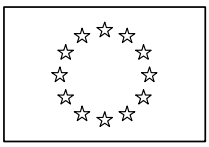

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.4.2004
SEC(2004) 491

COMMISSION STAFF WORKING PAPER

Proposal for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union

Extended Impact Assessment

{COM(2004)328 final}

COMMISSION STAFF WORKING PAPER

Proposal for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union

Extended Impact Assessment

1. INTRODUCTION

It is important for the judicial authorities of each Member State to have confidence in the judicial systems of the other Member States and in particular in their criminal justice systems. This will be all the more so when there are twenty-five rather than fifteen Member States after 1 May 2004. Faith in procedural safeguards and the fairness of proceedings operate so as to strengthen that confidence. It is therefore desirable to have certain minimum common standards throughout the European Union, although the means of achieving those standards must be left to the individual Member States.

The Commission has spent more than two years carrying out research and consultation on how EU action in this area can improve the situation, leading to the identification of five areas of concern. The consultation process carried out prior to publication consisted of a Consultation Paper posted on DG-JHA's website in January 2002 to which about 100 responses were received, a questionnaire was sent to the Ministries of Justice of the Member States and an experts' meeting was held in October 2002. After adoption of a Green Paper in February 2003, all respondents were invited not only to submit their comments in writing, but also to attend a public hearing held in June 2003. Over 100 people attended, and there were 40 oral presentations, from practising lawyers, academics, representatives of NGOs and delegates from government departments. The following is a discussion of the Commission's assessment of the different options considered for action in this field as well as their relative merits and potential impacts.

It must be noted however that the impact assessment process started relatively late: policy formulation in the area of procedural safeguards had being underway for more than a year when the decision to carry out this extended impact assessment was taken. Consequently, the influence of impact assessment on the choice of the scope and the alternatives to be proposed was quite limited – it did however add value to the policy design process by usefully assisting in the decision on the most appropriate instrument and on the parameters of intervention. Furthermore, the impact assessment did allow for a more careful consideration of the potential social, economic and environmental impacts of the proposal, in the course of the extensive consultations leading to its formulation.

It can therefore be concluded that the impact assessment process has helped in clarifying **how** could the EU best intervene in this most sensitive area, as well as **what results** this action would eventually bring about. The issue of **where** to focus this

proposal specifically was influenced by the extended impact assessment to a lesser extent, and had to take other considerations into account.

2. WHAT ISSUE/PROBLEM IS THE POLICY/PROPOSALS EXPECTED TO TACKLE?

- What is the issue/problem in a given policy area expressed in economic, social and environmental terms including unsustainable trends?
- What are the risks inherent in the initial situation?
- What is (are) the underlying motive force(s)?
- Who is affected?

The policy proposal is expected to tackle a number of interrelated and complex issues in the field of procedural safeguards. The table in Annexe n° 1 gives an overview of the main issues to be addressed and the related challenges. It identifies a number of unsustainable economic and social trends, affecting both third-country nationals and the EU at large, which require an appropriate response at EU level.

The main challenge is to increase confidence in the criminal justice system of each Member State and to enhance perception of these systems in the eyes of the public, legal practitioners, the media and governments. In view of enlargement, this mutual trust is more important than ever. Indeed, mutual trust is a precondition for all the mutual recognition measures. One example is the introduction of the European Arrest Warrant, since surrendering an own national to another Member State for trial implies a high level of trust in that Member State's judicial system.

Respect for the procedural rights of suspects and defendants in criminal proceedings is an important aspect of mutual trust. The Member States of the EU are all signatories of the principle treaty governing those rights, the European Convention on Human Rights, as are all the acceding countries, so a mechanism for achieving mutual trust is already in place. However, practice shows that within the European Union, there is a lack of consistency in the application of these rights.

In the broader context, the Commission has found it useful to launch a debate on what constitutes a fair trial. Every Member State recognises this principle as a basic right, but the content differs in practice. We have been able to examine what the minimum requirements for a fair trial are in the minds of different actors in the criminal justice system and in the views of Member States.

The specific challenges in the protection of procedural rights can be classified into five major subdivisions. These are (1) the right to legal assistance and representation, (2) the right to interpretation and translation, (3) the protection of certain potentially vulnerable groups, (4) the possibility for detained persons to communicate their whereabouts to the outside world and for foreign defendants to receive consular assistance and (5) the right to written notification of rights to ensure that each suspect/defendant is aware of his rights (the "Letter of Rights"). Evaluation and monitoring of the situation in the Member States is an essential component in order to achieve common minimum standards and to promote trust.

Legal advice

The key issue is probably that of access to legal advice. The suspect or defendant who has a lawyer is in a far better position as regards enforcement of all his other rights, partly because his chances of being informed of those rights is greater and partly because a lawyer will assist him in having his rights respected. The right of access to legal assistance and representation is prescribed by Article 6 ECHR, and yet the case-law of the European Court of Human Rights demonstrates that there are instances where this right is not complied with in the Member States.

In the Commission's questionnaire to the Member States, there was a question about access to legal assistance and representation. The arrangements in the Member States varied considerably. Differences between Member States appear in organisation, level of qualification required and payment of lawyers.

Moreover, in some Member States, legal advice on arrest is given on a *pro bono* basis, sometimes by junior inexperienced lawyers, sometimes even by trainees. Lawyers giving legal advice in these circumstances must be competent in order for the proceedings to comply with the ECHR. If there are not enough qualified lawyers prepared to undertake this type of work, this could be in part because the remuneration is not attractive enough.

Interpretation and translation

Defendants who do not speak or understand the language of the proceedings (either because they are non-nationals or because they come from a different linguistic region) are clearly at a disadvantage. There is every chance that they do not have any knowledge of the country's legal system or court procedures. Whatever their circumstances, they are vulnerable as a result of not knowing the language. Consequently, the right to interpretation and translation, which is enshrined in the ECHR, strikes the Commission as particularly important. The difficulty is not one of acceptance on the part of the Member States, but one of levels and means of provision, and perhaps most importantly, concern about the costs of implementation.

Ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention

It is part of the Commission's philosophy to try where possible to assist the most vulnerable members of society and this is reflected in its policies and instruments. In the consultation phase, the Commission asked experts whether it was appropriate to require Member States to provide suspects and defendants who were members of society's most vulnerable groups with a higher degree of protection as far as procedural safeguards were concerned. This suggestion was well received but it presents two substantial difficulties: (1) defining "vulnerable groups" and (2) establishing the mechanisms for offering this higher degree of protection. It was therefore decided to use the concept of "persons who are not capable of understanding or following the proceedings owing to their age or their physical, medical or emotional condition".

Communication and consular assistance

As already seen above in relation to interpreters and translators, one readily identifiable vulnerable group is that of non-nationals, both nationals of other EU Member States and of third countries. Many NGOs identify this group as one that does not always receive equitable treatment. Some considerable protection would be offered by full implementation of the provisions of the 1963 Vienna Convention on Consular Relations (VCCR). Where foreign nationals refuse to see the representative of their government, for example, in the case of asylum seekers and refugees fleeing persecution in their State of origin and who therefore might not expect or want help from their Consulate, a recognised international humanitarian organisation could provide similar assistance.

It was also noted that detained persons should have a limited right of communication even where they were not foreigners in order to inform their family or place of employment about the detention. Accordingly, a “right to communication” should be considered with use being made of consular authorities to assist in that communication where appropriate.

Written notification of right - the "Letter of Rights"

The research and consultation carried out in the course of preparing this initiative clearly pointed to a problem of ensuring that all suspects have actual knowledge of their rights. It was repeatedly stated that if suspects were properly aware of their rights on arrest, during questioning and in all the phases of the procedure up to and including the trial, there would be fewer allegations of miscarriage of justice and violations of the ECHR. The Commission suggested that a simple and inexpensive way to ensure an adequate level of knowledge was to require Member States to produce an easily understood, written statement of basic rights (the "Letter of Rights") and to make it compulsory for all suspects to be given this written notification in a language they understand at the earliest possible opportunity and certainly before any questioning takes place.

