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Procedural Rights in Criminal Proceedings

Report with Evidence

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ABSTRACT

The Commission has proposed that a number of minimum procedural rights for defendants should be applicable in criminal proceedings across the Union. These rights would include access to legal advice, interpretation and translation, and communication with consular authorities. All individuals detained or arrested should be given a “Letter of Rights”.

The proposed Framework Decision responds to some of the criticisms made by the European Parliament and others about the absence of provision for procedural safeguards in measures such as the European Arrest Warrant. The Commission’s proposal constitutes the first major attempt to address the concerns expressed.

The Report examines the draft Framework Decision and concludes that minimum standards are needed to improve public perception of criminal procedures in other Member States and to enhance mutual trust between the authorities in Member States executing mutual recognition requests.

The Government are urged to ensure that the outcome of the present negotiations is truly “something worthwhile”. British citizens facing justice abroad will only be confident of access to standards of criminal justice comparable to those in the United Kingdom if the Government takes a strong stance on minimum safeguards now.

The Report also contains a detailed analysis of the Framework Decision and makes a number of specific recommendations for change.

Procedural Rights in Criminal Proceedings

CHAPTER 1: INTRODUCTION

An area of freedom, security and justice

1. One of the main objectives of the Europe Union is to maintain and develop the Union as “an area of freedom, security and justice”.¹ To date the “security” element has been dominant. Much attention has been directed at the fight against terrorism, quite understandably in the light of events such as 9/11 and the Madrid bombings. The 9/11 events created pressure for a political response at EU level. This resulted in the adoption, within months, of a number of measures intended not only to combat terrorism but aimed also at serious crime generally. Most notable were the European Arrest Warrant, a Framework Decision on terrorism and a Decision establishing Eurojust. Thereafter, a number of proposals, based on the principle of mutual recognition and intended to promote the efficiency of criminal investigations and trials, have emerged. These have included a Framework Decision on orders for freezing property or evidence, proposals on the mutual recognition of confiscation orders and financial penalties, and proposals for the transmission of evidence and criminal records.

Minimum standards in criminal proceedings

2. The emphasis on measures to enhance the efficiency of investigation and prosecution procedures has led to criticisms regarding the direction of EU criminal policy. It has been argued that too much emphasis has been placed on enforcement measures, without giving due regard to measures protecting the rights of individuals who may be affected by these measures. The proposal which is the subject of this Report, for a Framework Decision insisting on the availability of certain procedural rights in criminal proceedings,² responds to criticisms, made by the European Parliament and others, about the absence of procedural safeguards in measures such as the European Arrest Warrant. This proposal constitutes the first major attempt to address the concerns expressed.
3. The Commission has proposed that in criminal proceedings across the Union there should be minimum standards relating to such matters as access to legal advice, interpretation and translation and communication with consular authorities. And all individuals detained or arrested should be given a “Letter of Rights”. The aim of the proposal is to improve compliance with minimum ECHR³ standards across the disparate criminal justice systems of the twenty five Member States. In this way, the Commission hopes, mutual trust by Member States in the criminal justice systems of other Member States would

¹ Article 2 TEU.

² Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. Brussels 28 April 2004. COM (2004) 3289 final.

³ The European Convention for the Protection of Human Rights and Fundamental Freedoms.

be enhanced, mutual recognition of orders made by judicial authorities in other Member States and, ultimately, co-operation in criminal matters between Member States, would be facilitated.

Relationship with ECHR

4. The question might be asked why an instrument insisting on common standards is necessary at all. All Member States are parties to the ECHR which contains important safeguards including the right to liberty and security (Article 5) and the right to a fair trial (Article 6). But concern has been expressed over the failure of many Member States to observe the ECHR requirements with satisfactory consistency. A large number of cases complaining of breaches of the ECHR (not all relating to Articles 5 and 6) have been brought against Member States (including the United Kingdom) before the European Court of Human Rights (ECtHR or the Strasbourg Court). A disturbing number have succeeded.

Mutual trust and confidence

5. It should not, therefore, be thought surprising that, notwithstanding that all Member States should be playing by the same basic rules, there is not, as the Commission itself has acknowledged, always sufficient trust in the criminal justice systems of other Member States. We have referred to this, in the context of our work on the European Arrest Warrant and other mutual recognition instruments. So too have national courts, especially in the context of terrorism cases.⁴ Cases such as the Greek plane-spotters case demonstrate quite clearly the breadth of the legal and cultural differences between some Member States.
6. Citizens need to have confidence not only in the fairness of their own national laws and procedures but also, in the context of the European Union, in the fairness of the criminal laws and procedures of other Member States. The importance of this has grown following the adoption of the European Arrest Warrant and other measures, including the enforcement of those providing for fines and penalties imposed by the courts of other Member States, based on the principle of mutual recognition. A national judge may have no choice but to enforce the order of a court of another Member State without himself examining the facts and merely on the basis of a form containing a number of boxes that have been ticked. For such a system to be acceptable there must be confidence that the individual, the subject of the proceedings, has been and will be treated fairly. Compliance by Member States with minimum procedural standards for criminal investigations and prosecutions is, therefore, essential.

Outline of the proposal

7. The Commission's proposal comprises six main elements:
 - Access to legal advice, both before and at the trial;
 - Access to interpretation and translation;
 - Protecting persons who cannot understand or follow the proceedings;
 - Communication and consular assistance to foreign detainees;

⁴ COM (2004) 3289. Commission's explanatory memorandum, para 29.

- The Letter of Rights;
- Evaluation and monitoring.

The Framework Decision sets down certain “common minimum standards”, building on the requirements of the ECHR. Member States will be free to maintain or adopt higher standards. Where higher standards currently exist they should not be lowered (the “non-regression” rule).

8. The Framework Decision has a potentially very broad scope. It would apply to all criminal proceedings across the Union, not simply to those having a cross-border dimension. However, the proposal is not intended “to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime, in particular terrorism”.⁵

Preliminary reactions

9. Many have welcomed the proposal which is seen as addressing the “justice” element of an area of freedom, security and justice. The proposal is, however, controversial. Some Member States have in the past expressed reservations about the usefulness and legality of such a proposal. They have argued that subsidiarity precludes action at EU level and that the Treaty does not provide a sufficient legal basis for the proposal. On the other hand, some of those welcoming the proposal think that the minimum standards have not been set high enough and that additional significant issues, such as the right to silence and access to bail, should have been addressed.
10. As we explain in subsequent chapters, the Commission has responded robustly to these criticisms. The draft Framework Decision is but a “first stage”. Work is now underway on such matters as bail, on which the Commission issued a Green Paper in August 2004. As to the wider political and legal dimensions, the Commission has drawn attention to the fact that the rights of defendants were explicitly mentioned in the conclusions of the European Council in October 1999 at Tampere. As to the legal basis for the proposal, the Commission relies on Article 31(1) of the Treaty on European Union (TEU). This envisages “common action” to ensure compatibility in rules where necessary to improve “judicial cooperation in criminal matters”. Member States have agreed that the principle of mutual recognition should be “the cornerstone” of such cooperation.⁶ The Commission argues that minimum standards for safeguarding the rights of suspects and defendants facilitate the application of the principle of mutual recognition.

Pre-conditions for success

11. Two things will be critical to the success of the present proposal in maintaining and, where needed, raising standards across the Union. The first is the fixing of the standards at a satisfactorily high level. As we explain below, this will be no easy task. There are more than 25 disparate criminal justice systems to take into account.⁷ Any significant change may have both cultural and resource implications. The combination of the need for

⁵ Preamble, para 8.

⁶ Tampere European Council: Conclusion of the Presidency. Para 33. Bull. EU 10-1999, p 11.

⁷ Some Member States, *eg* the United Kingdom, have more than one.

unanimous agreement, and a political deadline of 2005,⁸ will make a lowest common denominator approach and/or woolly drafting difficult to avoid.

12. Second, the success of this proposal will depend upon there being proper machinery for monitoring and evaluation. Without that the Framework decision is unlikely to make any real difference. The effectiveness of the proposal, in particular in removing mistrust by citizens in one Member State about the procedures in other Member States for the investigation, prosecution and trial of criminal offences, will to a very great extent depend on the effective and independent monitoring of what actually happens in police stations and court rooms and whether the means are provided to root out and expose any systematic injustice or irregularity.

The inquiry

13. The proposed Framework Decision has resulted from a long period of preparation and detailed consideration and consultation. As mentioned above there has been some criticism of the Commission's initial ideas; it is noteworthy that some Member States have queried whether the Framework Decision was needed at all; and there is evidence to suggest that the proposal has been "watered down". Having taken a preliminary look at the proposed rules we decided to conduct an inquiry and to hear the views of experts and other interested parties.
14. The inquiry was undertaken by Sub-Committee E (Law and Institutions) under the Chairmanship of Lord Scott of Foscote. We are grateful to all those who gave evidence to us, and in particular to the representatives of the Commission (Directorate-General for Justice and Home Affairs), Mme Vernimmen and Ms Morgan, who travelled from Brussels to answer our questions. The evidence, written and oral, is published with this Report, which is made to the House for information.

⁸ The Hague Programme. Strengthening Freedom, Security and Justice in the European Union. Para 3.3.1.

CHAPTER 2: GENERAL ISSUES

The two main aims underlying the proposal

15. Two main aims underlie the Commission's proposal: first, the need to improve the levels of compliance by Member States with their ECHR obligations; and, second, the desire to enhance confidence in the competent authorities and citizens of Member States in the criminal justice systems of other Member States in order to complement the principle of mutual recognition which is a central feature of EU criminal law policies and measures.

(i) Compliance with ECHR

16. The Commission explained that the aim of the Framework Decision was "not to fix new standards but to make the standards of the European Convention for Human Rights more efficient, more concrete, making them more transparent and providing the tools for them to be effectively protected" (Q 7).
17. All Member States of the Union are signatories to the ECHR. It might be thought that if each observed its obligations under the ECHR (including Article 6 – Right to a fair trial) then there would be no need for a Framework Decision on the matter. The problem, however, is not the absence of standards but what happens in practice. Eurojust said: "The problem is essentially one of compliance" (p 110). There are a number of Strasbourg decisions indicating breaches by Member States. While the Commission had not undertaken systematic research into breaches of the ECHR they were aware that the case law of the Strasbourg Court shows findings of violations against all Member States, though at different times and relating to different subject matter (Q 5). JUSTICE referred to problems in certain of the new Member States. Mr Smith, for JUSTICE, said that there was a long way to go in those countries in terms of complying with Convention standards (Q 98).
18. Those with responsibility for prosecutions were optimistic that the Framework Decision would lead to improvements. Eurojust believed that by setting out the standards "in a more proactive and prescriptive way" the Framework Decision would make the observance in practice of ECHR rights more effective and visible. Eurojust was "confident that with the adoption of the draft Framework Decision, shortcomings in the practice in the Member States should decrease as it will provide a serious incentive for Member States to protect and apply the right to a fair trial and will guarantee the effectiveness of the remedies available for any violation" (p 110). The Crown Prosecution Service (CPS), too, believed that the Framework Decision would promote greater compliance with the ECHR, but expressed the view that there were some areas where the ECHR rules should suffice by themselves (p 107).
19. Legal practitioners welcomed the fact that the proposal addressed the initial stages of a criminal investigation and prosecution. The European Criminal Bar Association (ECBA) said: "the ECHR case law is very good at what happens at the end of a set of proceedings but is woefully inadequate in terms of what happens right at the beginning if there is a problem" (Q 328).

For the Law Society of Scotland, Mr Brown said that the Framework Decision was “focusing on the more practical implications of what should be done by those who are involved in dealing with suspects and what the suspects are entitled to in respect of their rights and safeguards” (Q 331). The legal practitioners were nonetheless more cautious than the prosecutors. In the ECBA’s view, the proposal was insufficiently precise. Attention to detail was lacking. The ECBA thought that a great deal of work needed to be done on the detailed application of standards in the various legal systems (Q 332). We consider the detailed provisions of the Framework Decision in Chapter 3.

(ii) Enhancing confidence in mutual recognition

20. The Commission has sought to emphasise the role the proposal would play in eradicating public perception that criminal justice systems abroad are less fair than domestic ones. It is clear that a problem exists.
21. Both the AA Motoring Trust (AA) and the Road Haulage Association (RHA) gave practical examples as to how and why the citizen needed to have confidence in the fairness of foreign criminal laws and procedures. The AA believed that it was as motorists that most EU citizens were likely to fall foul of the criminal laws of other Member States.⁹ The AA said: “If they don’t believe they will be treated fairly as visitors, European integration will be damaged” (p 104). The Road Haulage Association (RHA) described how lorries were frequently targeted by criminal gangs intent on smuggling goods (including drugs). The RHA said that drivers often found themselves the victims of crime but were treated as if they were the criminals. “Sadly, we still hear of several cases each year where drivers caught in such circumstances then find themselves in prison without access to acceptable levels of representation and interpretation or what they consider to be fair treatment. These instances are not unique to a single country although they seem to occur more frequently in one or two Member States (*eg* France and Greece)” (p 120).
22. The Government acknowledged their awareness of cases where it had been alleged that United Kingdom citizens had not received acceptable treatment in criminal proceedings in other Member States and acknowledged that there had to be sufficient trust and confidence between Member States if effective judicial cooperation were to be achieved. Mr Bradley (Home Office) said that “the Framework Decision addresses some core issues which would help to ensure greater visibility of existing rights under the ECHR and to make sure that those rights are applied in a more consistent way across the European Union” (Q 234). The Government hoped that the proposal would help to improve public perceptions about the standards of justice across the EU as a whole (Q 267).
23. As mentioned, Member States have formally subscribed to the principle of mutual recognition as the “cornerstone” of judicial co-operation. But if citizens in the United Kingdom are to have the confidence in the judicial systems of all other Member States that the Government profess to have, then positive and effective action to promote that confidence needs to be taken. It is most notable that procedural safeguards and defendants’ rights have hitherto failed to receive the same attention as moves to enhance the

⁹ Each year 3 million drivers took their cars across the Channel (p 102).

efficiency of investigations and prosecutions. As JUSTICE said: “In the absence of equivalent safeguards in all Member States, mutual recognition may in fact breed mistrust, suspicion and uncertainty rather than fostering the culture of trust and co-operation necessary to effectively tackle cross-border crime” (p 32).

24. Absence of confidence, and consequently of mutual trust, has also had an effect on those authorities in Member States required to give effect to mutual recognition instruments. Ever since the Framework Decision establishing the European Arrest Warrant entered into force (and it has now been implemented in nearly all Member States), there has been the prospect of individuals from any one Member State, including of course this country, being surrendered (extradited) to another Member State to stand trial there without the merits of the case against them having been examined or considered by a judge in the home State. The Crown Prosecution Service (CPS) considered that there were legitimate concerns about the trust and confidence that Member States had in each other (p 107). Eurojust said that “practical problems can arise if there is a variable level of human rights observance within the European Union”. Eurojust believed that the proposal might help to alleviate any reluctance on the part of the authorities of one Member State to surrender a national to the judicial authorities of another (p 109).
25. We have no doubt that citizens, not just in this country but across the Union, need to have confidence in the fairness of foreign criminal laws and procedures to which it is proposed to subject them. So too do those charged with applying the criminal justice systems from day to day in the various Member States. The programme of measures based on the principle of mutual recognition adopted so far has placed great strain on any such confidence and mutual trust. **This failing underlines the importance that minimum standards that are actually observed should emerge as quickly as possible to improve public perception of criminal procedures in another Member State and to enhance mutual trust between the authorities in Member States. But quality, ie setting clear standards at the right level, must not be sacrificed in order to secure agreement in the Council of Ministers. Otherwise the proposal will fail to achieve its objective.**

A welcome measure

26. There was general agreement that the proposed Framework Decision would be a welcome measure. JUSTICE described the proposal as “highly welcome, if long overdue” (p 32). Eurojust welcomed the Commission’s proposal “as a positive step to develop standards and consistency to protect the rights of individuals in the European judicial area where judicial cooperation between police and prosecuting authorities is becoming increasingly necessary and frequent to deal with serious cross-border crime” (p 109). Mr Meehan, for The Law Society of Scotland, considered that the proposal was “a significant first step” (Q 336).
27. Eurojust said that the increase in cross-border cases made the Commission’s initiative “even more significant”. Eurojust envisaged the number of foreign suspects and defendants growing as criminal activity in the Union increasingly assumed a trans-national character (p 109). The Crown Prosecution Service (CPS) believed that action at EU level would produce

quicker and more demonstrable results than waiting for individual states to demonstrate compliance with the ECHR (p 107).

28. The Government were “broadly supportive” of the Framework Decision, believing that it would aid effective judicial co-operation founded on the principle of mutual recognition and that, by laying down minimum standards, it would help ensure that citizens received an adequate standard of treatment during criminal proceedings within the Union. But the Government’s support for the proposal was expressed to be dependent on certain conditions. A number of the provisions of the proposed Framework Decision needed clarification. The United Kingdom is not alone in having concerns about the detail (QQ 233, 235).

The *vires* question

29. As mentioned above Member States opposing the idea of a Framework Decision have queried the adequacy of the legal base in Article 31(1)(c) TEU. In particular, the Irish Government, in response to the Green Paper, queried the EU power to introduce measures that would apply purely to internal cases in each Member State. However, the large majority of Member States take the view that there is a solid legal base in the Treaty (Q 235).

30. Article 31(1)(c) enables common action to be taken on judicial cooperation in criminal matters “ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such [judicial] cooperation”. That provision should, we believe, be read in the light of Article 29 TEU (which opens this Title of the Treaty) which refers to the Union’s objective being:

“to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and combating racism and xenophobia”.

Article 29 continues:

“That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: ...

closer co-operation between judicial and other competent authorities of the Member States including co-operation through the European Judicial Co-operation Unit (“Eurojust”), in accordance with the provisions of Article 31 and 32”.

It is noteworthy that no specific reference in the present Treaties is made to rules of criminal procedure.

31. The Commission argues that the language of Article 31(1)(c) (cited in paragraph 30 above) is sufficient to provide a legal base for the minimum procedural rules proposed. The Commission says: “Ensuring compatibility can be achieved, *inter alia*, by providing for some approximation of minimum procedural rules in the Member States so as to enhance mutual trust and confidence”.¹⁰

¹⁰ COM (2004) 3289. Commission’s explanatory memorandum, para 50.

