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NOTE

Subject: Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings
- Explanatory memorandum

Please find attached an explanatory memorandum relating to the initiative by a group of Member States for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings.

Brussels, 14 December 2009

Initiative

of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the Republic of Estonia, the French Republic, the Republic of Hungary, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Austria, the Republic of Portugal, Romania, the Republic of Finland and the Kingdom of Sweden

for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

ON THE RIGHTS TO INTERPRETATION AND TO TRANSLATION

IN CRIMINAL PROCEEDINGS

EXPLANATORY MEMORANDUM

EXPLANATORY MEMORANDUM

1. BACKGROUND

Article 82(1) of the Treaty on the Functioning of the European Union provides that judicial cooperation in criminal matters in the European Union shall be based on the principle of mutual recognition of judgments and judicial decisions.

Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States.

The right of suspected or accused persons to a fair trial is a fundamental right which the European Union and its Member States respect under Article 47 of the Charter of Fundamental Rights of the European Union (Charter) and under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted by the European Court of Human Rights (ECtHR).

For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Charter and the ECHR, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.

There is wide support among experts for European Union action on procedural rights, through legislation and other measures ¹. These sentiments are echoed by the European Parliament ² and by the European Commission ³.

¹ See *inter alia* the "Analysis of the future of mutual recognition in criminal matters in the European Union", report of 20 November 2008 by the *Université Libre de Bruxelles*.

² See e.g. the "European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area", 2009/2012(INI), point 1 a).

³ See *inter alia* "An area of freedom, security and justice serving the citizen", COM (2009) 262/4 (point 4.2.2.).

In April 2004 the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union ¹. After 3 years of discussion, it appeared however impossible to reach (unanimous) agreement on the text. Subsequently, other avenues were explored with a view to reaching the objectives set out by that proposal, which aimed at enhancing procedural rights of suspected and accused persons in criminal proceedings.

In this light, the Swedish Presidency of the European Union presented on 1 July 2009 a proposal for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The Roadmap proposed to address the procedural rights in a step-by-step-approach, addressing future actions one area at a time. This would allow to pay appropriate attention to each individual measure, so as to enable problems to be identified and addressed in a way that would give added value to each measure.

The Roadmap, which was very much welcomed by Member States, was soon transformed into a Resolution of the Council. The Roadmap was adopted by the Council (Justice and Home Affairs) on 30 November 2009 ².

In the Roadmap, the Council agrees that action needs to be taken at the level of the European Union in order to strengthen the rights of suspected or accused persons in criminal proceedings. Such action can comprise legislation as well as other measures. The Roadmap enumerates six measures as the basis for future action. One of these measures is the right to translation and interpretation in criminal proceedings (measure A).

In view of the step-by-step approach set out in the Roadmap, the Commission presented on 8 July 2009 a proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings. This proposal was accompanied by an Impact Assessment ³.

¹ Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union, COM (2004) 328 of 28.04.2004.

² OJ C 295, 4.12.2009, p. 1.

³ COM(2009) 338 final SEC(2009) 916.

On 15 July 2009, the Swedish Presidency presented a proposal for a Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings. This Resolution aimed at accompanying and complementing the proposal for a Framework Decision presented by the Commission.

After intense negotiations, the Council reached on 23 October 2009 a general approach regarding both the proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings ¹ and the accompanying Resolution ².

Due to the entry into force of the Lisbon Treaty on 1 December 2009, the proposal for a Framework Decision needs to be transformed into a proposal for a Directive in order to allow continuation of the work to be carried out on the text. Since the Commission which is in place until 1 February 2010 has only a care-taker task and can, in principle, not adopt new proposals, it is felt appropriate that a group of Member States presents the text of the general approach on the proposal for a Council Framework Decision as an initiative for a Directive of the European Parliament and of the Council. Such initiative, taken in accordance with Article 76(b) TFEU, will allow to continue the work on the text under the Lisbon Treaty where it ended under the Amsterdam/Nice Treaties. Taking such an initiative will also ensure that no time is wasted so that the citizens of the European Union can as soon as possible benefit from the rights set out in the new instrument to be adopted by the European Parliament and by the Council in the context of the ordinary legislative procedure ("co-decision").

The Impact Assessment (SEC(2009) 915 final) carried out by the Commission in relation to its proposal for a Council Framework Decision is equally valid for the initiative for a Directive, since it covers exactly the same subject matter. This impact assessment is therefore re-submitted as detailed statement allowing to appraise compliance with the principles of subsidiarity and proportionality in accordance with Article 5 of Protocol No 2 to the Lisbon Treaty.

¹ 14792/09 DROIPEN 132 COPEN 204.