The Letter of Rights would include both common “European” rights and also a section where specific national provisions should be listed.

Evaluation and monitoring

A key condition for successful policy implementation is to improve the tools available for monitoring and evaluation. In order to develop or enhance the effectiveness and credibility of strategies to improve the existing procedural safeguards at national and EU-level, monitoring and evaluation are crucial. Without accurate and comparable data and knowledge about the effectiveness of measures and the extent of the costs, the EU and the Member States are not in a position to know if their policies have the desired outcome. The principle that "justice must not only be done, it must be seen to be done" applies here since some Member States will be reassured by data and reports showing that Member States are complying wit their obligations. Experience has shown that even one negative report in the media can prejudice the perception of the whole of a Member State's criminal justice system.

At present there is a growing demand for evaluation of Justice and Home Affairs measures. Several contributions to Working Group X ("Freedom, security and justice") of the Convention on the Future of Europe have called for evaluation and monitoring of the implementation of the Area of Freedom, Security and Justice.

Who does the proposal address?

Given the diversity of the issues to be addressed, a wide range of groups is affected by the proposal, made up of all those who are directly or indirectly involved with the criminal justice system. The main group consists of suspects and defendants, their lawyers and their families, who rely on a fair treatment during the proceedings. Additionally, all the professionals involved in the proceedings will be confronted with the consequences of this policy. This includes police officers, translators and interpreters, judges, prosecutors, social workers, doctors, etc. Witnesses and victims will also be affected indirectly by the proposal. The scope of the policy is very wide, since anyone could be subject to criminal proceedings. Our research disclosed cases where ordinary law-abiding citizens found themselves unwittingly involved in criminal proceedings, occasionally as defendants. Consequently any EU national or national from a third country residing the EU territory is potentially affected, as well as temporary visitors from third countries.

3. WHAT MAIN OBJECTIVES IS THE POLICY/PROPOSALS EXPECTED TO REACH?

- What is the overall policy objective in terms of expected impacts?
- Has account been taken of any previously established objectives?

The overall objectives of EU policy in this area are to enable European citizens to know that they can rely on the criminal justice systems of the Member States to offer protection to suspects and defendants by way of specific guarantees. In this respect, the aim is to ensure that throughout the EU, all persons encounter equivalent fair trial standards in the course of criminal proceedings regardless of the Member State in which those proceedings occur.

A more general objective was to launch a debate on what constitutes a fair trial and what sort of standards could be considered common to EU Member States. This objective was achieved during the preparation of this proposal: indeed, the Commission's preparation, research and consultation in this area (by way of a Consultation Paper, Green Paper, experts meeting and other debates in various fora) and the publicity these measures were given have encouraged Member States to reflect on their own criminal justice systems. This consideration may help the Commission to clarify the priorities for the future action.

As described above, the problem to be tackled was split into five main areas for concern: the corresponding five specific objectives targeted by this initiative are set out below.

Legal advice

The Commission supports the idea of having national schemes in the Member States that meet common minimum standards so that the general rules on eligibility are applied uniformly throughout one Member State, although of course the details of the provision remain the responsibility of Member States. This would lead to a more equitable system, since all arresting officers would be familiar with the nationally applicable provisions. If these were also explained in writing to arrested persons (see Part 6 - The Letter of Rights - below), this would lead to a situation of greater transparency and increased general awareness of the right.

In the case of newly qualified lawyers or trainees giving legal assistance to arrested persons, and indeed for all lawyers undertaking this work, there should be some form of quality control. This quality control must apply also to the preparation for trial and the trial itself. It would therefore be desirable for the Member States to establish a mechanism for ensuring effectiveness and a complaints system in the event of poor standards.

The Commission recognises that schemes that provide legal assistance and representation at the State's expense are very costly. Naturally, this begs the question whether the duty extends to those who can afford to pay for some or all of their legal costs and to persons charged with minor offences only. Some Member States apply a means test, such as "earning less than twice the minimum monthly salary" as the threshold for eligibility. Others have no threshold and deem it more expensive to assess the defendant's means than to grant legal aid without a means test. In view of the costs of the system, there might be common standards regarding the level of seriousness of the offence for which free legal representation should be provided, and whether certain trivial offences can be excluded. Then the Member States would retain the discretion to provide assistance that exceeds that agreed common minimum.

Interpretation and translation

In order to comply with the requirements of the ECHR and other international instruments, all Member States should ensure, not only that a competent interpreter is always available where the defendant does not understand the language of the proceedings but also that training, accreditation and registration of legal translators and interpreters is provided.

Cost is often mentioned as a reason why Member States do not fulfil their ECHR obligations in this respect. Member States must make funds available for this purpose. Court interpreters and translators must be offered competitive rates of pay so as to make this career option more attractive. Professional bodies representing translators and interpreters often mentioned the lack of regulation (leading to a lower status for the profession) during the consultation phase. It was deemed important to try to enhance the status of the profession.

Protection of persons who, owing to their age or their physical, medical or emotional condition, cannot understand or follow the proceedings

The Commission proposes that there be a general obligation for Member States to ensure that their legal system recognises the higher degree of protection that must be

offered to all categories of vulnerable suspects and defendants in criminal proceedings. The Commission acknowledges that the assessment of vulnerability can be difficult to make and that simply using a category-based method is not appropriate. The ECtHR considers the legal aid awarding authorities capable of making an assessment of the "personal situation" of defendants in order to decide whether a person is especially vulnerable. Police and law enforcement officers could also be called upon to make this type of assessment. Examples of potentially vulnerable groups are children, foreigners, elderly persons, physically or mentally handicapped persons, persons with a low IQ etc. but this list is indicative and not exhaustive. The Commission suggests that specific and appropriate attention be offered to persons who, owing to their age or their physical, medical or emotional condition, cannot understand or follow the proceedings. The assessment of the "physical, medical or emotional condition" must be made at all relevant stages of the proceedings from arrest onwards.

Law enforcement officers should consider the question. They should be required to show, by making a written record, that they have assessed the suspect. If a finding that, owing to his age or physical, medical or emotional condition, the suspect cannot understand or follow the proceedings, they should be required to demonstrate that they have taken the appropriate steps (for example obtaining medical assistance, contacting the family, enabling the suspect to inform someone of the detention etc) to provide specific attention. They should be required to make a written note, which can be verified subsequently, of the steps they deemed it necessary to take and confirmation that those steps were actually taken.

Once the suspects is charged with a criminal offence, and becomes a defendant facing trial, any potential vulnerability, such as the need for linguistic or medical assistance, should be noted in the court record of the proceedings and in the defendant's custody record if he is kept in pre-trial detention. If it subsequently comes to light that a defendant's relevant age or physical, medical or emotional condition was either not recorded or that if a record was made, it was not acted upon, the Member State in question should provide for some recourse or remedy for the person concerned.

Communication and consular assistance

In the normal course of events, a detained person should have the right to basic communication with the outside world so that his family, dependants and place of employment are aware of the detention. Where circumstances require that the detention not become public knowledge (for example where there is a risk of alerting an accomplice still at large or that evidence may disappear) the right to communication will be adapted.

Where the suspected person is a foreigner, use should be made of the consular authorities of his home State in order to assist with the communication. Proper implementation of the VCCR could be achieved by Member States appointing a dedicated official in each Consulate to cover cases where nationals are accused of crimes while abroad. This consular official could also assist with victims of crime, since they would be required to know the local law and criminal procedure. The consular official could assist in liasing with the family of the accused, with lawyers, with any potential witnesses, with NGOs that offer assistance to prisoners abroad and if necessary in helping to organise special procedures such as appeals for witnesses.

The attraction of this idea is that it would reduce the burden on the Host State and increase the suspect/defendant's chances of getting assistance, especially assistance in a language he understands. Where foreign nationals refuse to see the representative of their government, it should be possible to contact representatives from another State that has agreed to look after their interests or an international humanitarian organisation for this type of assistance.