32. The Commission's position has potentially serious implications for the respective competences of the Union and Member States. It is therefore necessary to be certain that the proposal does fall within the powers (*vires*) conferred by the Treaty. The *vires* issue raises two questions: first, the meaning and extent of "common action on judicial co-operation"; and second, the extent to which measures taken under Article 31 TEU are restricted to cases with a cross-border dimension.
33. On the first question, Professor Kaiafa-Gbandi (Aristotle University, Thessaloniki) took the view that Article 31(1)(c) only concerned "judicial co-operation directly, as for example regulations for the transmission of documents, the communication of judicial authorities etc". She argued that if the adoption of minimum rules about the rights of persons in criminal proceedings could be justified under Article 31(1)(c) as being necessary for the improvement of judicial co-operation, then practically all rules of criminal procedure would be candidates for EU harmonisation to encourage mutual recognition of the relevant decisions of judicial authorities. In Professor Kaiafa-Gbandi's view there was no competence under the TEU to set common standards relating to individuals' rights in criminal proceedings. However, as she explained, such a competence would be given in the proposed Treaty for establishing a Constitution for Europe, but even then it would be limited in scope (p 117). We consider below the impact of the proposed Constitutional Treaty, and in particular what would be the effect of the proposed new Article III-270.
34. The cross-border question has been pursued most vigorously by our sister committee in the House of Commons.¹¹ The Framework Decision would apply not just in the case of criminal proceedings which have a cross-border dimension but also in relation to proceedings without such dimension and which could be considered purely internal: Article 1 of the Framework Decision makes clear that it is intended to be applicable to "all proceedings taking place within the European Union". The European Scrutiny Committee has taken the view that the Framework Decision would exceed the powers conferred by Article 31(1)(c) since it is not confined to rules which are "necessary" to improve judicial co-operation between Member States. The minimum standards applicable to purely internal cases raise, it is said, no issue of mutual recognition.
35. The Government's response has been twofold. First, they have said that given the nature of the safeguards being proposed it would not be feasible to limit the proposal to cases in which mutual recognition may be relevant, as this would create disparities and inequalities in criminal procedure with different categories of defendants being treated differently. Further, it would not be possible, in the context of ever increasing free movement of persons within the Union, to foresee in which cases the judicial co-operation of another Member State should or could be requested. The Commons Committee's riposte was to point out that this approach would seem to lead to the conclusion that there was no way to ensure that the measures were "necessary" for improving judicial co-operation. Whether or not standards imposed at Union level for cross-border cases should apply to purely internal cases should be a matter for national parliaments. If cooperation was sought

¹¹ See the reports of the European Scrutiny Committee HC 42-xxii (2003-04), para 15 (9 June 2004), HC 42-xxvi (2003-04), para 4 (7 July 2004), HC 42-xxx (2003-04), para 7 (9 September 2004), HC 42-xxxii (2003-04), para 16 (13 October 2004), and HC 42-xxxv (2003-04), para 5 (3 November 2004).

via a European Arrest Warrant or in seeking the enforcement of a financial penalty, then the proper place for specifying appropriate procedural safeguards would be in the body of the instrument providing such measure of co-operation.

36. The Government's second line of argument has been that a framework decision limited to cross-border cases would not be sufficient to enhance mutual trust or mutual recognition for judicial co-operation purposes because mutual recognition and judicial co-operation generally was not restricted to cross-border crime. But, in the Government view, that did not mean that the Union had general competence to harmonise criminal laws and procedure across the Union. A measure must still be necessary to improve judicial co-operation. Mr Norris (Home Office) said: "The European Union legislator can only do what is necessary to improve mutual recognition, so you have to look at those areas of the criminal procedure law which need to have certain minimum standards in order that the different Member States are prepared to recognise each other's decisions without looking behind those decisions, so I think that is the restraint" (QQ 250-3).
37. As mentioned above, Professor Kaiafa-Gbandi took the view that the position would change under the proposed Constitutional Treaty. The Government, disagreeing, said that the proposed Constitutional Treaty would only make explicit what is now implicit, namely that the Union has competence to do what is necessary to improve mutual co-operation (QQ 261-2).
38. In the present context, the effect of the Constitutional Treaty would appear to be twofold. First, the principle of mutual recognition of judicial decisions in criminal matters would be explicitly stated in the Treaty. Article III-270(1) provides that:
- "judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III-270(2)".
- The reference to the principle of mutual recognition is new, though, as explained above, the principle has an established political pedigree¹² and has been the basis of a number of legislative measures and proposals to date.
39. Second, Article III-270(2) provides:
- "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, European framework laws may establish minimum rules ... they shall concern ...
- (b) the rights of individuals in criminal procedure".
- The Commission does not consider the changes made by the Constitutional Treaty would be "significant" in this respect.¹³
40. That there is a genuine concern over the *vires* of the present proposal is confirmed by an examination of the new Constitutional Treaty. The inclusion for the first time of express reference to establishing minimum

¹² Tampere European Council fn 6 above, and see now the Hague Programme para 3.3.1.

¹³ The policies of the Union: justice and home affairs (Commission website on the Constitutional Treaty).

rules, including rules relating to “the rights of individuals in criminal procedure”, might suggest that the power to make such rules did not exist at present. We note that the Working group X “Freedom, Security and Justice” of the Convention whose work formed the basis for the new Treaty recommended “the creation of a legal basis permitting the adoption of common rules on specific elements of criminal procedure”.¹⁴ This, too, would suggest that the draftsmen of the new Treaty had it in mind that they were conferring a new competence and not merely codifying the existing position. We ourselves identified “an extension of competence in the field of criminal procedure”.¹⁵ The French Senate, in their comparison of the new Treaty with the existing Treaties describe paragraphs III-270 (2) and (3) as introducing “des dispositions nouvelles relatives à l’harmonisation de la procédure pénale”. They also draw attention to the limitations placed on these powers.¹⁶ If, as the Government argue, the new Treaty would only make explicit what is now implicit, then what is to be made of the express limitation in the (new) Article 270(2) to “judicial co-operation in criminal matters *having a cross-border dimension*” (emphasis added)? If any case can have cross-border dimension because, as the Government argue, the possibility (however remote) of having to enforce a penalty overseas or some other form of judicial co-operation then these words are illusory and potentially misleading.

41. **We draw attention to the difference of views and consequent uncertainty as to whether Article 31(1)(c) provides a sufficient legal base for the present proposal. If that Article is to be interpreted in the way being advanced by the Commission and the Government, then, as the Commons Committee noted, there is the risk that this approach might lead, over time, to the incremental unification of criminal procedure throughout the Union. The principle of subsidiarity might act as a check on any “creeping competence” but should not be allowed to distract from the more fundamental question of defining where the Union’s powers begin and end in this politically and constitutionally sensitive area.**

Action at Union level—delay and timing

42. The Commission has been the subject of two main criticisms. First, it has been dilatory in bringing forward the present proposal. Second, the proposal does not go far enough and omits key safeguards for the individual.
43. The Commission cannot be accused of inaction but hitherto has given priority in justice and home affair matters relating to criminal law to security measures, such as the European Arrest Warrant. Events such as 9/11 and the Council’s response to them seem largely to have dictated the political agenda. But we note that the scope and content of the proposal as at present put forward is much reduced from that envisaged in the Commission’s Green Paper. We sought to discover the reasons for the apparent delay in bringing forward the present proposal and in particular were concerned to learn whether there was any lack of political will in the Member States to address the issue.

¹⁴ Final report of Working Group X “Freedom, Security and Justice”. CONV 426/02, at para II (2)(b).

¹⁵ *The Future of Europe—The Convention’s Draft Constitutional Treaty* (41st Report 2002-03) at para 269.

¹⁶ *CONSTITUTION EUROPEENE Comparaison avec les traités en vigueur*. October 2004, at p. 242.

44. The Commission acknowledged that it has been criticised for the delay in bringing forward measures that would enhance “justice” and “freedom”. For the Commission, Mme Vernimmen explained the lengthy preparation and consultation process which the proposal had undergone. She said that Member States had been cautious at first about proposals for the approximation of laws in this area but that there was now much less reluctance, the mutual recognition programme having shown the way (Q 1).
45. The Commission has described this proposal as a “first step” and has drawn attention to other on-going initiatives including its Green Paper on bail and preliminary work relating to fairness in obtaining, handling and use of evidence throughout the Union.¹⁷ There is, it should be noted, already on the table a proposed Framework Decision on the European Evidence Warrant.
46. The European Criminal Bar Association (ECBA) expressed concern that the Framework Decision was “out of time” with other framework decisions, such as the European Arrest Warrant and the European Evidence Warrant. Mr Mitchell said: “The safeguards simply are not keeping up with the amount of European Union Framework Decisions that are coming through. That is a singular dangerous problem, we submit, for defendants and suspects in all the countries of the EU” (Q 336). The ECBA was pleased that other procedural rights measures were being prepared by the Commission, but argued that until all these were worked out and implemented then other prosecution driven measures should not be introduced (Q 337). Ms Hodges said: “Without safeguards in place, do we want to be creating European instruments that could cause injustice? I do not think that we should be shy about saying that these safeguards do need to be in place if mutual recognition is going to work at all in practice” (Q 338).
47. JUSTICE had no problem with the Commission dealing piecemeal with various “justice” requirements, whether for political, technical or other reasons. But JUSTICE would have liked to see the Commission proceed on a number of fronts at the same time. However, the minimum that JUSTICE sought for the present proposal was an insistence on observance of Article 6 ECHR rights. Mr Smith said: “That is a definable core. I am therefore a bit nervous that this document does not have things in it like the presumption of innocence and the right to silence, and so on—which I think should be in there” (Q 127).
48. It seems that “justice” is destined to be of secondary importance to “security” for at least the next five years. It is clear that work on “fairness” in criminal procedure is in a preliminary and much less developed state than other criminal law initiatives and that this is unlikely to change. The most recent statement of priorities, the Hague Programme, is hardly encouraging. A commitment is made to adopt this proposed Framework Decision by the end of 2005. But otherwise relatively little mention is made of other procedural rights initiatives. A greater emphasis appears to be placed on prosecution and enforcement measures, both generally and by reference to specific proposals. **Whether this is the correct balance is an issue which we intend to pursue with the Government in the context of our current inquiry into the Hague Programme.**

¹⁷ COM (2004) 3289. Commission’s explanatory memorandum, para 25.

Scope of the Framework Decision

49. There are a number of matters which are important in ensuring a fair trial but which are not mentioned in this “first step”; for example, the presumption of innocence, and the burden of proof. And at least one witness, Fair Trials Abroad, expressed surprise that the Commission considered the right to communicate with consular authorities to be a matter of priority (p 25). We were therefore interested to learn what criteria the Commission had adopted in determining what should be included in the Framework Decision.
50. The Commission justified the decision to limit the proposal to the five specific rights on the basis that they were “more immediately relevant to mutual recognition and the problems that have arisen to date in the discussion of mutual recognition measures”.¹⁸ For the Commission, Mme Vernimmen explained that the choice of rights covered in this proposal was made on the basis of extensive consultation. She said that the first version published on the Commission’s website had covered a much broader spectrum of rights and that: “The rights identified ... are those which are in our view very important because they activate other rights ... It means that the fact that you have access to a legal adviser, the fact that you have the facility of having quality translation and interpretation is a pre-condition for all the other rights”. Mme Vernimmen also drew attention to other on-going initiatives including the Commission’s Green Paper on bail and a proposed Green Paper on the presumption of innocence (Q 8).
51. Nonetheless, a number of witnesses drew attention to what they thought were obvious and/or serious omissions. For example, Dr Hodgson (University of Warwick) commented on the absence of any reference to the right to silence (p 116). Other witnesses, too, thought that that right should have been included in the Framework Decision. Fair Trials Abroad noted the failure of the Framework Decision to address the issue of bail (p 26). Amnesty International proposed that the Framework Decision should include a requirement for the electronic recording of police questioning of all suspects and defendants. They also argued that there should be an express right of access to a doctor of one’s choice (p 105). We consider each of these proposals below.
52. The Crown Prosecution Service (CPS) believed that some Member States would find it difficult to comply with the Framework Decision as it stood. That being so the CPS did not think that there would be any point in attempting to raise the standards proposed or to include any additional matters (p 108). The Government, too, were also content with the choice that the Commission had made. The rights included in the proposed Decision were those which were particularly important in ensuring that a suspect or defendant understood the proceedings, understood his rights and the possibilities of consular assistance, and had access to legal advice and the assistance of translation and interpretation. The Government considered the right last mentioned to be particularly helpful in relation to investigations involving a foreign defendant unable to speak the language of the country in question. The Government proposed to await the results of the Commission’s examination of the need for further measures in areas such as admissibility of evidence, the means of obtaining evidence, and the right of

¹⁸ COM (2004) 3289. Commission’s explanatory memorandum, para 25.

silence, but at present were not convinced that it would be necessary to impose minimum standards in these areas (Q 268).

The right to silence

53. A number of witnesses advocated the inclusion in the Framework Decision of the right to silence. In the United Kingdom (but *nb* the position in England and Scotland although similar is not identical Q 350) the right is not an absolute one; inferences may in certain circumstances be drawn from a person's silence. In this respect the position of the United Kingdom may be different from that of other Member States. In the view of the European Criminal Bar Association (ECBA) the inclusion of the right of silence would improve the position in the United Kingdom. Mr Mitchell said: "In the UK we are not perfect here, we could benefit from some of the European systems in reintroducing the right to silence in its naked form as a way of propping up the burden of proof because we have a lot of cases—the reverse burden of proof cases and so on ... —that are deteriorating rapidly even here" (Q 354).
54. The Government did not consider it necessary to include the right to silence "because this right is already accepted by all Member States, and it is underpinned by the case law of the ECHR" (Q 270). They distinguished the rights included in the Framework Decision as being ones which were "particularly relevant for assisting foreign suspects and defendants" (Q 271). Were the right to silence to be included, then it would then be necessary to consider what other rights, such as the right against self-incrimination or the burden of proof, should also be addressed at the same time. The Government said that the Commission were examining those issues and studying the differences which might exist between legal systems of the Member States before coming up with proposals. While all accepted the principle, there were some differences in regard to the propriety of drawing inferences from silence. The Government felt it better to wait for this wider examination rather than to try and deal with the right to silence in the present proposal (QQ 274-7).
55. It is necessary to be clear what is meant by the right to silence. In the United Kingdom, the right to silence does not mean that adverse comments on an individual's decision to say nothing cannot ever be made at an eventual trial. In England and Wales, PACE requires a caution to be given on arrest or before a person is charged or informed that he may be prosecuted. The form of caution is as follows:

"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."¹⁹

A similar rule applies at common law in Scotland. So in these jurisdictions the right to silence is not absolute. Witnesses believed that in some Member States adverse comments about the defendant's silence are never permitted. There would be little purpose including a minimum standard or harmonised right to silence unless the content of the right could be identified and a common definition agreed. **Trying to harmonise detailed rules (beyond the ECHR principles) about the right to silence could well present major technical and political problems and inclusion in the**

¹⁹ PACE Code C, para 10.5.

Framework Decision of what the ECBA termed a “naked right to silence” would be unlikely to secure unanimity. The outcome of the Commission’s examination of the issues must be awaited.

Bail

56. Not surprisingly, the failure of the Framework Decision to address the issue of bail (which recent experience—the Greek aircraft spotters case—confirms has immediate and direct cross border implications) was noted by a number of witnesses. Fair Trials Abroad believed that the question of bail was possibly the most urgent matter to deal with. Mr Jakobi said that the question of bail “causes far more misery and demonstrable injustice in the European system than almost anything else you can think of affecting foreigners. Whereas the native goes free on conditions, the foreigner sticks inside jail” (Q 131).
57. The Commission acknowledged that bail is an important issue. Mme Vernimmen said that bail was of such importance that it merited separate consultation and a separate legal instrument. A Green Paper on bail was issued in August this year (Q 17). **We are pleased to see that the Commission is taking action. It is regrettable, however, that bail was not one of the subjects designated by Heads of State as a priority in the Hague Programme.**
58. The Green Paper²⁰ discusses the need for a new legislative instrument on the mutual recognition of judicial decisions relating to non-custodial pre-trial supervision of defendants in criminal proceedings. The Commission has invited views on two different proposals, the first for a European Order to Report (requiring the individual to report to an appropriate authority in his home State, possibly in combination with a travel prohibition order), and the second for a system of Eurobail in which the trial court would make a preliminary assessment of whether the offence was “bailable” if it was directing the individual to go before a court in his home State to determine whether bail should be granted. There would have to be a guarantee that the defendant would return, or be returned, if necessary by coercive measures, to face trial. In this regard it is noteworthy that the European Arrest Warrant is not considered a sufficient guarantee. As the Government has acknowledged the Green Paper raises a number of questions and they themselves are consulting on it.²¹ **The Commission expect to produce a draft proposal for a Framework Decision on bail in the Spring of 2005 (QQ 17-19). This may be optimistic given the number and nature of the issues raised. The Committee is holding the Green Paper under scrutiny and will look carefully at the results of the consultation process and any legislative proposal that emerges.**

Recording police interviews

59. Amnesty International expressed concern that, by placing exclusive emphasis on administrative and legislative safeguards against ill treatment, the Framework Decision might prove to be inadequate in preventing the actual

²⁰ Green Paper on mutual recognition of non-custodial pre-trial supervision measures. COM (2004) 562 final.

²¹ Fair Trials Abroad criticised the Green Paper as not going far enough, being restricted to the conditions of bail and not addressing the issue of when and how bail should be granted in a cross-border case.

ill treatment of suspects. They proposed that the Framework Decision should include a requirement for the electronic recording of police questioning of all suspects and defendants. Such a requirement should not be limited to those entitled to “specific attention” under Article 10-11 or to the verification of the accuracy of interpretation under Article 9. Other witnesses supported that proposal and drew attention to the importance that electronic recording of police interviews had had in the United Kingdom for ensuring the fairness of proceedings.

60. Fair Trials Abroad had no doubts as to the value of recording police interviews. Sarah de Mas explained that research had shown “that not only was a recording essential at the police station as well as in courts, not only was it helpful for the defendant or the suspect or the witness, it was also helpful for the authorities—for the police, the courts—because if there was any doubt at any stage of the proceedings of what was said and by whom, across these barriers of language, there would be the tape, which was objective. The tape would be the final arbiter of who said what, to whom, how, and in what way” (Q 138). (This was also the experience of the Law Society of Scotland—Q 401). Sarah de Mas said that although recording had initially been treated with some reservations in some other countries (as a possible infringement of human rights) it was now becoming widely accepted as an inexpensive and valuable tool in resolving disputes about the conduct of police interviews (Q 138). In Fair Trials Abroad’s experience, recording was, however, the exception, rather than the rule, in the new Member States. There were obvious cost implications, but, as Mr Jakobi pointed out, audio recording was cheap compared with video recording (QQ 140-143).
61. The Government, however, doubted whether there would be support from most of the Member States for including a requirement for the tape-recording of police interviews in this first stage proposal. There would be significant costs for those Member States that do not at present have tape-recording facilities in their police stations. Member States “might well ask why this particular English system, which does not apply in all cases throughout the United Kingdom, should be applied across the whole of the European Union, particularly in those member states where they have examining magistrates and therefore they have other ways in which they can control the reliability of evidence which is collected through police interviews” (Q 281). Moreover, the Government did not have clear evidence as to whether the lack of tape-recording (of interviews) in police stations in other Member States was one of the issues which particularly concerned our citizens (Q 310).
62. It is clear that the Commission is not opposed to compulsory recording of police interviews. We asked the Commission whether an audio/video requirement should apply to every police interview of a suspect. For the Commission, Mme Vernimmen replied: “That would be an ideal world. I think that would be certainly an added value, but from the consultation we had we received the reply that that could be very costly and very difficult to organise also in terms of installation” (Q 14). It appeared that objections had come from a number of Member States and that consequently the Commission had limited the requirement of video recording to two specific cases (Q 15).
63. The costs implications need exploring. As both the European Criminal Bar Association (ECBA) and the Law Society of Scotland were quick to point

out, the introduction of tape recording may well bring about savings. Mr Mitchell said: “We can tell our European colleagues, and frequently do and they listen, that having a proper interviewing system, by audio or videotape, saves a lot of money in terms of trials and investigations that go on. Whether or not they see it as a fair system, there is a pecuniary advantage in having it” (Q 355). Mrs Keenan, for the Law Society of Scotland said: “As a former prosecutor I can say certainly there were trials which were resolved at an early stage when we were able to play the tape to the defence in a particular case” (Q 357).

