 5 of the Convention (see the Explanatory Memorandum, § 11; Preamble, recital 8) could be misleading and should therefore be removed. For Article 5 of the Convention deals only with rights which can be invoked in the context of a deprivation of liberty, notably with a view to having the lawfulness of such a deprivation assessed by a court (Article 5 § 4: *habeas corpus*). It has little to do with proceedings for the determination of a criminal charge. An implicit reference to Art. 5 would also appear to result from the fact that the detention order is listed among the essential documents which are to be translated (Art. 3 § 2).

A reference to Article 5 of the Convention is equally misleading in respect of the “proceedings for the execution of a EAW” intended to be covered by the FD, inasmuch as these proceedings are meant to be only those which are instituted for the execution of the EAW, not for the purpose of challenging the arrest as such (see paragraph 15 *in fine* of the Explanatory Memorandum, which states – wrongly, in our opinion - that the proposal to extend the scope of the rights to interpretation and translation to the European Arrest Warrant “is a further development of Article 5 ECHR”).

b. Ratione temporis

According to Article 1 § 2 of the FD, “those rights apply to any person from the time that person is *informed* by the competent authorities of a Member State that he is suspected of having committed a criminal offence until the conclusion of the proceedings (the “suspect”)”. The mere reference to such “information” to be provided to a suspect by the competent authorities, without further qualification, might be understood as referring to a formal legal act by the authorities, such as the official notification of a charge. Yet, under the Strasbourg case-law, the “criminal charge” – which triggers of the application of Article 6 – is to be given a *substantive* rather than a *formal* meaning. Consequently, a “charge” can implicitly result from events such as the arrest of a person, the opening of a preliminary investigation or even, as in the case of *De Weer v. Belgium*¹, the closing of a shop pending the outcome of criminal proceedings.

¹ See *De Weer v. Belgium*, Commission decision of 10 March 1977, Decisions and Reports 8, p. 96.

Thus, in order to avoid any misunderstandings in this respect, and indeed a lower level of protection than the one resulting from Article 6 of the Convention, it would be advisable to amend Article 1 § 2 of the FD so as to read: “... from the time that person is *made aware* by the competent authorities of a Member State, *by official notification or otherwise*, that he is suspected of ...”.

III. Comments on some specific provisions

a. Preamble

Paragraph 5 of the preamble as it stands is rather negative. It would be important to consider this FD as a way of enhancing full implementation of the ECHR (as § 8 of the preamble indeed does) and we propose a wording such as that of preambular paragraph 3 of the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (DROIPEN 22 of 20 March 2007):

“Mutual recognition is contingent on trust. Recognition of decisions in criminal matters presupposes that Member States have trust in each other’s criminal justice systems. Adherence to the minimum standards set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, in respect of arrests as well as in criminal proceedings, forms the basis for such trust. This Framework Decision, to the concrete form of which the Council of Europe has also contributed with its advice, is intended to reaffirm and carefully to expand the minimum standards described in the said Convention – as interpreted and refined in the case-law of the European Court of Human Rights – which are recognised by all Member States. No Member State of the European Union may however fail to meet the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

b. Article 1

This article lacks the horizontal clause that was contained in Article 1(4) of the March 2007 version of the former proposal for a framework decision, which, together with the non-regression clause aims to ensure consistency with ECHR standards (see our first comment under “Scope” above and our comments of 30 March 2007). Article 1(4) of the March 2007 version read:

“Unless otherwise provided in this Framework Decision, the meaning of the provisions of Articles 2 to 5 of this Framework Decision which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same as those laid down by the said Convention and as developed in the relevant case-law of the European Court of Human Rights”

The non-regression clause is included in the current proposal (Article 6), but there is no clause on the consistency of interpretation of rights set out in the FD and corresponding ECHR rights. Such a clause should be inserted in the FD.

c. Article 2 § 1

According to Article 2 § 1, only a suspect who does not understand and speak the language of the criminal proceedings concerned is entitled to interpretation. By contrast, Article 6 § 3 e) of the Convention confers this right upon any accused person who cannot understand or speak the language used in court, which appears to be a more protective test. Article 2 § 1 should therefore be adapted accordingly. In the same vein, it would then be logical to make a similar change to Article 2(6).

d. “Necessary”

Article 2 §§ 1 and 2 introduces a kind of necessity test in respect of some of the rights it lays down (“all necessary meetings”, “any necessary interim hearings”, “where necessary”). This raises a question as to the criteria to be used when applying that test. In other words, what is the purpose by reference to which the necessity of a measure should be assessed: the fairness of the trial, the

interests of justice (see Article 6 § 3 c) of the Convention) or any other purpose? In order to avoid misunderstandings in this respect and with a view to being in line with the Strasbourg case-law (see, among others, *Hermi v. Italy* [GC], 18.10.2006, no. 18114/02/ § 69), consideration should therefore be given to specifying that what is meant here is the necessity *for the purpose of ensuring the fairness of proceedings*.

e. Article 2 § 5

It might be better to reword this Article to read “The right to interpretation shall include, where necessary, an entitlement to specific assistance for persons with hearing or speech impediments” (See, *mutatis mutandis*, *S.C. v. UK*, judgment of 15 June 2004, concerning the trial of a mentally retarded minor, where “effective participation” in a trial was held to mean “that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court” (para. 29). See also *Stanford v. UK*, judgment of 23 February 1994, where it was held that “Article 6 (art. 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings.”)

f. The costs of interpretation and translation

The text of Article 4 does not expressly exclude the possibility of the State asking for payment where the accused is convicted. This point is made clear only in paragraph 18 of the Explanatory Memorandum. It would seem advisable to reflect this in the wording of Article 4 itself, e.g. by adding the words "whatever the outcome of the proceedings".

g. Non-regression clause

From a Convention point of view, the non-regression clause laid down in Article 6 of the FD is to be welcomed. It is indeed essential for ensuring that the day-to-day application of the framework-decision and/or its “translations” into domestic legislation do not fall behind the standards of the Convention which, as illustrated by many examples, are sometimes raised in the Strasbourg Court’s case-law as a consequence of the Convention being a “living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today” (*Kress v. France* [GC], 7.6.2001, no. 39594/98, § 70).

h. Higher standards

Finally, it would appear that some provisions lay down standards surpassing those of the Convention. That, however, does not raise a problem in terms of their compatibility with the Convention, since its Article 53 explicitly provides for such an eventuality. However, as mentioned above, it is important that such higher standards are clearly indicated.