² 14793/09 DROIPEN 133 COPEN 205.

The proposal for a Resolution accompanying the proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings is not directly affected by the Lisbon Treaty, but it is linked to that Framework Decision and therefore follows the latter instrument in the decision making process. Since the proposal for a Framework Decision is replaced by the initiative for a Directive, the said Resolution can only be (formally) adopted when the Directive will be adopted.

2. SPECIFIC PROVISIONS

The initiative for a Directive on the right to interpretation and to translation in criminal proceedings is based on Article 82(2)(b) TFEU, according to which *"To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (...) (b) the rights of individuals in criminal procedure."*

This initiative for a Directive sets out basic obligations and builds on the ECHR and the case-law of the ECtHR. In accordance with Article 82(2), the provisions of this Directive set minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. However, the level of protection should never fall below the standards provided by the ECHR, as interpreted in the case-law of the ECtHR.

This initiative for a Directive is gender neutral: the terms "he" and "his" are used throughout the text to refer to the suspected or accused person or to that person's legal council, as the case may be. The terms are intended to be gender neutral and to cover both male and female suspected or accused persons and male and female legal councils.

Article 1 – Scope of application

The scope covers all persons that are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence. The final determination means that the guilt or innocence of the suspected or accused person has been determined and it is not possible to appeal. The term “suspected or accused person” is intended to be an autonomous term, irrespective of the designation of such persons in national proceedings. The scope does not include proceedings which may lead to sanctions being imposed by an authority other than a criminal court (typically administrative proceedings), as long as the imposed sanction has not been appealed to such a court.

The Article clarifies that the initiative also applies to European Arrest Warrant cases. It is important that European Arrest Warrant cases are covered by the Directive, since the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States ¹ only addresses the rights on interpretation and translation in general terms.

Article 2 – The right to interpretation

This Article lays down the basic principle that interpretation, including of communication between the suspected or accused person and his/her legal counsel, shall be provided during the investigative and judicial phases of the proceedings, i.e. during police questioning, at trial and at any interim hearings or appeals, and may be provided in other situations. In this context, recital 10 recalls the case-law of the ECtHR according to which the suspected or accused person should be able, *inter alia*, to explain to his legal counsel his version of the events, point out any statements with which he disagrees and make his legal counsel aware of any facts that should be put forward in the defence.

This Article clarifies that it does not affect rules of national law concerning the presence of a legal counsel during any stage of the criminal proceedings.

¹ OJ L 190, 18.7.2002, p. 1.

Article 3 – The right to translation of essential documents

The suspected or accused person has the right to translation of essential documents, or at least the important passages of the documents (if, for example, the documents are extremely extensive) in order to safeguard the fairness of the proceedings. It is the competent authorities that decide which are the essential documents, but essential documents shall always include the charge sheet or indictment as well as any judgments. Translation should also be provided of any detention order or order depriving the person of his liberty.

In respect of proceedings for the execution of a European Arrest Warrant, the European Arrest Warrant shall be translated by the executing Member State.

An oral translation or an oral summary may be provided on condition that it does not affect the fairness of the proceedings and that it is appropriate to provide translation in such a form.

Article 4 – Member States to meet the costs of interpretation and translation

This Article provides that the costs of interpretation and translation are to be met by the Member State, irrespective of the outcome of the proceedings.

Article 5 – Quality of the interpretation and translation

This Article sets out the basic requirement to safeguard the quality of interpretation and translation. Recommendations in this respect can be found in the Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the rights to interpretation and to translation in criminal proceedings.

Article 6 – Non-regression clause

The purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of lowering standards in certain Member States and that the standards set in the ECHR or other relevant international agreements are maintained. Member States remain entirely at liberty to set standards higher than those agreed in this Directive.

Article 7 – Implementation

This Article requires that Member States must implement the Directive at the latest 30 months after its entry into force and, by the same date, send the text of the provisions transposing it into national law to the Council and the Commission.

Article 8 – Report

42 months after the entry into force of the Directive, the Commission must submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 9 – Entry into force

This Article provides that the Directive will enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

3. SUBSIDIARITY PRINCIPLE

The objective of the Directive cannot be sufficiently achieved by Member States alone, since the aim of the proposal is to promote trust between them and it is therefore important to agree on a common minimum standard that applies throughout the whole of the European Union. The Directive will approximate Member States' substantive procedural rules in respect of interpretation and translation in criminal proceedings in order to build mutual trust. The Directive therefore complies with the subsidiarity principle. For further details, reference is made to the detailed statement which is attached to the initiative for a Directive.

4. PROPORTIONALITY PRINCIPLE

The Directive complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose. For further details, reference is made to the detailed statement which is attached to the initiative for a Directive.