64. Recording of interviews between police and suspected persons is important in ensuring that there is confidence on the part of the public in such procedures. The electronic recording of police questioning in this country has had a significant impact in reducing the occurrence of miscarriages of justice. Recording can settle disputes as to who said what and what took place and can therefore help to identify whether an individual has been unfairly treated or ill-treated. **We believe that it would enhance confidence if electronic recording of police interviews of suspects were a standard requirement throughout the Union.**
65. The cost should not be regarded as a sufficient objection to providing the requisite recording facilities. As Mme Vernimmen said, “fairness is a duty and even if it is costly it remains a duty” (Q 16). We accept that video recording is more expensive than audio recording but if, as JUSTICE proposed, the Framework Decision were to require Member States to ensure that audio or video recording were available, that would give Member States the option (Q 146). As we explain below, the problem may not simply be costs but a much more fundamental one.

Diversity and unanimity

66. The Framework Decision, it is important to note, does not aim to harmonise procedural rights. That is not necessary. The rights are already there, principally in the ECHR. The Commission’s proposal seeks to raise the level of compliance with Member States’ existing obligations by setting out certain minimum requirements for discharging those existing obligations. It must be emphasised that they are minimum requirements and it is to be hoped that a good number of Member States will have higher standards. It is also to be hoped that the standards set out in the eventual Framework Decision (if agreement is reached) will be sufficiently high. Concern was expressed by a number of witnesses that too low a standard might be specified and that, notwithstanding the non-regression clause in Article 17, there would, as an indirect consequence, be a lowering of standards. For example, Dr Hart-Hoenig, a German lawyer representing the European Criminal Bar Association, warned that, if the introduction of minimum standards led to a lowering of standards in Germany, it might no longer be possible to resist a European Arrest Warrant on the grounds that the standards in the issuing State were significantly lower than those applicable in Germany (Q 342).
67. JUSTICE noted that the United Kingdom had high standards of procedural rights in criminal proceedings and argued that the United Kingdom should take the lead in Europe “to ensure that its mostly enviable standards set the pace for EU-wide rules and not those of the lowest common denominator.” (p 30). JUSTICE argued that the Framework Decision should closely follow the ECHR, both in substance and wording (Q 98). Mr Smith said: “we

would like to see the highest possible common standards. I suppose the way through that is the Convention. We are content with the Commission seeking to put more bite into Convention standards, because that is sorely needed” (Q 121). Fair Trials Abroad took a very pragmatic approach, recognising that any measures would be dependant on the unanimous agreement of Member States. Mr Jakobi said: “Our problem is to try and start with the best we can get now and have a programme that raises standards, because some countries do not even have lawyers under legal aid” (Q 121).

68. **We conclude that British citizens facing justice abroad will only be confident of access to standards of criminal justice comparable to those in the United Kingdom if the Government takes a strong stance on minimum safeguards now.** But we saw no evidence to suggest that it was a priority of the Government to seek to ensure that British citizens facing justice abroad should be guaranteed access to standards of criminal justice at least as good as those in the United Kingdom. It appears to be inconsistent with the Government’s negotiating strategy to put forward anything that another Member State might object to or which might encourage another Member State to put forward something to which the United Kingdom might object (QQ 273, 317). We recognise that that approach, which many would find disappointing, may be the result of the political and practical considerations surrounding this proposal. Cynics might say that it may also reflect the fact that it has now been agreed that the Framework Decision should be adopted before the end of 2005²² *ie* in all probability during the United Kingdom’s Presidency.
69. As mentioned, the Framework Decision is addressed to 25 plus different criminal justice systems. There are radical differences of approach between those having an adversarial procedure (such as United Kingdom jurisdiction) and those having an inquisitorial system (such as France). Dr Hodgson (University of Warwick) helpfully explained the fears and problems which arose. She said that France was very suspicious of attempts to vary its essentially inquisitorial criminal procedure so as to move towards the adversarial “Anglo-Saxon” procedure, which France regards as less likely to achieve convictions of the guilty than its own (p 114). The rule in the Framework Decision that the suspect should have access to legal advice highlights this problem. One of the features of the French system is the ability of the police to question and seek to get the truth from parties before their lawyers are involved and might be able to advise the witnesses in such a way as, in the police and prosecution’s view, possibly to defeat the ends of justice. The right of the suspect to legal advice before being questioned by the police is likely to be characterised by the French as an adversarial system procedure and as inconsistent with their own procedures which, not surprisingly, they regard as preferable.
70. In its drafting of the various provisions of the Framework Decision, the Commission has tried to square this circle. But just as our Government are seeking changes in order to safeguard the law and practice in the United Kingdom so, quite understandably, the French (and no doubt many other Member States) are also looking for amendment of the Decision to ensure compatibility with their criminal legal system (Q 237). The Framework

²² The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. Para.3.3.1.

Decision requires unanimity in the Council and securing such agreement will be difficult. Other Member States may well not be prepared, for example, to sign up to anything which requires, as one of the minimum standards, access by an accused to a lawyer at the outset of any police questioning.

71. In addition to the problem of divergent national law and practices, certain provisions of the Framework Decision have potential costs and resources implications. Witnesses have drawn attention to the costs implications of those provisions which would lay down standards for the provision of legal advice and of translation and interpretation facilities. The compulsory recording of police interviews would, as we mention above, be likely to be met with similar objection.
72. The Government are looking to “the achievement of something worthwhile within a reasonable time” (Q 317). There is a serious risk, therefore, that the end result will be a fudge and/or the lowest common denominator. This might do nothing, or very little, to improve compliance with the ECHR, and would be unlikely to give the authorities and citizens of one Member State any greater trust and confidence in the systems of others. Worse still, it might give some sort of seal of approval to standards which are below those to which our citizens are accustomed and, we believe, should be entitled to expect throughout the Union. **We therefore urge the Government to ensure that the outcome of the present negotiations is truly “something worthwhile”. We trust that the Commission will stand firm and resist any attempt to water down a proposal which already shows signs of dilution.** We set out our detailed comments on the text of the Framework Decision in Chapter 3.

CHAPTER 3: ANALYSIS OF THE DRAFT FRAMEWORK DECISION

Scope of application of Framework Decision (Article 1)

73. The rights set out in the proposed Framework Decision are to apply in “criminal” proceedings for the benefit of the “suspected person”. They are to apply from the time specified in Article 1(2). A number of problems of definition arise.

Article 1

Scope of application of procedural rights

1. This Framework Decision lays down the following rules concerning procedural rights applying in all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence, or to decide on the outcome following a guilty plea in respect of a criminal charge. It also includes any appeal from these proceedings.

Such proceedings are referred to hereafter as “criminal proceedings”.

2. The rights will apply to any person suspected of having committed a criminal offence (“a suspected person”) from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until finally judged.

(a) Criminal proceedings

74. “Criminal proceedings” is defined in Article 1(1) as “proceedings ... aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence, or to decide on the outcome following a guilty plea in respect of a criminal charge”.²³ Any appeal from such proceedings is also included. The principal concern expressed by witnesses was that in the absence of an agreed definition of what proceedings were “criminal”, the national laws of Member States would produce differences of interpretation and scope for Member States to avoid their obligations under the Decision.
75. Amnesty International suggested that the Framework Decision should make clear that the scope of application should not be limited to what Member States’ national laws might determine to be “criminal” and that the scope of application should include all proceedings which would be considered “criminal” under international law. JUSTICE suggested that the term “criminal proceedings” should be interpreted in the light of ECHR jurisprudence. (The European Court of Human Rights has taken the view that “criminal proceedings” for the purposes of the ECHR has an autonomous meaning, which does not necessarily correspond with the meaning of “criminal proceedings” in individual Member States.²⁴) JUSTICE proposed that the Framework Decision should apply to

²³ The question whether there should be a cross-border element is considered at para 34 above.

²⁴ Where national law classifies a matter as “criminal”, it is *ipso facto* treated as “criminal” for the purposes of Art. 6 ECHR. Where a matter is not so classified, then the Strasbourg Court will have regard to (i) the nature of the offence or conduct in question; and (ii) the degree of severity of the penalty risked in the proceedings. *Engel and Others*, judgment of 8 June 1976, Series A No.22.

proceedings “which are essentially criminal in nature and including extradition and surrender” and should, in Mr Smith’s words, be “yoked to the meaning which it has in the Convention” (QQ 148, 151). The Law Society of Scotland also thought that it would be helpful to look at the approach adopted by the Strasbourg Court (Q 359).

76. The European Criminal Bar Association proposed a pragmatic approach. Dr Hart-Hoenig said: “It must cover all issues which are relevant or which could expose individuals to risks under criminal law, that is extradition proceedings as well as other proceedings dealing with criminal issues” (Q 359). Mr Mitchell added a further case, “if the sanctions that are imposed in any proceedings are equivalent to those that could be applied in criminal proceedings” (Q 361).
77. The Commission noted that there was no world wide agreed definition of what were “criminal proceedings”. What the Commission had sought to do was to define the scope in terms of the moment the rights were to apply. The Commission pointed to the danger of having a definition which might become a precedent and possibly restrict the Commission’s initiatives in other areas, such as the admissibility of evidence (Q 21).
78. The meaning of “criminal proceedings” has been raised in the Council working group. The Government explained that it was always difficult to agree a definition of criminal law matters for purposes of Third Pillar (Title VI TEU) instruments. While there might be room for some greater clarity in the Framework Decision, the Government thought that it would be very difficult to formulate a definition of criminal proceedings which would take account of all the differences that existed in the separate jurisdictions of the Union (Q 285).
79. **Difficult it may be, but the scope of application of the Framework Decision must be clear. The absence of a common definition of what is “criminal” will inevitably lead to uncertainty. Given that the purpose is to enhance the rights of the individual by, *inter alia*, improving Member States’ compliance with the ECHR, then the approach suggested by JUSTICE, to link the Framework Decision with the ECHR, would seem sensible and, at first sight attractive.** But any definition must be consistent with the Treaty itself. There is a *vires* issue here, with attendant implications for respective competences of the Member States and the Union. The Treaty (Article 31 TEU) gives power to take common action “in criminal matters”. “Criminal matters” is not, however, defined. Whether it is intended to cover all those matters which would be regarded as “criminal” under ECtHR jurisprudence is unclear.²⁵ “Criminal” for the purposes of the EU Treaty is itself likely to have an autonomous meaning. No doubt the Luxembourg Court would have regard to the ECtHR jurisprudence and the criteria adopted by the Strasbourg Court but it is by no means certain that in defining “criminal” for the purposes of the EU Treaty the Luxembourg Court would necessarily adopt the same meaning as that adopted by the Strasbourg Court for ECHR purposes. Nor is it certain that Member States would expect the Strasbourg definition and

²⁵ Is Title VI intended to cover, for example, competition laws where they may not be classified as criminal or involve criminal sanctions under national laws? They may be “criminal” under the ECHR. See *M & Co. v Germany* No 13258/97 and *Stenuit v France* No 11598/85.

criteria to apply to determine the respective competences of Member States and the Union in relation to Title VI matters.

80. **The Strasbourg route is neither simple nor trouble free. It might seem more practical to leave it to Member States to determine what proceedings are “criminal” for the purpose of the Decision.** But this would inevitably lead to an uneven application as between Member States and a lack of legal certainty. There would be opportunity for abuse by Member States by re-classifying some “criminal” procedures as “administrative”. But abuse might be limited by amending the non-regression clause in Article 17 so as to prevent Member States removing suspects’ rights by reclassifying offences or penalties (*eg* from “criminal” to “administrative” or even “civil”), though any such amendment would be likely to raise substantial competence and subsidiarity issues. Moreover, we would expect Member States when implementing the Framework Decision to pay due regard to ECtHR jurisprudence.

(b) Suspected person

81. The definition of “suspected person” is critical to the triggering of the rights set out in the Framework Decision and is potentially problematic. Under Article 1 (2), a person is a “suspected person” when he or she is informed of that fact by the competent authorities of a Member State. It would seem to follow that the Framework Decision rights would not apply until then.
82. Some witnesses thought that the definition might give rise to abuse: police authorities might postpone the coming into force of the requirements by simply delaying the moment at which the individual was informed that he was suspected. There was general agreement that the present text of Article 1(2) was unsatisfactory. The Government agreed that the Framework Decision should make clear that protection would apply “from the earliest possible stage when a person is suspected and not simply when the investigators choose to inform him that he is suspected” (Q 292).
83. There were, however, differing views as to how Article 1(2) should be amended. The Commission drew attention to the different ways in which criminal investigations were undertaken in the Member States. Mme Vernimmen considered that an individual under a “judicial investigation” should be entitled to the rights provided for in the proposed Framework Decision (Q 25). But the notion of a “judicial investigation” is not known in all Member States and in particular in the English system. Witnesses argued that if an individual was under investigation by the police in relation to a suspected crime he should be informed of the rights given under the Framework Decision. For the Commission Mme Vernimmen said: “As soon as a person is questioned, obliged to reply to certain things and under a certain form of constraint, obviously he must be informed that he is under suspicion” (Q 28). (This would accord with the Commission’s view as to when the Letter of Rights should be handed over—see paras 169– 170 below.)
84. It is to be noted that the Framework Decision appears to go beyond Article 6 ECHR which bites when a person is charged.²⁶ Most witnesses agreed that it

²⁶ Article 6 ECHR uses the term “everyone charged with a criminal offence”. ‘Charged’ in this context has been given an autonomous meaning by the Strasbourg Court and may extend to circumstances where

was important to get things right at the very beginning. Mr Smith, JUSTICE, said: “If one deals properly with the situation in the police station and interrogation, you are more likely to get a fair trial. The most likely source of injustice, or a likely source of injustice, is false confessions—alleged confessions of one kind or another. I cannot immediately think of a better way of saying it, but cleaning up the police station has been a major success of the last 20 years or so, in relation to what I know of, which is England and Wales” (Q 105).

85. Eurojust also took the view that it was important to ensure that the right to a fair trial was catered for at a sufficiently early stage: “This right should run from the moment the suspect is apprehended or, at the very latest, by the time he starts to be questioned”. On the other hand, Eurojust argued that “the principle of subsidiarity dictates that Member States should be entitled to exercise autonomy in this area” (p 111).
86. JUSTICE acknowledged the potential difficulty caused by differences among the jurisdictions in the Union but believed that it should suffice if Article 1 were amended to refer to a suspected person “from the time when he is *entitled to be informed* by the competent authorities of a Member State that he is suspected of having committed a criminal offence, *arrested*, or *otherwise affected by the compulsory powers* of such authorities (whichever is the earlier) until finally judged” (QQ 107-9).
87. For the Law Society of Scotland, Mr Meehan advocated the approach taken by Scottish courts when looking at the fairness question, namely “whether there are reasonable grounds to regard a person as a suspect or whether objectively that person was a suspect at that stage, so one would look at the stage in proceedings and the evidence available to make an assessment of whether the person is a suspect”. This would mean that the rights would not necessarily apply at the beginning of the questioning process but was not necessarily inconsistent with Article 6 ECHR (QQ 364-5). The European Criminal Bar Association (ECBA), on the other hand, were clear that the rights should apply at an earlier stage, “from the moment that the individual becomes involved in the investigatory process either by being questioned or being required to produce documents” (Q 365). The ECBA believed that “suspected persons” should include “accused persons” and those “under investigation” (p 78).
88. Under the Framework Decision, an individual would not have the rights described in the Framework Decision where he or she is, or as long as he/she is considered by the investigating authorities to be, merely a “witness”. There may be genuine cases where, in the course of questioning, the police view of an individual changes from that of being a witness to a suspect. At that moment a caution would, in our domestic practice, have to be introduced. However, Fair Trials Abroad noted that the wording of Article 1 appeared to be open to abuse by investigative authorities and argued that an individual should be informed of his rights from the moment of first questioning in the police station, regardless of the individual’s status as “witness” or “suspect” (QQ 110-118).
89. The Government, however, did not envisage the rights being triggered at such an early stage. Mr Macauley (Home Office) said: “The clear intention

of the Commission—and this is an intention that the Government would agree with—is that the provisions of the Framework Decision should apply to people who have been informed formally by the competent authorities of a Member State that they are a suspect, that they are suspected of committing a criminal offence. In terms of the UK procedure, that would correspond to either an arrest for an offence or the receipt of a summons in respect of an offence” (Q 285).

90. **The Framework Decision must be clear as to exactly when the rights are triggered. The present formulation in Article 1(2) meets this criterion but is clearly unacceptable.** The existence of rights should not depend on when a party is informed of them. There should be some easily identifiable objective criterion. **Whatever the formulation becomes the criterion has to be fair and workable,** not just from the point of view of the suspect but also from that of the investigator. It should not inhibit the whole process of police investigation. People can be involved in the investigative/criminal process as witnesses, but there may be cases where in the course of questioning by a policeman with a perfectly open mind as to who might be responsible for the crime it becomes clear that the person being questioned may well be responsible for the very crime. We draw attention to the position in Scotland: the stage of suspicion is reached when a particular individual is under serious consideration as the likely perpetrator of the crime.²⁷ **The Framework Decision should provide that a person should become a “suspected person” at that point, which could arise before or during the course of questioning.**

(c) The European Arrest Warrant

91. The application of the draft Framework Decision to the European Arrest Warrant (EAW) was raised by a number of witnesses. The EAW is mentioned in Article 3 but there remained some uncertainty in the minds of some witnesses as to the full extent of the application of the rights set out in the proposal to EAW proceedings. Witnesses referred to the case law of the Strasbourg Court which had classified extradition proceedings not as criminal but as administrative proceedings.²⁸
92. Amnesty International proposed that the Framework Decision should expressly apply to proceedings for the execution of an EAW (p 106). The Commission doubted whether it was necessary to include a reference to the EAW in Article 1. They expressed the view that Article 3 (which sets out specific cases where a Member State must ensure that legal advice is available to the suspected person) indicated that EAW proceedings were within the scope of the term “criminal proceedings” in Article 1 (QQ 21, 23).
93. The reference to the EAW in Article 3 needs some clarification. As an EAW is itself a procedural step taken in the context of criminal proceedings it is arguable that no reference to it is needed in Article 1. But because there is some uncertainty as to the meaning of “criminal proceedings” (see paras 74-80 above) and witnesses have also expressed substantial doubts as to whether “criminal proceedings” would necessarily encompass an EAW in every executing State, **it would be better if the applicability of the Framework**

²⁷ Stair’s Memorial Encyclopaedia, para 731.

²⁸ See, for example, evidence of Amnesty International, p 106.

Decision to EAW proceedings were made clear in Article 1. The Government agreed that the relationship between Articles 1(1) and 3 was unsatisfactory and that the Framework Decision should apply to extradition and European Arrest Warrant proceedings (QQ 286, 293).

94. **If extradition proceedings are to be included in the definition of criminal proceedings it is for consideration whether the Treaty base for the Framework Decision should be enlarged.** We have commented above on the meaning of “criminal proceedings” and the potential *vires* issues which definition of that term raises. In ECtHR jurisprudence extradition proceedings are not classified as criminal but are treated as administrative in character. We note also that the legal base for the EAW is Articles 31(a) and (b) and 34(2)(b) TEU and that Article III-270 of the proposed Constitutional Treaty (which replaces Article 31 TEU) no longer includes a reference to extradition, presumably because within the Union the EAW provides a means of surrender in criminal proceedings and “extradition” proceedings, in the strict sense, are not necessary.