A consular official can provide:

- a short but simple note on the local legal system covering, for example, preliminaries to trial, trial procedures and serving sentences,
- a list of local lawyers together with details of the availability of legal aid schemes to foreigners,
- where appropriate, information regarding interpreters and translators, including informing the detainee of their right to the free assistance of an interpreter at court hearings,
- a contact point for families of detainees,
- a note on the prison system;
- details of prisoner transfer schemes, where appropriate;
- details of any relevant NGO that may be able to offer support.

Thereafter, Consular officials could visit detainees to ensure, *inter alia*, that the person is not being subjected to degrading or inhumane treatment, or being discriminated against because of his or her nationality.

Letter of Rights

It is important for both the investigating authorities and the persons being investigated to be fully aware of what rights exist. The Commission suggests that a scheme be instituted requiring Member States to provide suspects and defendants with a written note of their basic rights – a "Letter of Rights". Since such a measure would significantly improve the position of suspects and defendants, Member States should be required to ensure that they receive a Letter of Rights, and ideally to check that this has been done by way of a written note in the custody record.

The European Parliament has reacted favourably to the suggestion of a Letter of Rights and has proposed that a budget line (within the AGIS budget line) be made available for funding research projects to examine what the content of the Letter of Rights should be. The Commission has its own model "Letter of Rights" but further input at a later stage could be useful. Producing such a document should be inexpensive, especially once the initial costs of drawing it up had been met.

The Letter of Rights should have two parts, one for "European" rights under the proposed Framework Decision, and one part where MS should set out what national provisions exist to safeguard the rights of suspected persons.

Evaluation and monitoring

Justice and Home Affairs Commissioner Antonio Vitorino favours "*enhancing[…], evaluation and monitoring mechanisms to check the real application of Union*

legislation at operational level"[1]. Other suggestions are an early warning mechanism for breaches of fundamental rights[2] and evaluation together with a greater involvement on the part of the ECJ.

This initiative must be accompanied with a thorough and reliable method of evaluation and monitoring since without that, and the concomitant reports, Member States cannot be offered the reassurance about other Member States' justice systems that forms the foundation of mutual trust.

4. WHAT ARE THE MAIN POLICY OPTIONS AVAILABLE TO REACH THE OBJECTIVE?

- What is the basic approach to reach the objective?
- Which policy instruments have been considered?
- What are the trade-offs associated with the proposed option?
- What "designs" and "stringency levels" have been considered?
- Which options have been discarded at an early stage?
- How are subsidiarity and proportionality taken into account?

Proportionality and subsidiarity

It is appropriate to consider the argument that the principles of subsidiarity and proportionality dictate that Member States should be entitled to exercise autonomy in this area and that action at EU level should not go beyond what is necessary. Article 5 of the Treaty establishing the European Community (which applies here by virtue of Article 2 of the TEU) provides:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen and that, if action is taken at EU level, it is justified, having regard to the options available at national, regional or local level. This means that the

---

1 Working Group X "Freedom, Security and justice", WD 17, 15 November 2002.

2 Working Group X "Freedom, Security and Justice", WD 13, 15 November 2002

EU should not take action unless to do so would clearly be more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaty. The measure adopted must be the least restrictive that could be adopted in the circumstances and the ends must justify the means.

The Commission considers that in this area only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied only on a national basis with their fair trial obligations, deriving principally from the ECHR. This has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This could be remedied by the adoption of common minimum standards. However, any Commission proposals would take account of national specificities. The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice[3] states that: *"the principle of subsidiarity, which applies to all aspects of the Union's action, is of particular relevance to the creation of an area of freedom, security and justice"*.

Great care will be taken not to encroach on matters that remain best covered at the national or regional level.

As regards the specific objectives of the TEU, which form the legal basis and the justification for this initiative, the relevant provisions are:

Article 31 TEU:

"Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

[..]

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation;[...]" which must be balanced against:

Article 33 TEU:

"This Title [Title VI] *shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security"*.

The Commission takes the view that "ensuring compatibility" between the Member States is of paramount importance and that this can only be achieved by action at the EU level.

---

[3] OJ C 19/1 of 23.1.1999

However, some Member States informed the Commission during the consultation phase that they consider that this measure infringes the subsidiarity principle and that the organisation of the criminal justice system remains a matter of sovereignty. The Member States taking that view point to the existence of the ECHR as an instrument that sets the "common minimum standards" and argue that Member States are free to decide how to implement that convention in their domestic legislation. They consider that the European Court of Human Rights offers sufficient remedy to those whose fair trial rights have been violated. Some Member States also contend that setting common minimum standards at EU level will lead to a lowering in standards in some countries as certain countries will interpret EU legislation as authority to treat "minimum standards" as sufficient.

Policy options

1) No policy change

The first option considered would be to do nothing and carry on with the existing, purely nationally based safeguards and the safety net of the ECHR and European Court of Human Rights.

More and more people are travelling, living or studying abroad and are therefore potential suspects and defendants and also potential victims of crimes committed in a country other than their own. Given the tendency towards greater movement of persons, the no-policy change option would lead to the increased involvement of foreigners in criminal proceedings and the concomitant potentially insufficient protection of foreign suspects and defendants. A lack in consistency of procedural safeguards and the lack of a relevant instrument means that the EU would be unable to protect them adequately against unfair treatment. Since any EU citizen or third country national could, even unwittingly, become involved in criminal proceedings while residing in another country, it is important to ensure that he receives treatment equivalent to that received in his home country.

Consequently, the no-policy change option could also have negative economic impact for the EU as whole. People might be deterred from moving to other Member States for employment purposes (or to a lesser extent, tourism) if they risk criminal procedures which they fear would not be equivalent to their own, should they find themselves involved in criminal proceedings. Moreover, the perceived potential negative impacts stemming from the measures in the Mutual Recognition Programme, and the implementation of the European Arrest Warrant in particular, would stay unsolved. (See section 5.1. below.)

The EU has sometimes been accused of being too "prosecution oriented" and of emphasising the "security" side of the equation at the expense of the "justice" side. It is important to dispel this misconception. A no-policy option in this specific field would give the wrong message. It should be noted that this is not a cosmetic exercise to answer the Commission's critics. There has been a very real commitment to a measure of this sort, and to ensuring a fair balance between prosecution and defence since Tampere. This measure has involved a lot of research and consultation, which is why it has taken longer than some "prosecution oriented" measures but this does not illustrate a lesser commitment to protecting defence rights.

Finally, enthusiasm in the media, from practitioners' organisations, the European Parliament and other quarters was such that the no-policy option could have led to charges of the EU, having floated the idea of this measure, defaulting on its duty if the Commission did not follow up with a proposal.

Hence, for all the reasons set out above, the no-policy change scenario was ruled out.

2) A wide-ranging proposal

A second option consists in creating a wide-ranging instrument that covers all the different aspects tackled in the initial Consultation Paper (about 20 different potential components of a "fair trial"). This would embrace the standards to be applied throughout the EU in criminal proceedings, from the moment an individual first becomes a suspect, throughout the investigation, trial and the post-trial period (detention or other sanction, and any appeal). As well as procedural safeguards, it could cover very wide-ranging issues such as the right to bail, fairness in handling evidence, the *ne bis in idem* principle and the protection of victims.

However, the wide scope of the instrument would make it unwieldy. Owing to the breadth and the potential scope of such a proposal, the necessary policy design and indeed decision-making processes would be extremely lengthy. Moreover, the subjects would be too disparate to unite in one instrument. In the same way that several instruments are needed to implement the prosecution oriented measures of the Mutual Recognition Programme, it is also the case that defence rights need to be tackled in a logical and structured way, taking topics that are related to each other in a single instrument, and topics that stand alone separately. Explaining why action is justified at EU level for each of the different areas of defence rights can involve different arguments. It is therefore politically easier as well as logistically simpler to make the proposals in a series of stages with rights that are consistent with each other presented in a single instrument and unrelated rights presented separately.

Finally, wide-ranging legislation is very difficult for the Member States to implement in one go.

Consequently, it is clear that this is not an option either.

3) Proposal initially limited to "basic" safeguards in the first instance, with a commitment to cover all the areas mentioned in the Consultation Paper as part of a programme over the next few years.