(d) Terrorism and other serious crime

95. Paragraph 8 of the preamble to the Framework Decision states that “the proposed provisions are not intended to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime in particular terrorism”. In JUSTICE’s view the inclusion of preamble 8 was a matter of concern, not least because any case involving a European Arrest Warrant was likely to relate to a serious crime (Q 231).
96. The need for paragraph 8, or something like it in an article in the Framework Decision, was identified by Eurojust and by the Government. Eurojust highlighted the potential problems that certain provisions of the Framework Decision could cause for some Member States: in Ireland, Spain and the United Kingdom, the adoption of Article 2 (the right to legal advice) as it stood appeared to conflict with specific rules delaying access to legal advice for suspects charged with terrorism offences (p 111). The Government’s concern was that terrorism should be expressly addressed in the substantive articles of the proposal and not simply in the preamble. They were also considering whether the Framework Decision should include a list of the “serious and complex forms of crime” referred to in paragraph 8 of the preamble (QQ 257-8).
97. The difficulty with paragraph 8 is that it raises the prospect that there may be a raft of crimes to which the Framework Decision is not intended to apply. What would be included in the term “serious and complex forms of crime”? There is a tendency not to define ‘serious crime’ in Third Pillar legislation.²⁹ The European Arrest Warrant does not contain any references to ‘serious crime’, but is applicable to offences punishable with imprisonment of at least 1 year. It lists a large number of crimes, the majority of which are not related

²⁹ The Europol Convention states that the organisation’s mandate covers terrorism, drug trafficking and ‘other serious forms of international crime’ (Article 2(1)). It does not include a definition of serious crime but contains a list of specific offences on which Europol is competent to act. Recent calls to broaden Europol’s mandate to cover ‘serious crime’ were rejected by both the Committee and the Government on the grounds that the term ‘serious crime’ is unclear and its inclusion would not enhance legal certainty — the proposal was finally not adopted. Similarly, the Eurojust Decision defines the organisation’s mandate by reference to the offences cited in the Europol Convention.

to terrorism, for the purpose of eliminating the requirement of dual criminality where a penalty of at least 3 years may be imposed. The situation is similar in other mutual recognition instruments such as the Framework Decisions on confiscation. The 1998 Joint Action on money laundering and confiscation of the proceeds of crime states that the scope of serious offences should include in any event ‘offences which are punishable by deprivation of liberty or a detention order of a maximum of more than one year, or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order of more than 6 months’ (Article 1(1)(b)). The 2001 Money Laundering Directive required Member States to align themselves with the above definition before 15 December 2004.³⁰ The recent Commission Staff Working Paper on bail seems to accept that a ‘serious’ offence covered by the European Arrest Warrant is an offence punishable by one year.³¹

98. **If the Framework Decision were inapplicable to any offence punishable by imprisonment for at least one year a vast range of offences and all European Arrest Warrant proceedings would be excluded. We can see no justification for such a major exception and doubt whether this is the Commission’s intention. We would welcome clarification of the scope of paragraph 8 of the preamble. Any proposed amendment to the Framework Decision seeking to exclude certain types or forms of crime will demand very careful scrutiny.**

(e) A de minimis rule

99. Our inquiry also revealed that in addition to excluding “serious and complex forms of crime” there is a move to exclude from the application of the Framework Decisions offences at the lower end of the spectrum. For the Government, Mr Macauley said: “There is a general desire, I think, that the Framework Decision does not cover very minor offending that might be described as “administrative” in some jurisdictions” (Q 287). The Government considered that the Framework Decision should apply “where someone is taken into custody and subject to a prolonged criminal investigation” but they had not finalised their position on the scope of application of the Framework Decision (Q 288).
100. The difficulty is that what might seem minor or trivial to one person might be important to another. Mr Brown, for the Law Society of Scotland, gave as an example a Road Traffic offence which might result in loss of a driving licence and as a consequence a particular individual’s livelihood (Q 360). Dr Hart-Hoenig (ECBA) pointed out that a matter might be classified in, for example, Germany as “administrative” but nevertheless could involve the imposition of a very large fine (Q 360).
101. **Any proposal to exclude “very minor offending” will need to be scrutinised with care. If, at one end of the spectrum, “serious and complex crimes” are to be excepted and “very minor offending” at the other, then it is to be wondered how much will be left for the**

³⁰ Until that date, serious crimes are offences which may generate substantial proceeds and which are punishable by a severe sentence of imprisonment in accordance with the penal law of Member States (Article 1(1)(E))—“serious crimes” also includes drug trafficking, organised crime, “fraud (at least serious)”, and corruption.

³¹ COM (2004) 562 final. Staff Working Paper, p 31, para 4.2.2.1.

Framework Decision to bite on and how serious the Union is in seeking to secure greater compliance with the ECHR.

The right to legal advice (Articles 2-5)

102. Article 2(1) states that “a suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings ...”. Article 3 specifies five cases where a Member State must ensure that legal advice is available: where the suspects (i) are persons remanded in custody before trial; (ii) are accused of committing “a criminal offence which involves a complex factual or legal situation or which is subject to severe punishment”; (iii) are subject to a European Arrest Warrant or extradition; (iv) are minors; or (v) are unable to understand the proceedings owing to age, mental, physical or emotional condition. Article 4 requires Member States to ensure the effectiveness of the legal advice. Article 5 specifies circumstances where the suspect is entitled to free legal advice. These provisions raise a number of issues.

Article 2

The right to legal advice

1. A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.
2. A suspected person has the right to receive legal advice before answering questions in relation to the charge.

Legal advice “as soon as possible”

103. Article 2(1) provides that legal advice shall be provided “as soon as possible”. The intention is that the individual should have the benefit of legal advice before any questioning.³² Article 2(2) makes clear that a suspected person has the right to receive legal advice before answering questions “in relation to the charge” but, as indicated above, rights may exist at an earlier stage in the procedure. Mme Vernimmen, for the Commission, accepted that the term “as soon as possible” was “a bit elastic”. It meant that the right to legal access could not be delayed (Q 40). “As soon as possible” remains a rather vague term and, as witnesses pointed out, legal systems may interpret it very differently according to their customs and traditions.
104. Eurojust noted that the ways in which the right to legal assistance applied to the preliminary pre-trial phases of criminal proceedings (*ie* investigation prior to arrest, investigation post arrest but prior to charge) varied considerably from Member State to Member State. In some Member States, lawyers are permitted to be present during the police interrogation of their clients. Other systems, where the procedure for investigation is more inquisitorial, impose limited access to legal advice, have an initial period during which the suspect cannot have access to a lawyer, or preclude the presence of a lawyer during police questioning (p 111).
105. Eurojust said that Article 2 could be controversial not least in the United Kingdom because of domestic rules delaying access to legal advice to suspects charged with terrorism offences (p 111). Indeed problems in the United Kingdom would not be restricted to terrorism cases. The

³² COM (2004) 3289. Commission’s explanatory memorandum, para 55.

Government made clear that, while the right to legal advice was an important one and should be included in the Framework Decision, they were looking to achieve some compatibility with the provisions in the Police and Criminal Evidence Act and its Codes of Practice (together “PACE”). That meant that although there would generally be a right of access to legal advice during the course of police questioning there would be some circumstances in which that right of access could be delayed (QQ 238-9, 242).

106. The Crown Prosecution Service (CPS) has been working with the Home Office on possible amendments to Article 2. Those amendments would seek to preserve the position under PACE (in particular, Code C, Annex B) which permits access to legal advice for certain suspects to be delayed if the police believe that the suspect’s legal representative might inadvertently or otherwise pass on information from the detained person that may lead to interference with evidence or people. The suspects to whom this applies are persons suspected of serious arrestable offences or of drug trafficking or persons against whom confiscation of assets orders may be made. The CPS was “firmly of the view that the UK should not sign up to the Framework Decision if it does not permit legal advice to be withheld in accordance with PACE” (p 106).
107. The position in Scotland is also noteworthy. The Law Society of Scotland noted that Article 2 of the Framework Decision would change the position in Scotland. The present position is that until a certain stage in the process has been reached interviews are conducted by the police and it is at the discretion of the police whether a solicitor attends. The Scottish courts have held that a person detained has a right to have his solicitor informed of his detention but does not have a right of access to that solicitor before being interviewed.³³ Mrs Keenan said: “there is no absolute right as it is framed currently in Article 2(2) of the Framework Decision. To that extent, it would be a clarification of a detainee’s right under Scots law” (Q 339). In Scotland, access to legal advice is not therefore allowed immediately after arrest but, in practice, only after six hours or thereabouts. The Law Society of Scotland believed that it was for consideration whether if the individual had a right to insist on a lawyer being present before answering questions, then the counterpart of that would be that the police could detain him until a lawyer arrived and the questioning could commence (Q 341). The Government are awaiting the results of consultations before reaching a view on the suitability for Scotland of Article 2, as it now stands (Q 240).
108. The Government accepted that the present language of Article 2(1) was vague. Consideration was being given to introducing a maximum time limit in addition to the phrase “as soon as possible”. Eight hours has been suggested (QQ 243-5). That would, of course, be two hours longer than the present practice in Scotland (described above). The Commission, however, had reservations about stipulating a time period in Article 2. Mme Vernimmen said: “If it is possible within two hours, it should be given within two hours and with no abuses. There is obviously advantage in fixing a particular deadline but there is also a risk that if we put a maximum it could be a period which in certain cases might be longer than “as soon as possible” (Q 40). Witnesses suggested various alternatives to “as soon as possible”. The ECBA suggested “as soon as the investigation begins” (Q 371). Both

³³ *Paton v Richie* [2000] SLT 239.

JUSTICE and the Law Society of Scotland proposed “without delay” (Q 371).

109. **In our opinion “as soon as possible” is too imprecise and does not provide a very useful minimum standard. The right to legal advice is a very important safeguard for the individual and should not be diluted, save in the most exceptional circumstances. Article 2(1) should therefore be clarified and strengthened. Any revision of Article 2(1) should also make clearer its relationship with Article 2(2). We suggest that the words “without delay and in any event before answering any questions” be substituted for the words “as soon as possible” in Article 2(1). This, we believe, would accord more closely with the Commission’s intentions. Article 2(2) would then become redundant and should be deleted. This amendment of Article 2(1) might, however, be unacceptable to those Member States that regard the role of the examining magistrate as providing sufficient protection to suspects. We urge the Government to stand firm on the need for some such amendment as we have suggested.**

The meaning of “the right to legal advice”

110. Two further points arise out of Article 2(1). The first is what is implicit in the use of the expression “the right”. Does that mean the right to free legal advice? Or that the Member State must provide the legal advice if the individual cannot pay for it?

Article 5

The right to free legal advice

1. Where Article 3 applies, the costs of legal advice shall be borne in whole or in part by the Member States if these costs would cause undue financial hardship to the suspected person or his dependents.
2. Member States may subsequently carry out enquiries to ascertain whether the suspected person’s means allow him to contribute towards the costs of the legal advice with a view to recovering all or part of it.

111. It is noteworthy that Article 5 (right to free legal advice) refers to Article 3 (obligation to provide legal advice) but not to Article 2 (right to legal advice). JUSTICE also pointed out inconsistencies in the wording of Articles 3 and 5 and that Article 5 used different words from the ECHR³⁴ (Q 231). The Law Society of Scotland took the view that if the Article 2 right was to be a real right to legal advice then there should be some provision with regard to remuneration (Q 373). **We agree. This matter, and the relationship between Articles 2, 3 and 5, needs to be clarified.**
112. Second, does “legal advice” mean simply “advice” or does it include assistance and representation in any criminal proceedings that follow? JUSTICE urged clarification of the term “legal advice”. It should not be too narrowly construed but should include “assistance” and “representation”. JUSTICE accepted, however, that there might be an issue as to the qualifications of those who could provide “representation” (see discussion of

³⁴ Article 6 ECHR refers to “legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

“lawyer” below) but did not believe that this should deflect from the need to ensure that “advice” was not too narrowly construed (Q 166).

113. The Commission did not agree that the Framework Decision needed to stipulate that legal advice included legal assistance and representation where necessary. Mme Vernimmen said that this could be deduced from Article 2 under which the suspected person has the right to legal advice “as soon as possible and throughout the criminal proceedings”. It was also clearly explained in the Commission’s explanatory memorandum (though this is not part of the Framework Decision). Mme Vernimmen believed the wording of the Framework Decision was sufficiently clear. There was no doubt that the Commission intended to include legal advice and representation (Q 74).
114. The Government took the view that the matter could be made clearer in the Framework Decision (Q 299). **We agree. This should be done.**

The definition of lawyer

115. Article 4(1) provides that Member States must ensure that “only lawyers as described in Article 1(2)(a) of Directive 98/5/EC³⁵ are entitled to give legal advice” in accordance with the Framework Decision. The Directive contains a list of those qualified. In the case of the United Kingdom “lawyers” means advocates, barristers and solicitors.

Article 4

Obligation to ensure effectiveness of legal advice

1. Member States shall ensure that only lawyers as described in Article 1(2)(a) of Directive 98/5/EC are entitled to give legal advice in accordance with this Framework Decision.
2. Member States shall ensure that a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective.

116. We queried why no one else would be entitled to give legal advice. Mme Vernimmen, for the Commission, explained that the aim of the provision was to protect suspected persons from unscrupulous advisers and to make sure that advice was given, not by amateurs, but by qualified persons. The Commission did not exclude the possibility that there might be schemes in operation in Member States which offered legal advice from persons not qualified under the Directive. The Commission would not object provided that the provision of legal services by such persons was properly regulated and that the quality was guaranteed (Q 52).
117. Fair Trials Abroad expressed concern that immediate implementation of Article 4 might undermine whatever provision for legal advice already existed in accession countries. Compliance with the Framework Decision would come at some expense to new Member States and might take some time. What would happen in the meantime? In some of those States law students often provide the service (Q 156). Mr Smith, for JUSTICE, pointed out that in the United Kingdom also much advice was provided by accredited police

³⁵ Directive 98/5/EC of the European Parliament and the Council of February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. [1998] OJ L 77/36.

station representatives, who need not be fully qualified lawyers.³⁶ What was important was that the legal advice should be provided by someone who was independent and accredited (QQ 158-160).

118. However, legal practitioners expressed concern about needs and standards. For the Law Society of Scotland, Mr Brown said: “it is very difficult to envisage anyone other than a solicitor having access to an individual at that stage because one has to give advice looking forward to the whole process of the trial, possible appeals and everything else. You have to have someone who is trained to do that” (Q 341). The European Criminal Bar Association (ECBA) also had reservations. They were most sympathetic to the position in certain of the new Member States but believed that “lawyers” should mean only those properly qualified. Dr Hart-Hoenig strongly believed that no derogations, temporary or otherwise, should be allowed. All Member States, he said, were aware of the situation and would have time to implement the Framework Decision. There should be no special transitional provisions for some Member States (Q 375). But Mr Mitchell believed that there might be situations, and not just in the new Member States, where it was unrealistic to expect that a qualified lawyer would be available in all circumstances. Therefore there might need to be a fall-back position (Q 401).
119. The Government recognise that there is a problem. Mr Bradley said: “It may be just a transitional issue and that greater time is needed in order to implement the requirements, or it may be that in fact greater flexibility is needed and there is a problem in requiring only lawyers to be used who meet the terms of Directive 98/5 EC. We are studying that problem at the moment because we are aware that in some Member States legal advisers may not be legally qualified within the terms of that Directive” (Q 298).
120. Article 4 as it is expressed at the moment is a counsel of perfection, especially, but not solely, in relation to certain of the new Member States. It is plainly desirable that there should be a system across the Union where qualified lawyers are available to give advice to suspects. However, that will take time. **The Framework Decision should not treat existing arrangements as necessarily being inadequate and unacceptable merely because they do not require the involvement of qualified lawyers. However, where persons other than qualified lawyers are used, Member States must put in place a system for accreditation and supervision.**

“Effective” legal advice

121. Article 4(2) requires Member States to ensure that “a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective”. We have difficulty in understanding what is intended and, unusually, the Commission’s explanatory memorandum provides no guidance on this. It is unclear whether the Commission is aiming at the content of legal advice, or at communication issues (*ie* at ensuring that whatever advice is being given can be understood by the person being given

³⁶ For the purposes of PACE Code C solicitor means “a solicitor who holds a current practising certificate” or “an accredited or probationary representative included on the Register of Representatives maintained by the Legal Services Commission” (Code C, para 6.2). Again, any request for legal advice and the action taken shall be recorded: PACE Code C, para 6.1(vi).

it) or at some general level of competence of those providing the legal advice. Both Fair Trials Abroad and the Government thought that it was the last of these. Mr Jakobi said: “I think they are aiming at competence in lawyers generally, ... but I do not think this is a good way of getting at it” (Q 168). The Government thought that the provision was aimed at ensuring that whoever provided the legal advice was of a competent standard. But it was not clear whether Article 4(2) was directed at some objective standard. This needed to be clarified (Q 301).

122. In the Commission’s view, the word “effective” did not mean that the lawyer always had to give the right advice. The term had been taken from the Strasbourg Court’s jurisprudence.³⁷ An example where the lawyer would not be “effective” was the case where he simply failed to turn up. But the Commission also appeared to envisage that a lawyer might not be “effective” where, through lack of experience or for some other personal reasons, he was not sufficiently qualified to provide the necessary advice (Q 55). The Commission accepted that if failure to turn up was simply the requirement for “effectiveness” then Article 4(2) might be redundant because Article 3 required Member States to ensure that legal advice was available.
123. Witnesses expressed doubts as to whether Article 4(2), and in particular the term “effective”, was meaningful or helpful. Mr Smith, for JUSTICE, said that it would be valuable if the Framework Decision said that a suspect or defendant had a right of complaint if dissatisfied with his lawyer and a right to change his lawyer (Q 170).
124. It is difficult to comment constructively on Article 4(2). The first essential is to determine what it is intended to achieve. That is not apparent from the present text or from the information we have received. Would ineffectiveness provide a ground of appeal in the event of a conviction? Does Article 4 relate to the debate about the need for a public defender system? In some areas of Scotland the defendant is simply allocated to a public defender for the purposes of this trial and cannot choose his lawyer. How far would the right to “effective” legal advice affect or influence this practice? We remain unclear as to what is intended by the reference to legal advice being “effective” in Article 4(2). **We cannot put forward any useful suggestion as to how Article 4(2) could be improved until we know what it is intended to achieve.**

Additional points

125. Two additional points on Article 4 were raised by JUSTICE. They said that the Framework Decision should make it clear that the right to legal advice meant a right to *confidential* legal advice. PACE draws attention to the importance of the right to consult or communicate with a solicitor in private: “if the requirement for privacy is compromised because what is said or written by the detainee or solicitor for the purpose of giving and receiving legal advice is overheard, listened to, or read by others without the informed consent of the detainee, the right will effectively have been denied”.³⁸ JUSTICE said that confidentiality was particularly important where advice was given in the police station (Q 164). Approaching the issue from a United Kingdom standpoint, the assumption would be that a reference to the right

³⁷ *Artico v Italy* A/37 (1980) 3 EHRR 1.