Some of the areas which could have been covered in a wide-ranging proposal warrant separate measures of their own in order to do them justice. These are primarily the right to bail (provisional release pending trial), the right to have evidence handled fairly, the question of jurisdiction and the related *ne bis in idem* principle and default judgments. Additionally, the protection of victims has already been covered in a separate instrument[4] and in the area of judicial co-operation in civil matters, work is underway on compensation to victims of crime.

---

[4] Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings OJ L 82/1 of 22.3.2001

The work on the right to bail (which also covers detention conditions) is an important and substantial area, which requires separate consideration: it was separated from the work on other safeguards at an early stage. It forms the subject-matter of a measure in the Mutual Recognition Programme (measure 10) and would be more appropriately dealt with as a single issue – a Green Paper in this area is forthcoming.

Also expected this year is a Green Paper on approximation, mutual recognition and enforcement of criminal sanctions in the EU. This is designed to ensure equality of treatment for convicted persons throughout the EU so that, for example, those sentenced in a Member State other than their own are not discriminated against by virtue of their foreign nationality.

Fairness in handling evidence actually covers many rights and many aspects of the proceedings. It soon became clear that all evidence based safeguards should be covered together in a separate measure as the subject of evidence was too vast to cover in a Green Paper that already proposed several rights. The Commission therefore decided to devote more time and a specific study to this topic as soon as the first stage of the procedural safeguards work was completed. We have now started work on a study of safeguards in fairness in gathering and handling of evidence. This will cover, *inter alia,* the right to silence, the right to have witnesses heard, the problem of anonymous witnesses, the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed) and many other aspects of the law of evidence.

As far as the protection of victims is concerned, several actions have already been carried out. In May 1999, the Commission adopted a Communication entitled 'Crime victims in the European Union - standards and action' to improve access to justice for victims of crime in the European Union and to protect their rights. This Communication deals with the prevention of victimisation, assistance to victims, the standing of victims in the criminal procedure and compensation. On 15 March 2001, the Council adopted a Framework Decision on the Standing of Victims in Criminal Proceedings with a view to harmonising basic rights for victims of crime within the all territory of the EU. On 16 October 2002, the Commission issued a proposal for a Council Directive on compensation to crime victims.

Given the fact that these issues are very substantial, and warrant separate measures owing to the extent of their impact, it makes sense not to deal with them in this proposal.

Another important factor was the limitations imposed by the legal basis for the measure, namely Article 31 TEU which provides as follows:

“Common action on judicial cooperation in criminal matters shall include:

(a)facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

(b) facilitating extradition between Member States;

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation*;*

(d) preventing conflicts of jurisdiction between Member States;

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking."

This provision, upon which the Commission relies as justification for this action, is open to interpretation and it became clear that there was no agreement that this was a sufficient legal basis for a proposal on procedural safeguards. Consequently, the Commission decided to make a fairly modest, realistic proposal that would be more readily acceptable.

The choice was therefore made to start with a proposal covering basic rights that was capable of being the subject of unanimous agreement, and to cover all the other relevant areas piecemeal at a later date.

Within this policy alternative, a choice had to be made between the different instruments foreseen in Article 34 TEU. This question is important in the light of their different levels of constraint (that is to say, how binding are they on Member States?) and mechanisms for ensuring compliance. The Commission's underlying concerns were to achieve a concrete result, in the shortest possible time, which would be consistent with the philosophy of the Area of Freedom, Security and Justice and the Tampere Conclusions.

a Common position

Common positions are binding on the Member States, who "shall ensure that their national policies conform to the common positions". Nevertheless, no enforcement mechanism is foreseen when a Member State neglects its obligations. Moreover, the European Court of Justice has no jurisdiction regarding this type of instrument. Hence, the option to adopt a common position was discarded.

b Convention

When how to achieve adoption of the European Arrest Warrant was considered, the option of using a convention was considered. Likewise, a convention might have been a way to achieve common minimum standards for procedural safeguards. However, since this instrument requires ratification by the Member States, it does not guarantee early implementation, and Member States that do not agree with it could refuse to ratify it. It could take a long time to come into force and might fail to achieve uniformity of standards. Consequently it was deemed inappropriate here.

c Framework Decision

A Framework Decision has the advantage that recourse to the European Court of Justice is possible on the basis of Art. 35 TEU. Secondly, only implementation in national legislation is required. The Commission retains a role in supervising and monitoring the implementation in national legislation.

It also seemed logical to use the same type of instrument as that used for the European Arrest Warrant. The arguments had been rehearsed in the context of the European Arrest Warrant and the Framework Decision was the instrument of choice for that measure.

5. WHAT ARE THE IMPACTS – POSITIVE AND NEGATIVE – EXPECTED FROM THE DIFFERENT OPTIONS?

- What are the expected positive and negative impacts of the options selected, particularly in terms of economic, social and environmental consequences, including impacts on management of risks? Are there potential conflicts and inconsistencies between economic, social and environmental impacts that may lead to trade-offs and related policy decisions?

- How large are the additional ('marginal') effects that can be attributed to the policy proposal, i.e. those effects over and above the "no policy change" scenario?

- Are there especially forceful impacts on any social group, economic sector (including size-class of enterprises) or region?

- Are there impacts outside the European Union on the Acceding Countries and/or other countries ("external impacts")?

- What are the impacts over time?

5.1. The impacts of the different policy options

5.1.1. No policy option:

As pointed out in point 4 above, in the context of the implementation of the EAW, concerns about the level of protection of fundamental rights in EU Member States are bound to increase. Indeed, the EAW presupposes a high level of trust between Member States in their criminal justice systems, and ensuring that criminal procedures safeguard individual rights would certainly contribute to increased trust. It can be said therefore that if no proposal was put forward in this area, the implementation of the EAW would be rendered more difficult and could be undermined by lack of trust between Member States.

Moreover, the EU as an area of freedom, security and justice, needs to assure its citizens that their rights will be adequately protected if they are subject to criminal proceedings in other Member States. If no policy is proposed in this field, and different levels of protection between Member States prevail, citizens may perceive the EU more as an area of "security" rather than of "freedom and justice". These

negative perceptions could lead to negative reactions to European integration in this area and also generally. Ultimately, it could affect the sense of belonging to the EU and the emergence of a true European citizenship.

Negative perceptions and lack of trust could in turn affect free movement of people across the EU, labour mobility would be constrained and leisure and business travel could decrease. The economic impacts of such phenomena are difficult to assess, but they seem nevertheless to be significant, in particular they could affect the functioning of the Single Market.

Finally, it can be said that the current level of judicial errors (erroneous convictions, miscarriages of justice) could increase in the future, owing to the increasing number of criminal proceedings involving non-nationals in the EU. This increase has been noted in the recent past, brought about by a number of factors (transborder transport and better communication making transnational crime easier to commit, increased travelling, increased numbers of resident non-nationals in every Member State, etc.) – it can therefore be said that the implementation of the EAW might contribute to increased criminal proceedings involving non-nationals. If no policy or initiative is put forward to protect fundamental rights in criminal proceedings, the increase in the number of cases, and the inevitable judicial errors could lead to the malfunctioning of criminal justice systems and to an increased backlog of cases, including appeals. This situation would lead to an overload of national justice systems, affecting their credibility and causing a waste of resources. It would also have a knock-on effect of submerging the already overloaded European Court of Human Rights in Strasbourg with applications.

5.1.2. A wide-ranging proposal, covering all the safeguards

If all the elements identified as safeguarding individual rights were to be addressed by a single proposal, one could consider that it would be an effective manner to design and implement policy in this field. Indeed, coherence and consistency would be easily ensured across the different areas and practitioners would have a single framework to refer to. It would also favour transparency during the decision-making process.

This policy option however would also have negative impacts. As we saw above in point 4, such a proposal would cover a wide range of issues, cutting across different aspects of criminal justice systems. A single proposal would then target a vast subject matter and audience, which would only result in a complex instrument, difficult to understand and implement.