³⁸ PACE Code C, Notes for Guidance 6J.

to receive legal advice would be a reference to the right to receive confidential legal advice. **But it would be desirable to spell this out in the Framework Decision.**

126. JUSTICE's second point was that Article 4 should include a statement that a person charged should have adequate time and facilities for the preparation of his defence. Mr Smith said: "This is part of an exercise where we would argue for ratchetting this onto the Convention right" (Q 165). This is surely right. **We invite the Government to support this proposal.**

European Arrest Warrant

127. Fair Trials Abroad described a particular problem concerning the continuity of legal advice and representation which had arisen in connection with the execution of a European Arrest Warrant. The defendant would be sent from the executing State to the requesting State on the basis of an application supported by a form completed by the requesting State. The defendant's lawyer might have very little idea about the grounds on which the individual concerned was to be prosecuted. There might, following the surrender, be a period of up to ten days, and sometimes longer, before he was slotted into the justice system in the requesting country. Sarah de Mas said: "During that period he is totally defenceless. He has no one supporting him in any way; whereas the prosecution have Eurojust, which is getting more and more organised, and [ensures] that all the information travels with the accused or the suspect; that there is good liaison between police and between prosecutors". Fair Trials Abroad was critical of the lack of thought given as to how legal advice and assistance would be provided in such cases. How would the first lawyer, who had appeared for the suspect on the application for the Arrest Warrant, even find the second lawyer, appointed to act for him at his eventual trial? How would the second lawyer then liaise with the first? How would information travel from the executing State to the requesting State and who would pay for it in the absence of legal aid for anything trans-border (Q 133). Fair Trials Abroad proposed that, as a counter to Eurojust, there should be some sort of European agency for safeguarding the interests of defendants. They envisaged a central body that could inform and link up the lawyers in the countries involved. There also needed to be a form of legal aid that would cross borders (Q 135).
128. The Government were not sympathetic and considered that this was a matter for the legal advisers concerned. The responsibility for providing legal advice fell on the State where the person was being held (Q 294). There was no difference between what was proposed under the Framework Decision and what took place under the previous extradition procedures: "We do not have any ability to apply safeguards or require safeguards to be applied for the legal advice given to the person after he has been extradited" (Q 295). However, the Framework Decision would be a step forward because it would ensure that there was effective legal advice provided from the time when the person arrived in the country to which he had been extradited (Q 296). The Government thought that the position was sufficiently clear—Article 2 required legal advice to be available "as soon as possible" (Q 297).
129. We are concerned to learn of the problems relating to the execution of European Arrest Warrants. It is clearly undesirable that an individual should be left, as it were, in limbo until lawyers in the requesting State can be found. The Framework Decision could assist in this respect, not just, as the

Government suggest, because legal advice must be available “as soon as possible” but because it must be available “throughout” the proceedings. This imports a continuing obligation. There should not therefore be any break in the provision of legal services for the proceedings instituted by the requesting State and of which the European Arrest Warrant and its execution would be a part.³⁹ Therefore, before acceding to the request for transfer, the judge in the executing State might wish to be assured that legal advice and representation was, or would be without delay, available in the requesting State and that appropriate arrangements would be made for the transfer of papers and other information between the defence lawyers. **It would be helpful, indeed advisable, if the requesting State annexed to the European Arrest Warrant details as to how the continuing right to legal advice would be fulfilled in the instant case following surrender.** If that information were not available the executing Court would need to consider carefully whether ECHR safeguards would adequately be met in the particular circumstances of the case. The minimum standards set out in the Framework Decision could provide helpful guidance for that purpose.

Rights to interpretation and translation (Articles 6-9)

130. Articles 6 and 7 provide rights to free interpretation and free translation of relevant documents. Article 8 requires Member States to ensure that translators and interpreters are sufficiently qualified and to provide replacements where inaccuracies are found. Article 9 requires an audio or video recording to be made of proceedings conducted through an interpreter and a transcript to be provided in the event of a dispute.

Article 6

The right to free interpretation

1. Member States shall ensure that a suspected person who does not understand the language of the proceedings is provided with free interpretation in order to safeguard the fairness of the proceedings.
2. Member States shall ensure that, where necessary, a suspected person receives free interpretation of legal advice received throughout the criminal proceedings.
3. The right to free interpretation applies to persons with hearing or speech impairments.

Article 7

The right to free translation of relevant documents

1. Member States shall ensure that a suspected person who does not understand the language of the proceedings is provided with free translations of all relevant documents in order to safeguard the fairness of the proceedings.
2. The decision regarding which documents need to be translated shall be taken by the competent authorities. The suspected person’s lawyer may ask for translation of further documents.

³⁹ This would seem to follow from the reference to the European Arrest Warrant in Article 3 of the Framework Decision.

Articles 6 and 7 are not limited to Community languages. Interpretation must be in a language that the suspected person understands⁴⁰. The provision of adequate translation and interpretation services is a fundamental right to which all suspects and defendants are entitled. As the Government pointed out, Article 6 gave a right to interpretation which would apply throughout the criminal proceedings, and interpretation had to be into a language which the individual could understand. That was already the case under Article 6 ECHR (Q 269). The Commission took a similar view (Q 34).

The resources implications

131. These Articles raise potentially serious budgetary concerns for a number of Member States. The requirement to provide translations would apply from the moment when a person became a “suspected person” (see paras 81-90 above). Eurojust described the problem as “one of levels and of means of implementation and how best to ensure implementation was in realistic limits” (p 112). The problem is certainly not restricted to the new Member States.
132. The Crown Prosecution Service (CPS) drew attention to the time and resource implications associated with Articles 7 and 9. A number of types of documents (exhibits, procedural information, bail notices, charge sheets, legal aid notices etc) are currently not routinely translated. Under Article 7 it would be for the competent authorities to decide in the first instance which documents were relevant and needed translating, but the suspect’s legal representative could also ask for further documents to be translated. The CPS noted: “the implications are considerable, particularly when the current system can only just supply the present demand”. They also pointed to the practical resource implications for Article 9. Proceedings in magistrates’ courts were not recorded in audio or video format and transcriptions were in English, not in the language spoken by the witness or the language of the defendant. If sign language were used in any part of the process then a video recording would be required (p 108).
133. **The Government have acknowledged that the Framework Decision will involve increased administrative costs but have not yet provided Parliament with an estimate of the increase. We request the Government to provide this information as soon as possible.**

Ensuring accuracy

134. Article 8(2) requires Member States to ensure that if translation or interpretation is found not to be accurate then a mechanism exists to provide a replacement. The Commission accepted that Article 8(2) gave Member States “a certain level of discretion” as to how it should be implemented (Q 50).

⁴⁰ JUSTICE argued that the language of the Framework Decision should be brought into line with the ECHR. The language of the Convention would be “understand or speak”. The Framework Decision, Article 6(1), speaks of a person “who does not understand the language of the proceedings”. In JUSTICE’s view there was no reason why the Decision should not follow the language of the Convention (Q 172).

Article 8

Accuracy of the translation and interpretation

1. Member States shall ensure that the translators and interpreters employed are sufficiently qualified to provide accurate translation and interpretation.
2. Member States shall ensure that if the translation or interpretation is found not to be accurate, a mechanism exists to provide a replacement interpreter or translator.

135. Eurojust noted that it was the practice in some Member States to use only translators and interpreters drawn from a recognised list of confirmed specialists whose qualifications were checked and whose quality was monitored. Such practice had met with widespread approval (p 112). PACE requires that, where necessary, appropriate arrangements are put in place for the provision of suitably qualified interpreters for those who are deaf or who do not understand English. Whenever possible, interpreters should be drawn from the National Register of Public Service Interpreters (NRPSI).
136. Fair Trials Abroad explained that the Commission's original idea was to have national registers of accredited interpreters and national disciplinary boards regulating the profession of interpreters, but that this obligation had been watered down for political reasons (Q 181). The Fédération Internationale des Traducteurs (FIT) also supported the "quality guarantees" proposed in the Commission's Green Paper (p 113). (JUSTICE argued that Article 8 should refer to interpreters who were "sufficiently qualified, *trained and independently accredited* to provide accurate translation and interpretation" (Q 181)). Member States should be required to provide registers of suitably qualified and trained interpreters, and to ensure that mechanisms existed to deal with the making of complaints and to provide replacements where necessary (Q 173).
137. The Law Society of Scotland welcomed the emphasis placed on the need for proper accreditation of interpreters. Mrs Keenan explained that it was a current concern that there was no vetting procedure and no monitoring of standards applicable to interpreters. Very few Scottish interpreters were on the NRPSI and there was no separate Scottish register. The Framework Decision would bring a very welcome change if it were to ensure a basic standard of quality in interpretation services (Q 340).
138. We recommend that the Commission's original idea⁴¹ of requiring every Member State to ensure that it has a system for training specialist interpreters and translators and to maintain national registers of accredited or certificated translators and interpreters should be revisited. **The Framework Decision should adopt current best practice.** If there are serious financial implications in establishing systems of accreditation and supervision in some Member States, then consideration should be given to making Community funds available under the AGIS programme.⁴²

⁴¹ Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union. COM (2003) 75 final, at para 5.2.2.

⁴² See Council decision of 22 July 2002 establishing a framework programme for police and judicial co-operation in criminal matters (AGIS). [2002] OJ L 203/5. The programme runs from 2003 to 2007. Art. 3 (3) (a) refers to court interpreters.

Recordings and transcripts

139. Article 9 calls on Member States to ensure that where proceedings are conducted through an interpreter an audio or video recording is made. This is essentially in order to ensure the accuracy of the translation. Article 9 provides that “a transcript of the recording shall be provided to any party in the event of a dispute”. The transcript may only be used to verify the accuracy of the interpretation. So it would not be available to provide the kind of protection or assistance that audio or video recordings of police questioning or of trials would normally be expected to provide.

Article 9*Recording the proceedings*

Member States shall ensure that, where proceedings are conducted through an interpreter, an audio or video recording is made in order to ensure quality control. A transcript of the recording shall be provided to any party in the event of a dispute. The transcript may only be used for the purposes of verifying the accuracy of the interpretation.

140. We do not see the need for such a restriction, which it should be noted does not appear in Article 11 (“Specific attention”—Member States must ensure that a recording is made of any pre-trial questioning of any person who owing to their age or mental, physical or emotional condition cannot understand the proceedings). Many people will be vulnerable when in a country whose language they cannot understand or speak, quite apart from when “specific attention” is needed. They may be at risk of having words put in their mouth or of being misunderstood. If an audio or video recording has been made, what is the possible justification for restricting its use in the way suggested by Article 9? Why should it not be used to assist if there is any dispute as to the fairness of the proceedings? Both the Commission⁴³ and the Government took the view that to allow the use of the recording would create a disparity of treatment between different interviewees, depending on whether the interview was or was not recorded (Q 313). Both were, however, prepared to look again at the issue (Q 314). **We urge them to do so. If there happens to be a recording, for whatever reason it has been made, it would be extraordinary if use could not be made of it to avoid a possible miscarriage of justice. To give as a reason that others, whose interviews had not been recorded, might be at risk of a miscarriage of justice which could not be avoided by recourse to a recording seems to us astonishing. Such a reason should only need to be stated to be rejected.**

Specific attention (Articles 10-11)

141. Article 10 requires Member States to ensure that a person who cannot understand or follow the proceedings, owing to his age or mental, physical or emotional condition, is given “specific attention”. Any steps taken as a consequence must be recorded. Article 11 sets out three specific rights of those entitled to specific attention: any questioning must be recorded;

⁴³ COM (2004) 3289. Commission explanatory memorandum, para 70. The Commission seeks to justify the restriction on the use of the transcript on the grounds that to allow it to be used “to challenge the proceedings from any other point of view” would “lead to preferential treatment of suspected persons who need interpretation”.

medical attention must be provided whenever necessary; and, the right “where appropriate” to have a third person present at any questioning.

Article 10

The right to specific attention

1. Member States shall ensure that a suspected person who cannot understand or follow the content or the meaning of the proceedings owing to his age, mental, physical or emotional condition is given specific attention in order to safeguard the fairness of the proceedings.
2. Member States shall ensure that the competent authorities are obliged to consider and record in writing the need for specific attention throughout the proceedings, as soon as there is any indication that Article 10(1) applies.
3. Member States shall ensure that any step taken as a consequence of this right shall be recorded in writing.

Who is entitled to specific attention

142. Article 10(1) sets out the categories of persons who are entitled to the right to “specific attention”. The categories are age (presumably being very old or very young) or mental, physical or emotional condition. It seems that in the first instance it would be for the police, rather than the courts, to take a view as to whether an individual requires specific attention. This would accord with PACE.⁴⁴ Under Article 10(2) competent authorities in Member States are required to consider and record in writing the need for specific attention throughout the proceedings. The criterion to be applied, set out in the first line of Article 10(1), is whether the person can understand and follow the content and meaning of the proceedings. The Commission has acknowledged that identifying the suspects to whom this criterion applies will be difficult.⁴⁵
143. The Law Society of Scotland drew our attention to recent legislation in Scotland, the Vulnerable Witnesses (Scotland) Act 2004, which notwithstanding its title also applies to defendants in criminal trials. The Act provided a test of vulnerability and a list of circumstances that can be taken into account when determining vulnerability. Vulnerability has to be considered at an early stage and specific measures put in place to assist the person concerned. Against that background the Society argued that “specific attention” in the Framework Decision should be further defined and a non-prescriptive set of examples given (QQ 379-80).
144. The European Criminal Bar Association (ECBA) suggested the list should also include those suspected of a political offence. Mr Mitchell explained that what they had in mind were cases such as the leaking of government documents of a highly charged political nature or relating to current political issues (QQ 382-3). The Commission had not contemplated including such

⁴⁴ Under PACE, the Custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person: (a) appears to be suffering from physical illness; or (b) is injured; or (c) appears to be suffering from a mental disorder; or (d) appears to need clinical attention. This rule applies even if the detainee makes no request for clinical attention and whether or not they have already received clinical attention elsewhere. PACE Code C, para 9.5 and 5(a). The Metropolitan Police very helpfully supplied the Committee with a copy of Form 57M “Risk Assessment, medical care and the need for other help” which forms part of the Custody Record.

⁴⁵ COM (2004) 3289. Commission explanatory memorandum, para 71.

persons in the list, which had been drawn by reference to the circumstances of the suspected person rather than the circumstances of the offence in question (Q 59).

145. We have serious reservations about ECBA's proposal for two main reasons. First, the notion of what amounts to a political offence is inherently imprecise and will vary from time to time and from place to place. To attempt to define it (because we have doubts as to whether it could be left undefined and/or simply passed back to Member States) would be highly problematic and politically sensitive. Second, it would not seem to be appropriate or necessary to include particular types of offence in the definition of specific attention. Articles 10 and 11 are aimed at redressing the balance where a suspect is particularly vulnerable. In order to ensure fairness, police and prosecuting authorities are required to take special care where the suspect is in a weak position because of inability to understand and follow the proceedings. It is the capacity of the person and not the nature of the offence which is relevant.

What does specific attention entail

146. We have puzzled over what precisely the obligation to give "specific attention" would require. We queried whether Articles 10 and 11 provided sufficient explanation and guidance. Article 10(3) says that where "specific attention" has to be given any consequential steps taken must be recorded in writing. But apart from the three matters listed in Article 11 (and as will be seen we are not convinced that all three are "special") it is not clear what those steps might be. In particular, it is not clear whether the Article 11 steps are intended to be exhaustive of the steps that must be taken.

Article 11

The rights of suspected persons entitled to specific attention

1. Member States shall ensure that an audio or video recording is made of any questioning of suspected persons entitled to specific attention. A transcript of the recording shall be provided to any party in the event of a dispute.
2. Member States shall ensure that medical assistance is provided whenever necessary.
3. Where appropriate, specific attention may include the right to have a third person present during any questioning by police or judicial authorities.

147. The relationship between Articles 10 and 11 is unclear. In Eurojust's view the term "specific attention" meant that a particularly high degree of protection should be afforded to vulnerable suspects and defendants. That protection should not be limited to the rights specified in Article 11, although the wording of both Articles 10 and 11 suggested a restrictive interpretation (p 112). The Government referred to the requirements of PACE in relation to vulnerable persons: "to assist them in the investigation, in the interviewing process, and particularly to ensure that they are not put in a situation where undue pressure is exerted or which results in undue pressure being put upon them" (Q 307). The Government agreed that the requirements of "special attention" could be spelt out more clearly. Article 11 referred to some specific requirements (making audio or video recording, providing a transcript, medical assistance and the right to have a third person

present during the questioning) but the relationship between Articles 10 and 11 was uncertain (Q 308)

148. **As mentioned above, we take the view that all police questioning should be recorded on audio or video. Article 11(1) therefore should be a general rule and should not be restricted to cases where special attention is needed.** Whether other Member States (particularly those having an examining magistrate system) will accept the requirement for electronic recording even for the particular purposes of Article 11(1) is not known. The Government reported that discussion so far had been concentrated on the resource implications (Q 309).
149. The last sentence of Article 11(1) raises another issue. The words “a transcript of the recording shall be provided to any party in the event of a dispute” occur in both Articles 9 and 11, but Article 9 also states that the transcript may only be used for the purposes of verifying the accuracy of interpretation. That appears to limit the use that could be made of the transcript under Article 9 while raising the question of what types of “dispute” fall within in Article 11. Simply disputes about what the person said, or disputes about how the person was treated, or what?
150. The Government thought that Article 11(1) was aimed at ensuring that if there were any disputes about the quality of the interviewing process and the reliability of any evidence collected from the person in view of that person’s physical or mental condition, then that could be checked by means of the audio or video recording. By contrast Article 9 was simply concerned with the quality of the interpretation (Q 311). **The Government nevertheless agreed that Article 11 might clarify what kind of “dispute” was being referred to (Q 312). We agree that this would be an improvement.** Further, as we have said above, if there is a recording of any part of the proceedings, why should the recording not be used to assist if there is any dispute as to the fairness of the proceedings? **The Law Society of Scotland thought that the transcript should be available in all circumstances, not merely in the event of a dispute. It should be available without qualification to the suspect or his representative for whatever purpose might emerge (QQ 384-5). We agree.**
151. **The Law Society of Scotland raised a further point on Article 11(1). It would be preferable if a copy rather than a transcript of the tape be made available.** Mr Meehan explained: “very often what the defence seeks to do is have a psychological assessment of all information, and that would include the inflexion, the tone. An expert who has that information, I would suggest, is far better placed than somebody reading a transcript, which can perhaps give a slightly distorted perception. Often transcripts do not pick up pauses between answers (Q 388). **We agree that this would be useful. Article 11(1) should provide for a copy of the tape, as well as or in place of a transcript, to be made available.** In addition to the point made by the Law Society of Scotland, there could well be some costs savings if it were not necessary in all cases to provide a transcript.
152. So far as medical assistance is concerned there was a general view that it is difficult to see why the Article 11(2) obligation, to “ensure medical assistance is provided wherever necessary”, should not apply to everyone. JUSTICE spoke of a general right to medical attention (Q 184). A person who could understand and follow the content or meaning of the proceedings might still

be in need medical attention. **Article 11(2) should also be a general, and not simply a special, right.**

153. Witnesses were generally of the view that Articles 11(1) and (2) should apply to all suspects. It was recognised that the third right (Article 11(3)—to have someone present, in Scotland a “supporter”) should be restricted to those requiring specific attention. The Crown Prosecution Service (CPS) expressed opposition to all suspected persons having the rights set out in Article 11. But that opposition seemed mainly to be directed at Article 11(3). For, as the CPS acknowledged, existing arrangements under PACE ensure that Article 11(2) would apply to all suspects in any event. Under PACE, the Custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person:

- (a) appears to be suffering from physical illness; or
- (b) is injured; or
- (c) appears to be suffering from a mental disorder; or
- (d) appears to need clinical attention.

This rule applies even if the detainee makes no request for clinical attention and whether or not he has already received clinical attention elsewhere.⁴⁶ As regards Article 11(3) (presence of a third person during questioning) the CPS said that “questioning” could be distinct from interviewing and could take place at a variety of locations and in vastly differing situations (p 108). We understood them to disagree that Article 11(3) should apply to all questioning of “special attention” suspects.

154. **The rights in Article 11(1) and (2) should apply in all cases. As we have pointed out above, the recording of questioning is a valuable tool in the avoidance of miscarriage of justice and therefore in building and maintaining confidence in the criminal justice system.** As regards Article 11(2) we can see no reason why any suspect who needs medical treatment should not receive it. To suggest that only those in need of “specific attention” should be entitled to medical assistance sends out entirely the wrong sort of signal. On the other hand, **Article 11(3) is a useful example of the special treatment that may be required, for example, where the suspect is a young child. We would not like to see any diminution of this right, and disagree with the comments of the CPS to the contrary.**

155. Finally, we acknowledge that without Article 11(1) and (2) the obligation to provide “special attention” begins to look very thin. The objective of the rules, to safeguard the fairness of proceedings where the suspect is particularly vulnerable, is highly meritorious. **What is needed is to make the nature and extent of the general rule in Article 10 much clearer.**

Right to communicate (Articles 12-13)

156. Articles 12 and 13 set out the suspect’s right to communicate with his family, his employer and his consular authorities.

⁴⁶ PACE. Code C, para 9.5 and 5(a).

Article 12

The right to communicate

1. A suspected person remanded in custody has the right have his family, persons assimilated to his family or his place of employment informed of the detention as soon as possible.
2. The competent authorities may communicate with the persons specified in Article 12 (1) by using any appropriate mechanisms, including consular authorities if the suspect is a national of another State and if he so wishes.

Remanded in custody

157. Under PACE, a person has the right not to be held incommunicado. The Code provides that any person arrested and held in custody at a police station or other premises may, on request, have one person known to them or likely to take an interest in their welfare informed at public expense of his whereabouts as soon as practicable. A record must be kept of any such requests made and the action taken.⁴⁷
158. Under Article 12 the right of a suspect to communicate with his family only arises when “remanded in custody” (presumably when held in custody awaiting trial on the order of the court). On the other hand Article 13 (the right to communicate with consular authorities) applies where a person is simply “detained”. We asked whether Article 12 was intended to cover those held in police custody without charge or was limited to those held in custody awaiting trial. The Commission explained that the Article was intended to cover people who were held in police custody. For the Government, Mr Macauley said: “The use of the word “remanded” in Article 12 is a mistake and it will be rectified” (Q 315).
159. Article 13 refers to “detained”. We see no justification for the distinction apparently being made between the two Articles. Accordingly **we recommend that the right to communicate with family or employer should also apply to any suspect being detained.**

Communication with a doctor

160. Amnesty International argued that the right to communicate should include an express right of access to a doctor of one’s choice. Such a right would, Amnesty said, act as a strong safeguard against torture and ill treatment (p 105). As mentioned above, the provisions dealing with those who require specific attention (Articles 10-11) provide that medical assistance should be given if the suspected person needs it. JUSTICE, too, considered that the Framework Decision should include a right to receive timely access to medical attention irrespective of whether the suspect qualified for “special attention” (see Articles 10-11 above) (Q 184). Fair Trials Abroad doubted how effective the right might be to a foreigner in a strange country. What was important was the right to have independent medical advice (Q 192).
161. The Commission was, however, sympathetic to the inclusion of a more general rule dealing with access to a doctor. Mme Vernimmen said: “but if it is included it should be drafted very carefully not to be a kind of right which might be exhausted if there is an interview by a doctor at the very first

⁴⁷ PACE. Code C, paras 5.1 and 5.8.

moment. There must be access to a doctor when there is a need for that. There might be a need for that at different times” (Q 9).

162. The Government did not deny the importance of the right but expressed concern that if it were to be included then so might a number of other rights: “it might make the handling of the negotiation and therefore the achievement of something worthwhile within a reasonable period of time more difficult” (Q 317). The Government doubted whether all Member States would readily accept a suspect’s right to a doctor of his own choice. However, a wider provision on medical assistance might be negotiable (Q 319). **We invite the Government to consider bringing forward an amendment to include in the Framework Decision the right to medical assistance.** A doctor of one’s own choice is probably not necessary, even if it were negotiable. What is important is that the doctor should be suitably qualified.

Consular authorities

163. Article 13 provides that a detained suspected person who is a non-national shall have the right to have the authorities of his home State informed of his detention as soon as possible and to communicate with the consular authorities. This Article differs from the others in that it derives from the 1963 Vienna Convention on Consular Relations and not from the ECHR. Whereas under the 1963 Convention the right belongs to States, under the Framework Decision the right is accorded to an individual who is a non-national in the State where he is being detained. **We welcome this.**

Article 13

The right to communicate with consular authorities

1. Member States shall ensure that a detained suspected person who is a non-national shall have the right to have the consular authorities of his home State informed of the detention as soon as possible and to communicate with the consular authorities if he so wishes.
2. Member States shall ensure that, if a detained suspected person does not wish to have assistance from the consular authorities of his home State, the assistance of a recognised international humanitarian organisation is offered as an alternative.
3. Member States shall ensure that a long-term non-national resident of an EU Member State shall be entitled to have the assistance of the consular authorities of that State on the same basis as its own nationals if he has good reason for not wanting the assistance of the consular authorities of his State of nationality.

164. PACE provides that any citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, may communicate at any time with the appropriate High Commission, Embassy or Consulate. The detainee must be informed as soon as practicable of this right and of the right, upon request, to have his High Commission, Embassy or Consulate told of his whereabouts and the grounds of his detention.⁴⁸ A

⁴⁸ PACE Code C, para 7.1.

record must be made when a detainee is informed of his rights and of any communication with a High Commission, Embassy or Consulate.⁴⁹

165. A number of witnesses questioned why the right to communicate with consular authorities was given priority of inclusion in this “first stage” measure. For the Commission, Mme Vernimmen pointed out that their consultation had provided support for including the provision. Further, it was a measure which would be “easily achievable” and would facilitate the possibility of individuals finding a legal adviser of their choice speaking their language and also the possibility of communicating with their families or employers (see Article 12 above) (Q 20). Mr Meehan, for the Law Society of Scotland, saw practical value in the provision; “the Society would be keen in those cases that immediate intimation is sent to the consulate so that a person who is either travelling abroad or working abroad does not seem to disappear off the radar. I do appreciate that the investigating authorities may not want the fact of intimation to be passed on to the family or employers for legitimate reasons connected with verification but at least it does mean that there is some monitoring or some independent organisation is aware of the detention in custody of a person” (Q 389).

The Letter of Rights (Article 14)

166. Article 14 places a duty on Member States to ensure that all suspected persons are made aware of the procedural rights immediately relevant to them by giving them a written notice setting out those rights. This is the so-called Letter of Rights. Police stations must keep the text in all the official Community languages. Both the law enforcement officer and the suspect, if willing, should sign a copy of the Letter to show that it has been offered and accepted. **The provision of this Letter is an important new safeguard. We welcome it.**

Article 14

Duty to inform a suspected person of his rights in writing—Letter of Rights

1. Member States shall ensure that all suspected persons are made aware of the procedural rights that are immediately relevant to them by written notification of them. This information shall include, but not be limited to, the rights set out in this Framework Decision.
2. Member States shall ensure that a standard translation exists of the written notification into all the official Community languages. The translations should be drawn up centrally and issued to the competent authorities so as to ensure that the same text is used throughout the Member State.
3. Member States shall ensure that police stations keep the text of the written notification in all the official Community languages so as to be able to offer an arrested person a copy in a language he understands.
4. Member States shall require that both the law enforcement officer and the suspect, if he is willing, sign the Letter of Rights, as evidence that it has been offered, given and accepted. The Letter of Rights should be produced in duplicate, with one (signed) copy being retained by the law enforcement officer and one (signed) copy being retained by the suspect. A note should be made in the record stating that the Letter of Rights was offered, and whether or not the suspect agreed to sign it.

⁴⁹ PACE Code C, para 7.5.

167. Under PACE, the normal procedure is that when a person is brought to a police station under arrest or is arrested at the station the Custody officer must make sure the person is told clearly about the following rights which may be exercised at any stage during the period in custody:
- (i) the right to have someone informed of the arrest;
 - (ii) the right to consult privately with a solicitor and that free independent legal advice is available; and
 - (iii) the right to consult the PACE Codes of Practice.

The detainee must also be given a written note setting out the above three rights, the arrangements for obtaining legal advice, the right to a copy of the custody record and the caution in the terms proscribed in PACE. The detainee is asked to sign the custody record to acknowledge receipt of these notices.⁵⁰

168. Article 14 raises three basic questions: when should the Letter of Rights be provided to the suspect; what should it contain; and, in how many/what languages should it be made available?

When handed over?

169. There seemed to be general agreement that Article 14 was not sufficiently clear in identifying when the Letter of Rights should be handed over. Article 14(3) might suggest that it is only when a person is arrested that he or she must be given the document. Paragraph 80 of the Commission's explanatory memorandum appears to support this interpretation: "The Commission proposes that the suspects be given a Letter of Rights as soon as possible after arrest". The Government appeared to favour this (Q 322). But other witnesses thought that the point of arrest would be too late. Fair Trials Abroad argued that the Letter of Rights should be handed over at the earliest opportunity, "the moment he crosses the threshold of a police station for any purpose" (Q 105).
170. **It must be clear when and in what circumstances the Letter of Rights should be handed over.** The Commission's intention seems clear but unfortunately the drafting of Article 14 and the explanatory memorandum have injected an element of uncertainty. If the suspect is to be aware of the rights "immediately relevant" then he needs the information at the earliest time the Framework Decision kicks in. As the proposal presently stands this would be when he becomes a suspect (see the discussion of Article 1 above). He is then entitled to legal advice (under Article 2) "as soon as possible and throughout the criminal proceedings". **In para 45 of its explanatory memorandum, the Commission indicates that the suspected person must be given the notice "at the earliest possible opportunity and certainly before any questioning takes place". Should Article 14 be amended to make this clear? The Commission agreed that that would be helpful (Q 47). We urge the Government to bring forward the necessary amendment.**

⁵⁰ PACE, Code C, para 3.1-2.

Contents of the Letter of Rights

171. As mentioned above, the suspect is entitled to be made aware of the procedural rights that are immediately relevant to them. These rights are not limited to those described in the Framework Decision, but include any right existing under national law. In this way the Framework Decision gives a further right, namely to be informed of any national rights applicable in the circumstances. Accordingly, Annex A to the Framework Decision, which contains a suggested form of the Letter of Rights, has two parts. The first (Part A) contains the rights to be guaranteed by the Framework Decision: legal advice; right to an interpreter; right to translation of relevant documents; specific attention; and, communication. Part B is headed “Other rights” and is intended to include rights guaranteed under the relevant national law.
172. There was general agreement that the Letter of Rights needed to be short and simple. In Eurojust’s view, it had to be “short, concise and easy to read. It should avoid jargon” (para 27). In Fair Trials Abroad’s experience it was important for the suspect that there should be “very clear and concise information contained in the shortest Letter of Rights possible” (Q 105). Mr Jakobi said: “The confused, the innocent and the semi-literate are really what we are looking at. We are not looking at people who have done first year law and people who are well educated. I think the more you put in the Letter of Rights the more confusing it gets in these circumstances” (Q 200).
173. Keeping the Letter of Rights short and simple may be difficult if it also has to recite all relevant national rules. The Law Society of Scotland made the point that the Letter of Rights should not get in the way of any formal statement of rights under the relevant national procedure.⁵¹ More generally, the CPS had “grave doubts about the feasibility” of a Letter of Rights: “A common EU Letter of Rights would either require substantial changes in United Kingdom law and procedure or be so general as to be of little value” (p 108).
174. **There is obvious merit in the Letter of Rights being as short and as simple as possible. Further, except as may be necessary for language purposes, Part A of the Letter (setting out the basic rights for which common standards are provided by the Framework Decision) should be uniform.** The Commission proposes that Member States should set out in the Letter, against a common heading (*eg* “Legal advice”) “the provisions of their national law on this right, including the provisions implementing the common minimum standard under the Framework Decision and any provision going beyond that minimum standard”. The danger with this approach, and the inclusion of a Part B dealing with national rights, is that the Letter of Rights could become quite a complex legalistic document and would necessarily vary, perhaps quite substantially, from one Member State to another.
175. If there is to be a common standard then it should be possible to state it in commonly agreed wording. We believe that it should be possible to arrive at a form of words which encapsulates the essence of the right in question. For example, “You are entitled to legal advice before any questioning takes place. The police will notify your lawyer or, if you do not have one, an independent lawyer and will arrange for you to speak to him and/or for him to be present

⁵¹ Submission to the Scottish Executive consultation on the Framework Decision. October 2004.

when you are questioned”. Such an approach would go further than the Commission has suggested. **The Letter should therefore concentrate on the common minimum standards.**

Part B

176. Part B of the Letter of Rights is the place to set out complementary or additional rights. The requirement to keep the Letter short and simple would seem to argue against the inclusion of Part B. Further, it is for consideration whether Part B is necessary. If a right exists in all Member States then arguably it should be included as a “common” standard in the Framework Decision and in Part A. For example, Fair Trials Abroad considered it important that the Letter of Rights should include the right to silence. It could be simply stated; “You are not obliged to say anything”. But because the position of the United Kingdom was out of step with other Member States, Mr Jakobi doubted whether the right should be included in the Framework Decision. The fact that in certain circumstances the judge, or jury, is entitled to draw inferences from the individual’s silence is considered to be contrary to the right of silence (QQ 203-6). (We consider the right to silence at paras 53-55 above.)
177. We recognise that the requirement, which would be imposed by Article 14(1), to give written notice of rights existing under national law may itself be a new and valuable one. We therefore considered what Part B might include in the case of the United Kingdom and sought views on this. We learnt that the Government have not yet started to consider what rights should be included in Part B of the Letter of Rights (Q 278). Others had given it some thought. For the European Criminal Bar Association (ECBA), Ms Hodges suggested that Part B might include the following: the right to a telephone call or communication; the right to a copy of the PACE codes of practice; the right to free legal advice at interview; the right to confidential consultation with a legal advisor; the right to silence, subject to the caution that adverse inferences can sometimes now be drawn; the right against self-incrimination; the right to a copy of the tapes on the charge; and the right to be informed of the allegation and the basis of the allegation (Q 393). **We are surprised and disappointed that the Government have not yet given any thought to what should go in Part B of the Letter of Rights. We commend the ECBA’s list for consideration by the Government.**

The language question

178. The Letter of Rights would need to be available in European Union official languages. We queried whether this would be sufficient. The Metropolitan Police Service said that in their experience there might well be “hundreds of cases” where the suspected person did not understand an EU official language (p 119).
179. The Letter of Rights needed, in Eurojust’s view, to be “available to the suspect/defendant in his mother tongue or in a language which he/she has no difficulty in understanding. Obviously if he/she is unable to read then the Letter should be read out aloud.” However, Eurojust accepted that for practical and budgetary reasons it might be necessary to restrict translation of the Letter of Rights to the official languages of the Union and to rely, in cases where the suspected person did not understand one of these languages, on the services of the interpreter called on to translate the questioning (p 113).

180. The Government reported that there had been some discussion in the Council working group about whether the Letter of Rights should be made available not only in official Union languages but also in other languages. This could, as the Commission indicated, be facilitated through the availability of the interpretation services to be provided under Article 6 (Q 36). But the Government were considering whether it might be useful to clarify Article 14 to seek to ensure that there would be some mechanism whereby Member States would be able to respond to requests to provide the Letter of Rights in languages other than Community languages (Q 269).
181. The European Criminal Bar Association (ECBA) suggested that the letter should be available in most of the commonly spoken languages of the world. The reader might be helped to identify the right one by a national flag or emblem being placed by the side of the appropriate language text (Q 397). The Law Society of Scotland pointed out that it might not be necessary for every police station to hold a printed copy in every language because with modern information technology a copy in the language required might be retrieved from a common database (Q 398).
182. If our suggestion, that the Letter of Rights should contain a simple, agreed statement of the basic rights described in the Framework decision, were to be accepted then, at least as regards Part A, the problem of translation (and any consequent resources issues) would greatly diminish. **There could be official Union language versions of the Letter, produced by the Union's translation services. As regards other languages used within the EU, then it would be the responsibility of a Member State to have available, or to be able speedily to make available, copies of the Letter in the required language. Member States should be encouraged to make such translations available to each other.** For example, the United Kingdom might reasonably be expected to make available a Welsh translation. Spain might provide a version in Catalan. This would be practical mutual co-operation to which, we would hope, no one would object. As the Law Society of Scotland pointed out, with modern technology it should not be necessary for every police station to hold a hard copy in every language.
183. We accept, however, that **there would remain a problem with Part B.** Here there could be no common text. Each Member State will have its own particular rules and hence the burden of translation would fall clearly on the shoulders of the individual Member State. As mentioned above, it is for consideration whether Part B is necessary: if a provision exists in all Member States then arguably it should be included as a "common" standard in the Framework Decision and in Part A. Where not, there is an argument that the Framework Decision might require the authorities to have available the Letter of Rights in all Union languages and in all other languages spoken by a significantly large number of people in the Member State in question. Defining the latter should, we believe, be for Member States. Therefore, **if Part B remains, we accept that Member States should not be burdened, as a matter of Union law, with having to produce texts of that part of that in languages other than the official languages.** Requirements of national law, such as PACE, may impose a greater obligation.

Evaluation and monitoring (Articles 15 and 16)

184. Article 15 requires Member States to facilitate the collection of information necessary for the evaluation and monitoring of the effectiveness of the Framework Decision. The evaluation and monitoring is to be carried out under the supervision of the Commission. Reports on the evaluation and monitoring exercise “may” be published. In order to enable monitoring and evaluation to be undertaken, Article 16 requires Member States to collect data and provide statistics to the Commission on a number of listed matters. The list in Article 16 is not expressed to be an exhaustive one.

Article 15

Evaluating and monitoring the effectiveness of the Framework Decision

1. Member States shall facilitate the collection of the information necessary for evaluation and monitoring of this Framework Decision.
2. Evaluation and monitoring shall be carried out under the supervision of the European Commission which shall co-ordinate reports on the evaluation and monitoring exercise. Such reports may be published.

185. Articles 15 and 16 are key to the success of the Framework Decision. As mentioned above, the proposal seeks to enhance the rights of all suspects and defendants.⁵² By defining minimum standards the Commission expects there to be greater compliance by Member States with the ECHR. The proper observance of the Framework Decision’s requirements will, we believe, be extremely important in improving the opinion of criminal proceedings in other Member States held by citizens of this country and, it is to be hoped, thereby producing the trust and confidence necessary to underpin mutual recognition. Mr Jakobi (Fair Trials Abroad) underlined the fundamental practical importance of the monitoring process. He said: “The compliance with ECHR being practical and effective is, in essence, what this Framework ought to be about. To a certain extent it is, but it depends entirely on the monitoring of what goes on on the ground and whether someone like the Commission has the teeth to enforce when there is systematic injustice” (Q 98).
186. Witnesses generally attached great importance to the evaluation and monitoring procedure. The exception was the Crown Prosecution Service (CPS), which did not believe that evaluation was an “essential component” of mutual trust and recognition. They said that a healthy degree of cooperation already went on daily across the Union to prove the point. What, in the CPS’ view, was important was that Member States should demonstrate within their existing national frameworks and procedures that they were complying with their duties and obligations under the ECHR (p 109). However, the Government acknowledged that without effective implementation and some way of checking that the Framework Decision’s requirements were being effectively implemented, then the Framework Decision would achieve nothing (Q 327).