As stated in point 4, the different elements that could have been included in such a wide-ranging proposal are already at various stages of development. Some of them, such as the right to bail, have evolved in recent months; others still require more thought, research, consultation and data collection (e.g. the fair handling of evidence). If the alternative of proposing a single proposal was selected, then action would have to be delayed until all the different aspects had been satisfactorily developed at European level. This alternative would then mean delaying the proposal of such an instrument for a number of months or even years, which would be difficult to achieve so as to be compatible with the schedule for implementation of the EAW. This alternative would risk failing to address the main challenge at the outset.

It can be concluded that the costs associated with proposing a single instrument covering all the safeguards, in terms of decision-making, responding to the challenges identified and actual implementation would certainly outweigh the advantages listed in the first paragraph of this section.

5.1.3. Instrument limited to the basic safeguards

As detailed in point 4, this alternative seems to be the most appropriate and feasible given the challenges to be addressed. Consequently, thorough consideration was given to the potential impacts of such a proposal, at different levels: on the EU economy and society as a whole, on suspects and defendants, including particularly vulnerable groups, on professionals working in the criminal justice systems and finally on victims in criminal proceedings. Economic and social impacts have been identified, both in direct and indirect terms. Adequate descriptors are given whenever possible and available quantitative evidence presented. As regards environmental impacts, it has been difficult to identify them for all the different levels of impact. Indirect impacts in this area have been included whenever relevant.

The tables annexed to this report present a schematic overview of the potential impacts, which are detailed below (section 5.2.). It must be underlined however that assessing impacts of a proposal safeguarding fundamental rights is extremely difficult and more often than not amounts to educated guesses and estimates. To try to pin down these impacts, a number of descriptors are provided, but again quantification is a difficult exercise.

5.2. Levels of impact

The tables enclosed in the report give an overview of the main potential impacts at different levels. These impacts have been identified through a series of consultations with stakeholders and brainstorming meetings – whenever possible descriptors are included, but we would like to highlight that the measurement and quantification of these impacts is rather difficult. On the basis of this conclusion, it has been decided to include the development of methods and tools for measuring impact on the monitoring and evaluation provisions (see point 6), in particular as regards the costs of implementation.

5.2.1. EU economy and society

The proposal is intended to impact at this level in terms of EU citizens' improved perceptions of the degree of protection of individual rights across different Member States, which should lead to more trust in their law enforcement and judicial systems. It is hoped this will trickle down in terms of increased mobility and free movement within the EU, with all the associated benefits in terms of economic activity.

More transparency in the judicial system will on the one hand lead to more efficiency, and on the other contribute to a better protection of individual rights. This can in turn facilitate the creation of an Area of Freedom, Security and Justice which must be supported by a true civic citizenship and which European citizens must believe in.

5.2.2. Suspects and defendants

This target group is directly affected by the proposal in terms of the protection of their individual rights. In particular, the **right to legal advice** will have immediate impacts for this group, both in terms of a decrease in costs associated with criminal procedures and in terms of a perception of fairer access to justice. Furthermore, this impact can extend to the suspects' and defendants' families: indeed, one of the criterion to decide on granting this legal aid is that paying for legal advice would cause undue financial hardship to the family. It is clear therefore that the proposal can have direct economic impacts on the situation of suspects and defendants and their families. This perception can contribute to a feeling of belonging in the society and can thus limit the sense of exclusion suspects and defendants or even their families often experience.

Another area which will impact significantly on this target group is the provision of full translation and interpretation during criminal proceedings. In cases where suspects and defendants are not own nationals and / or do not master sufficiently the language of the proceedings or the criminal justice system, access to full interpretation and translation is vital to the equitable administration of justice. It has been reported that, on occasion, the defendant's family or acquaintances have been asked to provide interpretation, with all the risks this implies for the accurate representation of the facts and the protection of the interests of the defendant. (See for example the ECtHR case of *Cuscani v. UK* - judgment of 24 September 2002; where the trial Court relied on the defendant's brother to interpret and which was held to be a violation of Art. 6). If the criminal justice system provides for proper interpretation, it will serve the interests of justice, and it will increase the trust of suspects and defendants, and also of victims, in the criminal justice system. Particularly disadvantaged groups can benefit more from the provision of interpretation and translation. For example, women from certain cultural backgrounds will probably find it easier to address themselves to an interpreter, in particular if the interpreter is also a woman, rather than having to rely on male members of the family for interpretation. When minors are involved, a properly trained interpreter may also be able to interpret more accurately for them than relatives or acquaintances.

5.2.3. Professionals working in the criminal justice system

Will the policy have an impact on the main professional target groups?

	Translator	Interpreter	Police	Lawyer	Judge	Social worker
Remuneration	✓	✓		✓		
Mobility	✓	✓		✓		
Workload	✓	✓	✓	✓	✓	✓
Status	✓	✓				

Nature of the impact on the main professional target groups

	Translator	Interpreter	Police	Lawyer	Judge	Social worker
Remuneration	+	+	0	+	0	0
Mobility	+	+	0	+	0	0
Workload	+	+	+	+	+	+
Status	+	+	0	0	0	0

+ : increase - : decrease 0 : neutral

From the tables above, it is clear that the Commission considers that the proposed policy will have an impact on the main professions working in the criminal justice systems. It must be noted that these impacts are greater for three groups: translators, interpreters and lawyers. Overall, these impacts are positive: increases in social status and remuneration, for example.

One negative impact must however be underlined: the workload of these professionals will probably increase across the board. This is bound to impact on the capacity of criminal judicial systems on the whole, and may in fact cause some backlog at the start of the implementation of these safeguards. In the long term, this should be absorbed by the system, and it is expected that the added transparency and reduced numbers of judicial mistakes will in fact decrease the judicial backlog.

An additional impact of this proposal in these professional groups will be the increased training needs almost every area.

Given current levels of provision of qualified legal translators and interpreters and the demand for these professionals that this proposal may create, training needs are expected to be greater for these professional groups. These training needs would be at two levels:

- initial training, as the specialised training for legal translator/ interpreter is not always available as part of the standard third-degree diploma;

- continuous professional development and on-the-job training for current professionals to bring them up to standard and to ensure that they keep up to date with changes in legislation and court practices.

It is difficult to provide estimates for the increased costs of training but the monitoring provisions of this proposal will include considering the costs associated with its implementation.

5.2.4. Victims

Impacts of this proposal on victims are harder to assess, given that they will be more indirect in nature. For example, the fact that the proposal contributes to a better application of justice, with fewer appeals and hence shorter proceedings, will impact

favourably on victims, who will be released from the burden of the trial earlier. Studies show victims recover from the trauma faster once there is "closure" (after the trial). Shorter proceedings also reduce costs for victims. Another possible positive indirect impact is linked to the better use (and consequent training) of consular officials, which will benefit victims of crimes who are foreigners. The consular official may provide the victim with information about the local legal system, including any compensation scheme, details of any relevant NGO which may be able to offer him support and information regarding interpreters and translators.

It should perhaps be pointed out that the proposal may also have indirect negative impacts on this target group – indeed, in a context of set resources for the criminal justice system, the costs of implementing the different safeguards put forward in this proposal may be to the detriment of the budget allocated to the protection of the interest of victims (opportunity costs). Given the necessary balance between the different interests at stake, this is a very remote possibility, but should however be flagged up.

6. HOW TO MONITOR AND EVALUATE THE RESULTS AND IMPACTS OF THE PROPOSALS AFTER IMPLEMENTATION?

- How will the policy be implemented?
- How will the policy be monitored?
- What are the arrangements for any *ex-post* evaluation of the policy?

The implementation of the initiative on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union will take due account of the ECHR – indeed, it is hoped that as a result of this initiative, Member States will achieve better standards of compliance with the ECHR. The ECtHR cannot be relied upon as a safety net to remedy all breaches of the ECHR. This is unrealistic in view of a number of factors. The ECtHR is a court of *last resort* and additionally the ECtHR itself has expressed concern over its ability to handle its ever-increasing caseload. If there are repeated allegations of violations of the ECHR, the Member States should have the means to remedy them of their own motion, or better still, to reduce the chances of them occurring at all. Since the principle of mutual recognition may only be implemented efficiently where there is mutual trust, it is important that these common minimum standards be complied with for this reason also.

The level of compliance should be demonstrably high. In order for each Member State to be certain of the level of compliance in other Member States, there should be some form of reliable evaluation. Mutual trust must go beyond the perceptions of governments of the Member States - it must also be established in the minds of representatives of the media, practitioners, law enforcement officers and all those that will administer decisions based on mutual recognition on a daily basis. This cannot be achieved overnight, and cannot be achieved at all unless there is some reliable means of assessing compliance with common minimum standards across the European Union. This will be all the more so in the light of enlargement.

The Commission considers it appropriate that it should play a major role in the evaluation and monitoring process. It needs to be informed of how measures are being implemented in practice.

It would therefore seem appropriate for the Commission to extend its task of collecting information on the transposition of EU obligations into national legislation to a regular monitoring exercise on compliance. This should be on the basis of Member States themselves submitting data or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could use the services of independent experts to analyse the data and assist with the drawing up of reports. One possible team of independent experts is the EU Network of Independent Experts on Fundamental Rights. It was commissioned by DG-Justice and Home Affairs "to assess how each of the rights listed in the Charter of Fundamental Rights of the EU is applied at both national and Community levels…[taking] account of developments in national legislation, the case law of constitutional courts […] as well as the case law of the Court of Justice of the European Communities and the European Court of Human Rights". The tasks of this network include the production of an annual report summarising the situation of fundamental rights in the context of both European Union law and national legal orders[5]. The network will report to the Commission and to the European Parliament. Since Articles 47 and 48 of the Charter of Fundamental Rights of the EU provide for the right to a fair trial and the rights of the defence, the network is already mandated to consider many of the provisions included in this proposal. In any event, evaluation of common minimum standards for procedural safeguards should be carried out on a continuous basis at regular intervals rather than as a once-off or on an *ad hoc* basis.

In this way, any persistent breaches will come to light, together with any patterns of standards falling below the agreed minimum.

7. STAKEHOLDER CONSULTATION

- Which interested parties were consulted, when in the process, and for what purpose?
- What were the results of the consultation?

For the past two years, the Commission has been carrying out a review of procedural safeguards. To this end, it published a broad Consultation Paper in several languages on the Justice and Home Affairs website in January and February 2002. That paper set out the areas that might become the focus of subsequent measures and asked for comments and responses from interested parties.

At the same time, a questionnaire on various aspects of trial procedures under their own existing domestic system was sent to the Member States, to be answered by their Ministries of Justice. Using the responses to those two documents, the Commission identified the following areas as appropriate for immediate consideration:

5 Network of experts on the Charter appointed in July 2002, Unit A5, DG-JHA; its terms of reference are set out in Contract notice 2002/S60 – 046435, OJ S60 of 26.3.2002.

– access to legal representation, both before the trial and at trial,
– access to interpretation and translation,
– ensuring that vulnerable suspects and defendants in particular are properly protected,
– consular assistance to foreign detainees,
– notifying suspects and defendants of their rights (the "Letter of Rights").

(The Council of the European Union has sent this questionnaire to acceding countries on its own initiative.)

Additionally the Commission's desk officer attended numerous conferences relating to these topics, both as speaker and listener. In order to get a clear view of the problem, several bilateral meetings were organised with various organisations. The organisations consulted include Amnesty International, the Law Society of England and Wales, JUSTICE, the Bar Council of England and Wales, Fair Trials Abroad, the European Criminal Bar Association, the Council of the Bars and Law Societies of the European Union, several Members of the European Parliament and the UK Liberal Democrat Party. Although it may appear that consultation centred largely on UK based NGOs, the desk officer noted that in any open consultation procedure, UK based NGOs often responded in much greater numbers than their counterparts in other Member States. All relevant bodies who sought an audience were heard and their views noted.

After an experts meeting held on 7 and 8 October 2002 on the appropriateness of EU action in this area, a Green Paper was adopted and published on 19 February 2003, focussing on the five areas mentioned above. The Green Paper listed a number of specific questions and requested comments and observations to be received by 15 May 2003. The Commission ensured that translations into English, French and German were obtained of all the responses received before 16 May 2003. The responses that were sent between 16 May 2003 and 10 June 2003 were translated where possible. Over 70 replies were received and have been published on the JHA website at: http://europa.eu.int/comm/justice_home/fsj/criminal/procedural/fsj_criminal_responses_en.htm.

In June 2003, when the Commission's services had a clearer view of the policy options available and their impacts, a public hearing was organised. All persons and organisations that had responded to the Green Paper were invited to attend, as well as representatives from the Ministries of all Member States and acceding countries. The meeting was publicised on the EU official website, giving anyone the possibility to attend if they so wished. At the hearing, national experts and NGOs concerned made a number of general observations and comments, which have been taken into consideration in the drafting of the proposal.

8. COMMISSION DRAFT PROPOSALS AND JUSTIFICATION

- What is the final policy choice and why?
- Why was a more/less ambitious option not chosen?
- Which are the trade-offs associated to the chosen option?
- If current data or knowledge are of poor quality, why should a decision be taken now rather than be put off until better information is available?
- Have any accompanying measures to maximise positive impacts and minimise negative impacts been taken?

There were many reasons why the European Commission launched an initiative on procedural safeguards. Important ones are freedom of movement, setting standards for an enlarged Europe and perhaps most important of all, facilitating the operation of Mutual Recognition by enhancing the mutual trust in which it is based. The rights of the defence have not suddenly appeared on the Commission's programme. They were explicitly mentioned in the Tampere conclusions[6] and have always been seen as an integral part of the Justice and Home Affairs agenda.

The aim is to achieve an equivalence of protection between the Member States and not *the same standards* although the starting point will be "common minimum standards" leaving the Member States free to build on those in order to ensure a fair trial system within their jurisdiction. As the Commission indicated in its Communication of 14 July 1998, Towards an Area of Freedom, Security and Justice "procedural rules should respond broadly to the same guarantees ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case".

As regards, freedom of movement - the EU encourages its citizens to move around freely, for work or other reasons. Employment and social security provisions make it easier to find work. European citizens and residents should reasonably be entitled to expect to encounter equivalent standards in respect of safeguards in criminal proceedings wherever they go in the EU.

Options considered included attempting to cover all fair trial rights in one instrument but on reflection, this was deemed too complicated, too unwieldy and less likely to achieve the stated aim. There were also the "third pillar" constraints of putting forward a realistic proposal that could be justified under Art 31 TEU and that would be realistic in view of the unanimity rule. Consequently, a stage by stage approach was adopted, with is proposal being the first of several measures to reach the stage of a draft Framework Decision. It is important to press ahead with this measure now so that agreed safeguards are in place as soon as possible (in view, *inter alia*, of the timetable for implementation of the European Arrest Warrant). Any follow up and subsequent proposals may be under a new regime if the EU draft Constitution is adopted (affecting the legal basis and unanimity requirements).

---

[6] Points 33 and 40, and implicitly in points 35 and 37.

To conclude, the Commission sees this measure as necessary in order to ensure the mutual trust which forms the basis of the measures set out in the Mutual Recognition programme, of which the European Arrest Warrant was the first to reach political agreement. However, a common set of minimum standards on safeguards will be necessary for all the Mutual Recognition measures, to allay anxieties about the perceived "lower standards" in other Member States and maybe in the acceding States after enlargement and to counter criticism of certain criminal justice systems in the EU. It will ensure that the fundamental rights of the European citizen are respected uniformly in this important area.