The need for independent monitoring and evaluation

187. Two main issues emerged from the evidence we received. The first concerned who would undertake the monitoring and evaluation. Article 15

⁵² COM (2004) 3289. Commission explanatory memorandum, p 2.

speaks of the exercise being conducted “under the supervision” of the Commission. Mme Vernimmen, for the Commission said it remained an open question as to who would carry out the work (Q 82). But it is to be noted that the Network of Independent Experts on Fundamental Rights⁵³ (“the Network”) is mentioned in the Commission’s explanatory memorandum.⁵⁴

188. Eurojust believed that the perceived and actual independence of any members of the monitoring/evaluation team was of crucial importance. Further, if the Framework Decision was to achieve its objective of enhancing mutual trust it was “of the utmost importance for this evaluation to be organised on a mutual basis, *ie* by way of mutual peer reviews carried out by delegations consisting of experts (including expert officials, judges, magistrates, academics and lawyers) from the other Member States”. Eurojust believed that the Network could play a key role in this context (p 113).
189. But not all agreed that involvement of the Network was necessarily the best way forward. Fair Trials Abroad suggested that some other body, such as Euromos, an independent organisation of practitioners, might be better placed to do the monitoring and evaluation work (Q 212). The Commission, however, doubted whether Euromos was better equipped than the Network to carry out the work (Q 82).
190. The European Criminal Bar Association (ECBA) argued strongly that an independent group of experts should be involved in the monitoring and evaluation process. Certainly the ECBA was not in favour of the Commission themselves carrying out the exercise. There needed to be a supra-national body, which was independent and transparent, to whom problems and inadequacies could be reported (QQ 402-8).
191. The Government acknowledged the need for effective implementation of the Framework Decision. How that should be achieved was something that they were still considering. They have been considering whether some form of mutual evaluation process, which could be built upon the existing mutual evaluation mechanisms⁵⁵ which the European Union has in place, would be the way forward.⁵⁶ The Network was certainly one body to which complaints could be made. But there were others and the Government were looking at “how a complaints mechanism which involves some of these existing bodies could work together with a mutual evaluation process” (QQ 323-4).

⁵³ The Network of Independent Experts in Fundamental Rights was set up by the Commission in September 2002, in response to a recommendation in the European Parliament’s report on the state of fundamental rights in the Union (2000/2231(INI)). The Network’s tasks are threefold: first, to produce an annual report on the state of fundamental rights in the Union and its Member States, assessing the application of each of the rights set out in the Charter of Fundamental Rights; secondly, to provide the Commission with specific information and opinions on fundamental rights issues, when requested; and, thirdly, to assist the Commission and the European Parliament in developing European Union policy on fundamental rights.

⁵⁴ COM (2004) 3289. Commission explanatory memorandum, para 83.

⁵⁵ *Ie* mechanisms whereby the performance of a Member State is evaluated by a panel of other Member States.

⁵⁶ Precedents for mutual evaluation can be found in context of the fight against organised crime and the fight against terrorism: see Joint Action 97/827/JHA of 5 December 1997, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime [1997] OJ L 344/; and, Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and implementation at national level in the fight against terrorism [2002] J L 349/1.

192. Mme Vernimmen said that the Commission would decide how the evaluation would be done on the basis of the data (listed in Article 16) provided by the Member States. It remained an open question as to who would carry out the work. Mme Vernimmen also pointed out that the proposed Constitutional Treaty included a mechanism for mutual evaluation and agreed that it might also be helpful in this context (QQ 82–3).

Article 16

Duty to collect data

1. In order that evaluation and monitoring of the provisions of this Framework Decision may be carried out, Member States shall ensure that data such as relevant statistics are kept and made available, inter alia, as regards the following:
 - (a) the total number of persons questioned in respect of a criminal charge, the number of persons charged with a criminal offence, whether legal advice was given and in what percentage of cases it was given free or partly free,
 - (b) the number of persons questioned in respect of a criminal offence and whose understanding of the language of the proceedings was such as to require the services of an interpreter during police questioning. A breakdown of the nationalities should also be recorded, together with the number of persons requiring sign language interpreting,
 - (c) the number of persons questioned in respect of a criminal offence who were foreign nationals and in respect of whom consular assistance was sought. The number of foreign suspects refusing the offer of consular assistance should be recorded. A breakdown of the nationalities of the suspects should also be recorded,
 - (d) the number of persons charged with a criminal offence and in respect of whom the services of an interpreter were requested before trial, at trial and/or at any appeal proceedings. A breakdown of the nationalities and the languages involved should also be recorded,
 - (e) the number of persons charged with a criminal offence and in respect of whom the services of a translator were requested in order to translate documents before trial, at trial or during any appeal proceedings. A breakdown of the nationalities and the languages involved should also be recorded. The number of persons requiring a sign language interpreter should be recorded,
 - (f) the number of persons questioned and/or charged in connection with a criminal offence who were deemed not to be able to understand or follow the content or the meaning of the proceedings owing to age, mental, physical or emotional condition, together with statistics about the type of any specific attention given,
 - (g) the number of Letters of Rights issued to suspects and a breakdown of the languages in which these were issued.
2. Evaluation and monitoring shall be carried out at regular intervals, by analysis of the data provided for that purpose and collected by the Member States in accordance with the provisions of this article.

The monitoring exercise

193. The preamble to the Framework Decision suggests that the evaluation and monitoring exercise will be limited to the collection and analysis of the information listed in Article 16.⁵⁷ A number of witnesses believed that something more than the collection of statistics was needed. JUSTICE said that there needed to be a range of indicators and a variety of mechanisms: “the evaluating and monitoring in Article 15 should be annual so that it is regular and periodic, and it should include not only the statistical basis but it should be done by independent experts who go out and do it proactively, so they look at judgments, they have interviews with professional bodies” (Q 215). Fair Trials Abroad emphasised the need for monitoring to be carried out at the grass roots level, involving legal practitioners and being independent of the State’s prosecution system (QQ 213, 223-4). For the ECBA, Ms Hodges said any monitoring should also include interviews with lay persons (suspects, defendants, victims and other witnesses) and legal practitioners (Q 402).
194. The Government were “not totally convinced by the rather onerous data collection requirements under Article 16”. As mentioned above, they have been considering whether some form of mutual evaluation process which could be built upon the existing mutual evaluation mechanisms which the European Union has in place, would be an effective way of carrying this out (Q 323). The Government also agreed that defence lawyers might be a reliable source of information (Q 325).
195. **It is very important that there should be proper monitoring and evaluation procedures put in place. It is not going to be enough simply to have a gathering of statistical data by Member States under the supervision of the Commission as suggested by Articles 15 and 16. What also will be needed is a system for obtaining information about inadequacies, proven or perceived, in the observance of the agreed minimum standards from the practical experience of suspects and their lawyers. The receipt, analysis and evaluation of all this data and material should then be undertaken by an independent body, possibly a group of experts appointed by the Commission and the European Parliament. That body should be provided with the necessary resources and support services. We envisage that it would work openly and all its reports, opinions and findings would be published (see below—para 198). At the Member State level, in addition to the formal returns made by governments under Article 16, national bodies (including some of those who gave evidence to us) should be encouraged also to collect, collate and submit material to the independent monitoring body.**

Publication of reports

196. Article 15(2) provides that the monitoring shall be carried out under the supervision of the Commission which “shall coordinate reports. Such reports may be published”.
197. In Eurojust’s view the reports on compliance should be widely accessible and available to the public (p 113). Mme Vernimmen, for the Commission, said

⁵⁷ Preamble, para 18. However, the Commission explanatory memorandum refers to the independent team carrying out “the *necessary research* and analysis” (para 82, emphasis added).

that, even if there was no obligation to publish, reports would very likely be available to the public by virtue of the rules on transparency (access to documents) binding the Commission (QQ 84-86). It appeared that the Commission would not resist an amendment requiring publication of all reports (Q 88).

198. We note that there is an inconsistency in the Framework Decision in this regard. Article 15(2) states that “reports may be published”. Paragraph 18 of the preamble states that “reports will be made publicly available”. The latter is to be preferred. Public confidence is hardly likely to be enhanced if results (presumably when unfavourable to one or more Member States) are not published and we would be surprised if any self-respecting supervisory body would accept a mandate which did not enable it to publish the results of its work. **We recommend that Article 15(2) be amended by substitution of “shall” for “may”.**

Enforcement

199. **If the monitoring and evaluation process reveals shortcomings on the part of a particular Member State or States, what happens next? The proposed Framework Decision is silent on this. Any failure by the Member State concerned to take remedial action would not, under the present Treaty, be subject to infringement proceedings before the Court of Justice. The position would change under the proposed Constitutional Treaty. In the meantime any sanction at Union level would be a political one.⁵⁸ However, evidence of a failure by a Member State to comply with the Framework Decision might be a highly relevant factor in the mind of the judge (in the executing State) asked to give effect to a European Arrest Warrant or any other form of judicial cooperation measure where compliance with ECHR rights is a prerequisite.**

⁵⁸ Sanctions may be imposed under Article 7 TEU where there is “a clear risk of a serious breach ... of principles mentioned in Article 6(1)”, which includes respect for human rights. Whether or not a failure to comply with the Framework Decision would amount to a “serious breach” is debatable.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

General

Need for minimum standards

200. Measures based on the principle of mutual recognition in criminal matters adopted to date have placed great strain on the confidence and trust of Member States in each other's criminal justice systems. This underlines the importance of having minimum standards that are actually observed in Member States. Such standards should be put in place as quickly as possible both to improve public perception of criminal procedures in other Member States and to enhance mutual trust between the authorities in Member States responsible for executing mutual recognition requests. But quality, *ie* setting clear standards at the right level, must not be sacrificed in order to secure agreement in the Council of Ministers. Otherwise the proposal will fail to achieve its objective (para 25).
201. British citizens facing justice abroad will only be confident of access to standards of criminal justice comparable to those they are entitled to expect in the United Kingdom if the Government takes a strong stance on minimum safeguards now (para 68).
202. We urge the Government to ensure that the outcome of the present negotiations is truly "something worthwhile". The Commission should resist any attempt to water down a proposal that already shows signs of dilution (para 72).

Legal base

203. We draw attention to the difference of views and consequent uncertainty as to whether Article 31(1)(c) provides a sufficient legal base for the present proposal. If that Article is to be interpreted in the way being advanced by the Commission and the Government, there is the risk that this might lead, over time, to the incremental unification of criminal procedure throughout the Union. The principle of subsidiarity might act as a check on any "creeping competence" but should not be allowed to distract from the more fundamental question of defining where the Union's powers begin and end in this politically and constitutionally sensitive area (para 41).

The Hague Programme

204. It seems that "justice" is destined to be of secondary importance to "security" for at least the next five years. A greater emphasis appears to be being placed on prosecution and enforcement measures than on defendants' procedural rights. Whether this is the correct balance is an issue which we intend to pursue with the Government in the context of our current inquiry into the Hague Programme (para 48).
205. It is particularly regrettable that bail was not one of the subjects designated by Heads of State as a priority in the Hague Programme (para 57).

Significant matters not included in the proposal

206. It is noteworthy that certain important matters have not been dealt with in the Framework Decision, most notably the right to silence and the issue of bail. But trying to formulate detailed harmonised rules (beyond the ECHR principles) about the right to silence could present major technical and political problems. The outcome of the Commission's examination of these issues must be awaited (para 55).
207. We are pleased to see that the Commission is taking forward work on bail. The Commission issued a Green Paper on bail in August 2004 and expects to produce a draft legislative proposal in the Spring of 2005. This may be optimistic given the number and nature of the issues raised. We are holding the Green Paper under scrutiny and will look carefully at the results of the consultation process and any legislative proposal that emerges (para 58).

Detailed points*Scope*

208. The scope of application of the Framework Decision must be clear. The absence of a common understanding or a definition in the Framework Decision of what is "criminal" will inevitably lead to uncertainty. The suggestion that Framework Decision terms should be given the same meaning that they bear in the ECHR seems, at first sight, sensible and attractive. But the Strasbourg route is neither simple nor trouble free. It might be more practical to leave it to Member States to determine what proceedings are "criminal" for the purpose of the Framework Decision. We would expect Member States when implementing the Framework Decision to pay due regard to ECtHR jurisprudence (paras 79-80).
209. The Framework Decision must be clear as to exactly when the rights are triggered. The definition of "suspected person" in Article 1(2) meets the criterion of clarity but is clearly unacceptable. The existence of rights should not depend on when a party is informed of them. The criterion has to be not only clear and workable but also objectively fair. The Framework Decision should provide that a person becomes a "suspected person" when he or she is under serious consideration as the likely perpetrator of the crime (para 90).
210. The applicability of the Framework Decision to European Arrest Warrant proceedings should be made clear in Article 1 (para 93). If extradition proceedings are to be included in the definition of criminal proceedings it is for consideration whether the Treaty base for the Framework Decision should be enlarged (para 94).
211. Paragraph 8 of the preamble raises problems and needs clarification. If the Framework Decision were inapplicable to any offence punishable by imprisonment for at least one year a vast range of offences and all European Arrest Warrant proceedings would be excluded. We can see no justification for such a major exception. Any proposed amendment to the Framework Decision seeking to exclude certain types of crime will demand very careful scrutiny (para 98).
212. Any proposal to exclude "very minor offending" will also need to be scrutinised with care. If, at one end of the spectrum, "serious and complex crimes" are to be excepted and "very minor offending" at the other, then it is to be wondered how much will be left for the Framework Decision to bite on

and how serious the Union is in seeking to secure greater compliance with the ECHR (para 101).

Legal advice

213. The right to legal advice is a very important safeguard for the individual and should not be diluted, save in the most exceptional circumstances. Article 2(1) should therefore be clarified and strengthened. The words “without delay and in any event before answering any questions” should be substituted for the words “as soon as possible” in Article 2(1). Article 2(2) could then be deleted (para 109).
214. The relationship between Articles 2, 3 and 5, including the extent of the right to free legal advice, needs to be clarified (para 111).
215. The Framework Decision should make clear that “legal advice” does not mean simply “advice” but also includes assistance and representation in any criminal proceedings that follow the questioning of the suspect (para 114).
216. The Framework Decision should not treat existing arrangements for the provision of legal advice as necessarily being inadequate and unacceptable merely because they do not require the involvement of qualified lawyers. However, where persons other than qualified lawyers are used, Member States must be required to put in place a system for accreditation and supervision (para 120).
217. Article 4(2) requires Member States to ensure that “a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective”. It is unclear what is intended by the reference to legal advice being “effective” (para 124).
218. The Framework Decision should make clear that the right to receive legal advice means the right to receive confidential legal advice (para 125).
219. Article 4 should include a statement that a person charged should have adequate time and facilities for the preparation of his defence (para 126).
220. In proceedings for the execution of a European Arrest Warrant the requesting State should annex to the Warrant details as to how the continuing right to legal advice would be fulfilled in the instant case following surrender (para 129).

Interpretation and translation

221. The Government have acknowledged that the Framework Decision will involve increased administrative costs but have not yet provided Parliament with an estimate of the increase. We request the Government to provide this information as soon as possible (para 133).
222. The Commission’s original idea of requiring every Member State to ensure that it has a system for training specialist interpreters and translators and to maintain national registers of accredited or certificated translators and interpreters should be revisited. The Framework Decision should adopt current best practice. If there are serious financial implications in establishing systems of accreditation and supervision in some Member States, then consideration should be given to making Community funds available (para 138).

Specific attention

223. The nature and extent of the general rule in Article 10 (the right to specific attention) should be much clearer (para 155).
224. It would enhance confidence if electronic recording of police interviews of suspects were a standard requirement throughout the Union (para 64). Article 11(1) therefore should be a general rule and should not be restricted to cases where special attention is needed. All police questioning should be recorded on audio or video (para 148).
225. If there happens to be a recording of the questioning of the suspect, for whatever reason it may have been made, it should be available for use to avoid a possible miscarriage of justice (para 140).
226. Article 11 should clarify to what kind of “dispute” it refers. Transcripts of questioning should be available in all circumstances, not merely in the event of a dispute (para 150).
227. Article 11(1) should provide for a copy of the tape, as well as or in place of a transcript, to be made available (para 151).
228. The rights in Article 11(2) (medical attention) should also apply in all cases (paras 152, 154). We invite the Government to consider bringing forward an amendment to include in the Framework Decision the right to medical assistance (para 162).
229. Article 11(3) is a useful example of the special treatment that may be required, for example, where the suspect is a young child. We would not like to see any diminution of this right (para 154).

Right to communicate

230. The right to communicate with family or employer should apply to any suspect being detained (para 159).
231. Article 13 of the Framework Decision would accord to an individual who is a non-national in the State where he is being detained the right to have the authorities of his home State informed of his detention as soon as possible and to communicate with the consular authorities. We welcome this (para 163).

The Letter of Rights

232. Article 14 places a duty on Member States to ensure that all suspected persons are made aware of the procedural rights immediately relevant to them by giving them a written notice (the Letter of Rights”) setting out those rights. We welcome this important new safeguard (para 166).
233. It must be clear when and in what circumstances the Letter of Rights should be handed over. The Commission has said that the suspected person must be given the notice “at the earliest possible opportunity and certainly before any questioning takes place”. We urge the Government to bring forward the necessary amendment so that Article 14 makes this clear (para 170).
234. The Letter of Rights should be as short and as simple as possible. Part A of the Letter (setting out the basic rights for which common standards are provided by the Framework Decision) should be uniform (para 174). The

Letter should therefore concentrate on the common minimum standards. Part B should be deleted (para 175).

235. If our suggestion, that the Letter of Rights should contain a simple, agreed statement of the basic rights described in the Framework Decision, were to be accepted then, at least as regards Part A, the problem of translation (and any consequent resources issues) would greatly diminish. There could be official Union language versions of the Letter, produced by the Union's translation services. As regards other languages used within the EU, it would then be the responsibility of a Member State to have available, or to be able speedily to make available, copies of the Letter in the required language. Member States should be encouraged to make such translations available to each other (para 182).
236. If Part B of the Letter of Rights remains, Member States should not be burdened, as a matter of Union law, with having to produce texts of that part of the Letter in languages other than the official Union languages (para 183).
237. We are surprised and disappointed that the Government have not yet given any thought to what should go in Part B of the Letter of Rights. We commend the European Criminal Bar Association's list for consideration by the Government (para 177).

Monitoring and evaluation

238. Proper monitoring and evaluation procedures will need to be put in place. It is not going to be enough simply to have a gathering of statistical data by Member States under the supervision of the Commission as suggested by Articles 15 and 16. What also will be needed is a system for obtaining information about inadequacies, proven or perceived, in the observance of the agreed minimum standards from the practical experience of suspects and their lawyers. The receipt, analysis and evaluation of all this data and material should then be undertaken by an independent body, possibly a group of experts appointed by the Commission and the European Parliament. That body should be provided with the necessary resources and support services. We envisage that it would work openly and all its reports, opinions and findings would be published (para 195).
239. Article 15(2) states that "reports may be published". We recommend that Article 15(2) be amended by substitution of "shall" for "may" (para 198).
240. Evidence of a failure by a Member State to comply with the Framework Decision might be a highly relevant factor in the mind of the judge (in the executing State) asked to give effect to a European Arrest Warrant or any other form of judicial cooperation measure where compliance with ECHR rights is a prerequisite (para 199).