ANNEX 1 –

Problem identification:

Main challenges (not in order of priority):

- Need to build trust between MS in each other's criminal justice systems, especially in the light of the European Arrest Warrant so that law enforcement and judicial authorities respect each other's decisions and procedures
- Need to protect individual rights to a common minimum standard
- Need to take account of right to freedom of movement
- Need to reinforce citizens' trust in other Member States owing to increased mobility including for employment purposes, transport companies (e.g. lorry drivers at risk of unwittingly carrying illegal cargo), tourism (e.g. road accidents and other "innocent activities" can inadvertently lead to criminal proceedings)
- Need to deal with mobility and increasing numbers of third-country nationals in the Member States
- Need to enhance the public understanding of the different criminal justice systems
- Enlargement will introduce 10 new countries into the system - it is harder to have a basic degree of uniformity as regards common standards with 25 than with 15
- ECHR implemented (and interpreted ?) differently in different Member States
- Avoid "naming and shaming" (which already goes on between the 15, especially in the media) but concentrate on agreeing common standards

Related challenges:

1. General

- Launch a debate on what constitutes a fair trial
- Ascertain what common standards already exist

2. Legal advice

- Uneven implementation of the provisions of Article 6 ECHR as regards access to legal representation throughout the EU (not only basic provision of lawyers but when suspect first has access to lawyer - e.g. before or after first police questioning?)
- Differences in access to free legal representation for those who cannot afford to pay
- Differences in how much legal representation is provided (lawyer present for all court appearances? Prison visits from lawyer to prepare case?)
- Substantial differences between Member States in organisation, level of qualification required and payment of lawyers (e.g. reduce reliance on *pro bono* work, ensure that all defendants represented) NB - different systems of provision may work equally well - e.g. "public defender" system v. own lawyer so not the intention to investigate what system is best, merely to ensure minimum levels of provision

3. Interpretation and translation

- Inadequate provision of competent, qualified language professionals in criminal proceedings in which the defendant is a foreigner and/or doesn't understand the language of the proceedings. Substantial differences between Member States in remuneration of interpreters and translators
- Substantial differences between Member States in training of interpreters and translators
- Insufficient numbers of legal translators and interpreters (especially for the more unusual languages); not "attractive" profession, highly technical, low status (in most MS, translation and interpretation not considered a "profession"), rare for translators and interpreters to be employees - usually employed on a freelance basis so no job security, no holiday or sick pay, no pension and other rights that go with an employment contract
- Many respondents to Green Paper, especially those representing professional organisations of translators and interpreters called for proper training/accreditation/recognition of diplomas/continuous professional education for translators and interpreters - with both language professionals and lawyers/judges involved in the accreditation process.
- Judges and lawyers not trained in how to deal with court translators and interpreters - need to provide for training of judges, lawyers and court personnel

4. Specific attention for persons who, owing to their age or their physical, medical or emotional condition, cannot understand or follow the proceedings

- Disadvantaged situation of certain people who are in an especially vulnerable position during criminal proceedings. Suspects who for physical, medical, emotional or other reasons (such as but not limited to age, nationality, race, gender, sexual orientation, state of health, educational level etc) are in a weaker position than the average person.
- Difficulties in identifying these groups of especially vulnerable people - some categories are obvious (e.g. children) but for others the vulnerability is not immediately obvious (e.g. low IQ, certain health problems etc).
- Once a suspect or defendant has been identified as needing specific attention, certain steps have to be taken. For a child, the parents or a social worker must be alerted, for someone with a health problem, a doctor may be needed.

5. Communication and consular assistance

- A detained person should be entitled to have family members, persons assimilated to family members and any employer informed of the detention. This can be achieved by having the relevant information communicated on behalf of the detained person if there are concerns about preserving any evidence.
- Where the detained person is a foreigner, use should be made of the consular authorities to assist with the communication.
- Problems with lack of compliance with the Vienna Convention on Consular Relations - law enforcement officials do not always contact the Consulate of the detained person; some detained persons choose not to have assistance even if it is offered owing to poor perception of the assistance.

6. Knowing of the existence of rights/ a "Letter of Rights"

- Other problems may arise if the detained person is a refugee or asylum seeker fleeing persecution in his home State and does not want assistance from consular officials - entitlement to have the assistance of a representative of an international humanitarian organisation
- Low awareness of the existing rights available to suspects and defendants during criminal proceedings, and as early on as arrest, (e.g. rights during police questioning)
- Difficulty in informing foreign defendants and/or those who do not speak the language of their basic rights, including the important right to a lawyer and an interpreter
- Lack of equivalence between MS in terms of protection of individual rights.

7. Evidence

- The right to be presumed innocent until proved guilty is at stake where the burden of proof is reversed in the definition of offences in a Member State
- The right to have someone informed of the detention is not always respected (anxiety that evidence will be destroyed, that suspect will alert accomplice etc.)
- Substantial differences between Member States in criteria and conditions governing self-incrimination (right to silence varies from one Member State to another)
- Cultural differences can lead to very different uses and interpretations of practices such as plea bargaining or the use of informers (e.g. *pentiti* in Italy)
- Discrepancies in rules governing admissibility of evidence
- Problems with prosecution failing to disclose all evidence, especially exculpatory evidence - rules vary from one Member State to another

8. Detention

- Substantial differences between Member States in criteria and conditions of bail
- Discrepancies between the Member States in relation to the right for a national of another Member State to serve any period of detention in their own Member State
- High number of persons in pre-trial detention, especially foreign defendants since they are perceived as presenting a higher risk of absconding (no community ties).

9. *Ne bis in idem* and *lis pendens*

- Lack of clarity in Article 54 Schengen Implementing Convention
- Disparities between Article 54 Schengen Implementing Convention and Article 50 Charter of Fundamental Rights
- Adapt current rules to the objective of an Area of Freedom, Security and Justice

10. Evaluation and Monitoring

- Difficulties in obtaining accurate, objective information about the actual situation in a country
- Need to have information at regular intervals so that it may be updated, and any improvement or deterioration noted

ANNEX 2

How to overcome these challenges? Objectives of the proposal

Global	• Create specific guarantees to ensure the protection of individual rights • Ensure that a person encounters equivalent standards in respect of safeguards in criminal proceedings across the EU as those in his or her Member State • Improve trust between Member States in their criminal justice systems as well as public perceptions thereof • New instrument will highlight existing rights
Specific	**Legal advice**
	• Create a more equivalent situation as regards legal advice in all the Member States • Agree common rules about when (at what point in the proceedings) the suspected person should be entitled to legal advice and in which situations that legal advice should be free (in whole or in part) • Encourage Member States to create a mechanism for ensuring effectiveness of defence lawyers
	Interpretation and translation
	• Strengthen compliance with ECHR requirements in this field. • Enhance the social situation of translators and interpreters • Aim for an equivalent level of training in Member States • Encourage Member States to create a mechanism for ensuring competence of interpreters and translators
	Specific attention for persons who, owing to their age or their physical, medical or emotional condition, cannot understand or follow the proceedings
	Ensure a higher level of protection by: • Identifying the suspects who need specific attention • Raising awareness of the vulnerable position of these people • Ensuring a better training of the police officers and other actors in the criminal process • Requiring a written record to be made of what specific attention was needed and record the fact that it was given
	Communication and consular assistance
	• Agreeing that there should be a basic right to communication with the outside world where a person is detained (unless circumstances dictate that this is not appropriate) • Ensuring that detained persons have the possibility of communicating with their family, dependants and/or place of employment (if necessary through a third party if direct communication is contraindicated). Where the defendant is a foreigner, ensuring that use is made of the consular authorities to assist with such communication.

	• Ensuring that consular officials in each Member State are prepared to offer such assistance and have the necessary knowledge of criminal proceedings in the host State. • Ensuring an appropriate training of police officers
	Knowing of the existence of rights/Letter of Rights
	• Would a "Letter of Rights" with equivalent contents throughout the Member States, which police stations would have ready in all languages, present a simple, inexpensive solution? Text of L/R could also be available on internet in numerous languages so readily available
	• Require Member States to ensure all suspects receive Letter of Rights • During the preparatory phase, all interested groups are invited to take part in the debate about what the contents of the Letter of Rights should be (budget available for experts meeting to be held in 2004 so can involve outside experts).
	• The Letter of Rights should cover both common "European" and specific national rights where relevant.
	Evidence
	• To include proposals for safeguards relating to evidence at this stage would be inefficient, as the proposal would be too broad and attempt to cover too many areas. The Commission plans to start work on a separate initiative covering all safeguards relating to evidence in 2004 and will develop a relevant strategy nearer the time
	Detention
	• Create equivalent standards on pre-trial detention and alternatives to such detention throughout the European Union • Enable control, supervision or preventive measures ordered by a judicial authority pending the trial to be recognised and immediately enforced in another Member State • Reduce the number of persons in pre-trial detention by covering alternatives to pre-trial detention • Commission plans separate Green Paper on this topic, to be adopted late 2003 or early 2004.
	Ne bis in idem and lis pendens
	• Guarantee that citizens are not prosecuted or tried for the same acts several times • Avoid duplication of work for prosecuting and law enforcement authorities

Horizontal	**Evaluation and Monitoring** Extend the Commission's task of collecting information on the transposition into national legislation of the relevant EU obligations to a regular monitoring exercise on compliance

ANNEX 3. Potential impacts

Expected impact on the EU economy and society if the suggested policy is implemented	
Target : EU economy and society	
Qualitative	Descriptors
Economic impact:	
Positive **Indirect** • Enhanced mobility and freedom of movement owing to increased trust on the part of citizens in their freedom to move across Europe, (benefits for employment purposes, transport companies (e.g. lorry drivers), tourism • More transparency leads to more efficiency (unnecessary appeals and people in custody, reduce backlog in courts, etc.) • Reduce expense of holding foreign nationals in detention (pre-trial and following conviction) , reduce miscarriages of justice **Negative** **Direct/Indirect** • Associated implementation costs (to be included in the monitoring and evaluation measure) • MS with no centralised systems for lawyers and translation will have to set them up; market levels of pay for lawyers and translators; Letter of Rights; training for police officers, consular services, lawyers, translators, social workers… • Abuses of these guarantees may cause undue delay in procedures.	• National motoring and touring organisations report the absence of sufficient procedural safeguards for their members when involved as suspects or defendants in cross border criminal proceedings across the EU • Negative reports in the press about "unfair" criminal proceedings in other Member States (e.g. "plane-spotters' case)
Social impact:	
Positive **Direct** • Better respect for fundamental rights - citizens reinforced in their value system and in validity of democracy (important especially in the light of fight against terrorism)	

• Increased trust between MS - can lead to more active cooperation in the judicial area, increased social cohesion and a sense of belonging • More transparency can lead to more respect for fundamental rights, which enhances mutual recognition • Reduce feelings of helplessness of individuals against a system perceived to be unfair • Increased faith in channels of communication between actors in the criminal justice system **Indirect** • Increased sense of belonging in society, of being a stakeholder • Concept of civic citizenship, may bring the EU closer to the citizens **Negative** **Direct/Indirect**	
Environmental impact:	
• More effective judicial systems will lead to more efficient use of resources. • More fluent functioning of the criminal justice system leads to a greater efficiency in the prosecution of environmental crimes.	

Expected impact on suspects and defendants if the suggested policy is implemented

Target group: suspects and defendants

NB: All these potential impacts apply to own nationals and foreigners alike. However, it must be noted that some aspects of the proposal target mainly foreign suspects and defendants, and hence impacts on this subgroup are multiplied.

Qualitative	Descriptors
Economic impact:	
Positive Direct • Ensure better representation hence lower costs for suspects, automatic right to free assistance of translators and interpreters	

• Reduce miscarriages of justice whereby innocent person wrongly convicted - economic costs (e.g. loss of job, loss of trust from employers) **Positive Indirect** • Increased awareness of rights not only on the part of suspects and defendants but also increased awareness on the part of all actors in the criminal justice system • Better knowledge of rights and better compliance with them may lead to speedier procedures **Negative Direct/Indirect**	
Social impact:	
Positive Direct • Equal access to justice in the broad sense (e.g. financial, linguistic, medical, etc.) • Awareness of their existing rights: better protection of their fundamental rights • Increase of independence of suspects/defendants with regards to their family • Reduce miscarriages of justice **Negative** • Ability for suspect or defendant in bad faith to misuse the guarantees provided • Abuses of the system may cause undue delay in procedures	
Environmental impact:	
No direct or indirect impacts	Not applicable

Expected impact on suspects and defendants' families if the suggested policy is implemented

Target group: suspects' and defendants' families	
Qualitative	Descriptors
Economic impact:	

Positive Direct • Increased faith in the criminal justice systems of all Member States so more trust both at home and abroad - reduced need to employ lawyer privately or to pay for translator or other assistance • Fewer miscarriages of justice will lead to fewer people in prison for offences they did not commit - therefore fewer families losing potentially main breadwinner • Legal aid: should be granted where the legal costs would cause the family undue financial hardship **Positive Indirect** • Greater labour mobility may be achieved, people more prepared to look for work abroad **Negative Direct/Indirect** • Costs of implementing the measures may lead to increased taxes or changes in financial priorities which could have a negative impact on families of suspects and defendants	
Social impact:	
Positive Direct • Increased faith in the criminal justice system • Increased trust in the criminal justice systems of other Member States **Negative** •	• Family members may be asked to assist, for example to stand surety for bail , to help trace witnesses, even to translate and bear other burdens during the proceedings
Environmental impact:	
No direct or indirect impacts	Not applicable

Expected impact on professionals working in the criminal justice system if the suggested policy is implemented	
Target group: translators/interpreters/police officers/lawyers/court officers/judges/social workers etc.	
Qualitative	Descriptors

Economic impact:	
Positive Direct • Enhanced social status • Greater recognition of qualifications of translators and interpreters and assistance with obtaining continuous professional development • Greater recognition for the work of translators and interpreters	• In some Member States legal advice on arrest is given on a *pro bono* basis by trainees and students, or under the "commis d'office" system
Positive Indirect: • Better remuneration for lawyers working under criminal legal aid schemes • Better remuneration for legal translators and interpreters • Increased number of qualified lawyers willing to accept *pro bono* cases • Increased numbers of legal translators and interpreters available to courts and police stations	• The GROTIUS Programme PROJECT 2001/GRP/015 has pointed out the lack of legal interpreters and translators because of the comparative unattractiveness and low status of these professions
Negative: • Increased costs in terms of training. • Increased workload for all actors in the criminal justice system	
Social impact:	
Positive Direct • Reduced criticism of criminal justice will improve the morale of all those working in the system • Efficient working of the judicial system in and out of court as a consequence of an appropriate training and awareness of courts and legal services to interpreters and translators during interdisciplinary training	• See above GROTIUS Programme PROJECT 2001/GRP/015 • The International Federation of Interpreters reports that judges and lawyers are unfamiliar or not trained to work with interpreters and translators which can slow down the procedure
Positive Indirect • Higher social status for translators and interpreters working in the criminal justice system	
Negative Direct	

Environmental impact:	
No direct or indirect impacts	Not applicable

Expected impact on victims in the criminal justice system if the suggested policy is implemented

Target group: victims and related pressure groups	
Qualitative	Descriptors
Economic impact:	
Positive Direct/Indirect • Better justice leads to fewer contested decisions. Fewer appeals lead to a quicker procedure which can help victims recover and reduce tangential costs for the victim **Negative Direct** • The costs of implementing the policy is chargeable to the justice budget - spending priorities relating to suspects and defendants means less available for compensation to victims **Negative Indirect** • The budget invested in the suggested policy will not be used for other victim centred purposes (opportunity costs)	
Social impact:	
Positive Direct/Indirect • Fewer appeals (see above) should lead to more expeditious procedures. This has a positive impact on the situation of the victim who is released from the burden of the trial. Studies show victims recover from the trauma faster once there is "closure" (after the trial) • The proposal raises awareness of the situation of victims • The proposals for making better use of consular officials will also be to the advantage of victims of crimes who are foreigners. The consular official may	

provide the victim with information about the local legal system, including any compensation scheme, details of any relevant NGO that may be able to offer him support and information regarding interpreters and translators. **Negative Direct**	
Environmental impact:	
No direct or indirect impacts	Not applicable