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie

Lord Brennan (up to November 2004)

Lord Clinton-Davis

Lord Denham

Lord Grabiner

Lord Henley

Lord Hope of Craighead (co-opted for the purpose of this inquiry)

Lord Lester of Herne Hill (from November 2004)

Lord Mayhew of Twysden

Lord Neill of Bladen

Lord Scott of Foscote (Chairman)

Lord Thomson of Monifieth

Declarations of Interest

Lord Lester of Herne Hill

Council Member, JUSTICE

President, Interights (the International Centre for the Legal Protection of Human Rights)

Member of Liberty

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- The AA Motoring Trust
- Amnesty International EU Office
- Crown Prosecution Service
- EUROJUST
- * European Commission, Directorate-General for Justice and Home Affairs
- * European Criminal Bar Association (ECBA)
- * Fair Trials Abroad
- FIT (Fédération International des Traducteurs)
- Dr Jacqueline Hodgson (School of Law, University of Warwick)
- * Home Office officials
- * JUSTICE
- Prof Dr jur M Kaiafa-Gbandi, Aristotle University Thessaloniki
- * The Law Society of Scotland
- Metropolitan Police Service, Linguistic and Forensic Medical Services
- Road Haulage Association Ltd (RHA)

APPENDIX 3: REPORTS

Recent Reports from the Select Committee

Annual Report 2004 (32nd Report session 2003-04, HL Paper 186)

Government Responses (26th Report session 2003-04, HL Paper 164)

Proposed Constitutional Treaty: Outcome of the Irish Presidency and the Subsidiarity Early Warning Mechanism (22nd Report session 2003-04, HL Paper 137)

Developments in the EU (13th Report session 2003-04, HL Paper 87)

Correspondence with Ministers (10th Report session 2003-04, HL Paper 71)

Recent Reports prepared by Sub-Committee E (Law and Institutions)

Strengthening OLAF, the European Anti-Fraud Office (24th Report, session 2003-04, HL Paper 139)

Security at EU Council Meetings (20th Report session 2003-03, HL Paper 119)

The Rome II Regulation (8th Report Session 2003-04, HL Paper 66)

The Future Role of the European Court of Justice (6th Report session 2003-04, HL Paper 47)

Other relevant Reports prepared by Sub-Committee E (Law and Institutions)

The European Arrest Warrant (16th Report session 2001-02, HL Paper 89)

Minutes of Evidence

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE E)

WEDNESDAY 13 OCTOBER 2004

Present	Borrie, L Clinton-Davis, L Denham, L	Mayhew of Twysden, L Scott of Foscote, L (Chairman) Thomson of Monifieth, L
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Memorandum by the European Commission, Directorate-General for Justice and Home Affairs

SUMMARY

In the following replies, I hope to show that the Commission's work in the field of procedural rights is necessary to promote the mutual trust that is essential for the proper operation of mutual recognition. Research and consultation has led the Commission to conclude that a certain degree of harmonisation of rights would lead to an overall improvement in fair trial standards in the EU and in mutual trust. The starting point for the Commission's proposal is the ECHR; the Commission has used the case-law of the ECtHR where necessary to explicit what was meant where the provisions of the ECHR were vague. However, care has been taken not to go beyond what is in the ECHR, or the spirit of the ECHR. The intention is to increase visibility of and promote compliance with, existing rights, by setting minimum common standards (of a sufficiently high standard) and requiring Member States to comply with the ECHR in equivalent ways, even if the detail is left to national legislations. The Commission sees this proposal as the first of several measures addressing the question of fair trial rights, with bail and evidence based safeguards, which can both have cross border implications, as the next priority areas for action. Thorough evaluation and monitoring is part of the Commission's strategy for ensuring compliance and using that demonstrable compliance to improve mutual trust.

1. NEED FOR ACTION AT UNION LEVEL

What evidence is there that procedural rights in criminal proceedings need to be harmonised?

1.1 It is important when considering this question to bear in mind the degree of harmonisation proposed. What the European Commission envisages is limited harmonisation, in certain key areas so as to promote the mutual trust that is necessary for the effective operation of mutual recognition. In Tampere¹, where the heads of state of the EU Member States "endorsed" the mutual recognition principle², it was agreed that incompatibility between the EU legal systems should not prevent individuals from exercising their rights³. The Council's Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters⁴ (of 15 January 2001) stated in its preamble that "Mutual recognition is designed to strengthen co-operation between Members States but also to enhance the protection of individual rights".⁵ The Programme listed 24 specific mutual recognition measures, some of which have already been implemented⁶. The debate surrounding the adoption of the European Arrest Warrant, for example⁷, suggested that the level of trust was insufficient for a seamless application of mutual recognition throughout the EU and reactions to subsequent mutual recognition measures provide further evidence of this.

¹ European Council 15-16 October 1999, Tampere, Finland.

² Conclusion 33.

³ For example Conclusion 28: "In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States".

⁴ 2001/C 12/02.

⁵ (Council and Commission) Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C12, 15 January 2001, p 10.

⁶ Such as the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L190/1 of 18 July 2002.

⁷ Press stories about the "planespotters' case" or the arrest of UK football fans at Euro 2004 illustrate a fairly widespread view in a Member State, in this instance the UK but this applies elsewhere, that defendants in other criminal justice systems are treated unfairly.

1.2 Whilst the establishment of common minimum standards was not explicitly included in the Mutual Recognition Programme, its preamble points out that “in each of these areas the extent of mutual recognition is very much dependent on a number of parameters which determine its effectiveness”. These parameters include “mechanisms for safeguarding the rights of [. . .] suspects” (parameter 3) and “the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” (parameter 4). The Commission’s position would therefore be that limited harmonisation of safeguards would be consistent with what was agreed by the heads of state in Tampere. It would provide the necessary reassurance throughout the EU that in other Member States, justice operates as fairly as it does at home and that, although legal systems are not the same, they are equivalent.

Does your experience confirm the Commission’s statement (EM para 22) that “there are many violations of the ECHR”? Are there, to your knowledge, significant failings by Member States?

1.3 The Commission bases its assertion that there are violations of the ECHR first of all on the number of successful applications to the European Court of Human Rights (ECtHR). In 2003, the number of judgments showing findings of violations of the ECHR (not only Article 6, but the ECHR as a whole) in respect of the Member States was as follows:

Austria (19), Belgium (7), Cyprus—an accession state in 2003—(1), Czech Republic—an accession state in 2003—(5), Denmark (1), Estonia—an accession state in 2003—(2), Finland (3), France (76), Germany (10), Greece (23), Hungary—an accession state in 2003—(13), Ireland (1), Italy (106), Latvia—an accession state in 2003—(1), Lithuania—an accession state in 2003—(3), Luxembourg (4), Malta—an accession state in 2003—(1), Netherlands (6), Poland—an accession state in 2003—43), Portugal (16), Slovakia—an accession state in 2003—(17), Slovenia—an accession state in 2003—(0), Spain (8), Sweden (2), United Kingdom (20). The total for the 25 EU Member States is 385.⁸

1.4 In 1989 there were 4,923 applications to the ECtHR of which 95 were declared admissible. In 2003, there were 38,435 applications of which 753 were declared admissible. The number of applications grew every year between 1989 and 2003 and the total increase was over 500% in that period. The Evaluation Group to the Committee of Ministers on the European Court of Human Rights reported in 2003⁹ that the ECtHR was seriously overloaded and that the ECtHR’s ability to respond was “in danger”. It made proposals to limit the number of admissible applications to a more manageable amount which included streaming of initial applications and also encouraging Member States to take “national measures” to reduce the number of applications. Statistics from the ECtHR tell a partial story since only some of those who believe that their human rights have been violated actually make an application to the ECtHR. There are several reasons for this: some may not have heard of the ECtHR, the procedure is complicated, not all lawyers themselves know how to make such an application, legal aid is not often available, the requirement that domestic remedies must have been exhausted means that potential applicants have sometimes become disenchanted with, and/or may not have the financial means to carry on with, court proceedings and/or may have lost interest in making a complaint in view of the time elapsed since the alleged violation. So it is reasonable to assume that the figures given by the ECtHR represent only a percentage of actual violations occurring.

1.5 The Commission has consulted external experts in the field of fair trial rights. The consultation exercise confirmed the view that the ECHR is violated, even within the EU’s borders. In September 2002 a network of independent fundamental rights experts was set up with EU funding. The Network of Independent Experts on Fundamental Rights consists of one expert per Member State and is headed by a coordinator. Every year the network produces an annual report on “the situation of fundamental rights in the EU”. In relation to fair trial rights, its 2004 report identifies “areas of concern” too numerous to list here in most of the Member States¹⁰.

1.6 It should be added that the Commission has had a deliberate policy of not “naming and shaming” Member States with poor track records, partly because it is not for the Commission to make such an assessment in individual cases and partly because it is not constructive in a climate of working together to improve standards throughout the whole of the EU. The aim is to agree common minimum standards, not to allege failings in certain Member States.

⁸ Source: Council of Europe—European Court of Human Rights, Survey of Activities 2003.

⁹ Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (EG(2001)1 of 27 September 2001.

¹⁰ A synthesis of the 2004 Annual Report, dated 4 February 2004, is available on line at : http://europa.eu.int/comm/justice_home/cfr_cdf/doc/synthesis_report_2003_en.pdf

Are they failings which only the Union can address or which the Union could do better than individual Member States? Will the proposal remedy those failings?

1.7 Member States are all signatories of the ECHR and have been for many years. They have thus been free to address fair trial issues in accordance with their interpretation of the ECHR and their own legislation. This approach had led to inadequacies and failings and can therefore be considered to have failed. As explained above, the aim is to achieve agreement as to common minimum standards to be applied throughout the EU. If the initiative is not carried out at EU level and individual Member States remain free to set their own standards, this will not achieve the primary aim of this proposal since the perception will remain that criminal justice systems abroad are less fair than domestic ones. This perception is widespread, with some professionals and some factions in the media tending to think that their justice system is superior to those of their neighbours¹¹. Unless all Member States agree to implement certain basic safeguards, the desired objective of palliating concerns about other Member States' justice systems and therefore enhancing mutual trust will not be achieved. The time has come, in the light of the Mutual Recognition programme and other EU measures to make these rights more visible, more transparent and therefore more effective.

1.8 The proposal, if it leads to the adoption of a Framework Decision, will remedy those failings in that it will ensure that, for basic safeguards such as provision of legal advice and interpretation for foreign defendants, compliance will be consistent throughout the EU, including the 10 new accession countries. An important factor in compliance is improved awareness of rights, on the part of all parties to criminal proceedings, including the police. The Framework Decision will ensure that all those involved in the criminal process are aware of the minimum standards, through the "Letter of Rights" mechanism. The Commission is currently promoting a number of schemes for exchanges between judges, some offering training in the judicial systems of other Member States, which will also contribute to better understanding. If minimum common standards are consistently applied throughout the EU and judges know more about the criminal process in other Member States, increased trust in each others' systems will follow.

2. RELATIONSHIP WITH ECHR

The Commission states: "The intention here is not to duplicate what is in the ECHR, but to promote compliance at a consistent standard".

Why does not the ECHR (and the EU Charter) provide a sufficient common standard? Would the Framework Decision promote compliance with the ECHR?

Are you satisfied that the standards set out in the draft Framework Decision are ECHR compliant?

2.1 The ECHR is deliberately drafted in general terms so as to be applicable in any contracting State, whatever the legal system. So whilst it does set a standard, it does not give any indications as to how to interpret those standards. The Commission's reply to the preceding question sets out the situation regarding compliance with the ECHR. One of the aims of this proposal is to clarify what is meant by some of the concepts used in the ECHR, in terms applicable in the EU. For example, whereas Article 6 (3)(e) ECHR provides that "[Everyone charged with a criminal offence has the right] to have the free assistance of an interpreter if he cannot understand or speak the language of the court", the Commission's proposal has taken that article, together with the case-law of the ECtHR to clarify that:

- The right also covers translations of all the relevant documents in the proceedings (Article 7 of the proposal, or FD for short).
- Legal and court interpreters should be qualified and provide accurate interpretation (and translation) and there should be a mechanism to replace those that fall below an acceptable standard (Article 8 FD).
- Proceedings where an interpreter is used are to be recorded so that quality can be subsequently verified in the event of a dispute/appeal (Article 9 FD).

2.2 Aside from the provision regarding recording, the Commission's proposal does not go further than what is in the ECHR or may be inferred from the case-law, but its added value lies in the clarification and highlighting of those rights.

2.3 The proposal will promote compliance by way of several mechanisms. First, the obligation to give suspects a Letter of Rights will ensure that they are aware of their rights and can assert them themselves in the first instance. Second, all the actors in the criminal process (eg police officers and prison officers) will be more aware

¹¹ This is the personal view of the desk officer in charge of this file, based on numerous meetings with lawyers and other experts during the research and consultation phase.

of rights which will lead to better compliance. Third, the proposal contains specific provisions regarding evaluation and monitoring so that failures to comply, especially if they are recurring failures involving a particular Member State, will be more visible and easier to target.

2.4 The arguments in relation to the Charter of Fundamental Rights are similar to those for the ECHR but the Charter currently only has declaratory force and is not binding. In any event, like the ECHR, it states what rights exist, but does not clarify how they are to be implemented in practical terms. Consequently, any standards set in it would only give Member States an indication of what was expected rather than any practical help in meeting the standards, unlike the Commission's proposal which by its nature sets out very clearly how to meet the standards.

2.5 The research and consultation stage of this proposal took over two years. It involved, *inter alia*, publication of a Green Paper¹² and a public hearing on the Green Paper on 16 June 2003. Therefore the question of the ECHR was widely canvassed and explored over many months and with many different audiences. The Commission can state with certainty that the standards in relation to the two ECHR rights it proposes, the right to legal advice and to interpretation/translation, are ECHR compliant. The requirement of specific attention to be paid to weaker suspects (Article 10–11 FD), the right to communication (Articles 12–13 FD) and the right to receive a "Letter of Rights" (Article 14 FD) are not ECHR rights, although the right to specific attention follows logically from the ECHR principle of equality of arms, but they are not inconsistent with the ECHR.

3. MINIMUM STANDARDS

The aim of the proposal is to set common minimum standards. Are the standards proposed sufficiently high? Is Article 17 (Non-regression) adequate to avoid any risk that existing standards may be lowered?

3.1 As already stated, this proposal is the outcome of a lengthy consultation exercise. At the Green Paper stage, certain Member States made it clear that they could not support the proposals then being considered by the Commission. In the interests of achieving agreement and of standing a realistic chance of ending up with the adoption of a Framework Decision, the proposal presents a reduction in scope and ambition and was kept to what is considered a bare minimum to facilitate mutual recognition. However, it sets standards that are sufficiently high and, in any event, it is intended to be a first step in a raft of proposals that taken together should provide satisfactory fair trial guarantees.

3.2 Article 17 is quite explicit. If Member States agree to adopt it and actually do so, it will prevent any lowering of standards. Member States will have a certain amount of time to transpose the Framework Decision into national legislation. The Commission will then prepare a report on the implementing legislation assessing whether it has correctly implemented the provisions of the Framework Decision. The Commission's report will be the first stage of verifying standards. Post-adoption, an evaluation and monitoring mechanism (as proposed in Article 16, if the Member States accept it, or else their suggested alternative) will encourage Member States to comply with their obligations.

4. SCOPE OF THE FRAMEWORK DECISION

The Commission describes its proposal as a "first stage". Are there any matters which should be included in the draft but which have not been? In particular are there any which might have immediate and direct cross border implications (such as bail)?

4.1 Careful consideration was given to what should be included in this first proposal. The rights discussed in it are considered to be basic and clearly very important. However, the list is not exhaustive, hence the use of the expression "certain procedural rights" in the title of the FD, which was designed to convey the fact that further rights could be addressed in the future. A number of current or planned measures address the issue of crime with cross-border implications. For example, the Commission has recently adopted a Green Paper on bail¹³ with specific reference to foreign defendants and the imposition of bail supervision conditions that would allow the defendant to return to his state of residence. Fairness in handling evidence often has cross border implications and is important, in purely domestic situations also, especially as regards confidence in the criminal justice system. Evidence is relevant for many rights and aspects of the proceedings and is now a priority area for consultation. A report is currently being drawn up by the Law Society of England and Wales

¹² Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (COM(2003) 75 final) adopted on 19 February 2003.

¹³ Green Paper on Mutual Recognition of Non-custodial Pre-trial Supervision Measures (COM (2004) 562 final adopted on 17 August 2004.

and will be submitted in October 2004. The Law Society's study will provide a basis for wide consultation on evidence based safeguards, tentatively planned under the following headings:

- (i) The presumption of innocence.
- (ii) The gathering of evidence (including samples and identification evidence, interception of communications, witnesses and access by the defence to evidence gathering).
- (iii) Disclosure (prosecution and defence).
- (iv) Criteria for admissibility.
- (v) Special rules applying to terrorism and organised crime.

A Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions adopted in April 2004¹⁴ is based on several measures of the Mutual Recognition Programme and solicits comments on systems enabling convicted persons to serve their sentence, or the domestic equivalent, in their home state. *Ne bis in idem* (a measure in the Mutual Recognition Programme) will be covered in a Commission Communication planned for 2005. *In absentia*, or default, judgments will be the subject of a Green Paper, also in 2005.

5. SCOPE OF APPLICATION OF FRAMEWORK DECISION (ARTICLE 1)

The rights set out in the proposal apply in "criminal proceedings" to "a suspected person" and within the time limits as specified in Article 1. Is the scope of application sufficiently clear? Is it wide enough?

5.1 Article 1 was drafted as widely as possible to include all criminal proceedings, whatever the legal system. The Commission considers that the wording chosen, namely "all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence, or to decide on the outcome following a guilty plea in respect of a criminal charge. It also includes any appeal from these proceedings" will cover all eventualities.

6. THE RIGHT TO LEGAL ADVICE (ARTICLES 2–5)

How would Article 2 add to existing rights? What specific obligations does it impose on Member States?

Should Article 4(1) be limited by reference to the 1998 Directive?

How do you envisage Member States giving effect to Article 4(2)? How, in practice, do you foresee the condition, "if the legal advice is found not to be effective", being determined?

6.1 Article 2 (The right to legal advice) is worded as follows:

- (i) A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.
- (ii) A suspected person has the right to receive legal advice before answering questions in relation to the charge.

Article 2 specifies when the right to legal advice arises and makes it clear that the right applies throughout the proceedings, including any appeal. Although the phrase "as soon as possible" does confer a certain discretion on Member States, the Commission intends Member States to implement this right in such a way as to ensure that denying a suspected person access to a lawyer is very much the exception. The clarification in Article 2(2) provides an important safeguard in that this right arises before any questioning on the part of police authorities.

6.2 Article 4(1) is drafted in this precise way to prevent advice being given by unqualified persons (which had been mentioned as a problem in consultation).

¹⁴ COM (2004) 334 F of 30 April 2004.

6.3 There is ECtHR case law on minimum acceptable standards for legal advice which gives Member States guidance.¹⁵ As regards the way in which individual Member States operate a mechanism to replace lawyers who do not give effective legal advice, that is something for them to determine in accordance with the principle of subsidiarity and in collaboration with their professional lawyers' associations and Bar councils.

7. RIGHTS TO INTERPRETATION AND TRANSLATION (ARTICLES 6–9)

Are these provisions satisfactory? Will translation/interpretation be available in any language, not just official Community languages? (The Letter of Rights is limited to official Community languages—see question 10.)

Article 6(2) calls for the provision of free interpretation of legal advice “where necessary”. Should this be defined?

How do you envisage Member States giving effect to Article 8(2)? How, in practice do you foresee the condition, “if the interpretation or translation is found not to be effective”, being determined?

7.1 Articles 6–9 aim to clarify the ECHR provisions on the provision of interpretation, by reference to the ECtHR case law which provides that such interpretation should be free of charge to the defendant¹⁶ and that the right extends to provision of translations of essential documents.¹⁷ The proposal states these latter provisions explicitly and goes on to consider how the accuracy of the interpretation and/or translation may be verified. The Commission considers that these provisions are satisfactory. They go as far as Article 31 of the Treaty on European Union allows in terms of ensuring compatibility in rules to improve judicial cooperation.

7.2 In accordance with the ECHR, translation and interpretation must be provided if the defendant “cannot understand or speak the language used in court”¹⁸. The accused must also be informed of the nature and cause of the accusation against him “in a language which he understands”¹⁹ which will very often imply a language other than an official Community language. The specific language requirements therefore stem from the ECHR and not the EU. These requirements already exist under the ECHR so there is no need to specify in the proposal what languages should be available, and arguably no EU competence to do so. The reason Article 14 establishing the Letter of Rights is specific about which languages Member States are to be required to produce the Letter in is that the obligation to produce, translate and issue a Letter of Rights will be a new obligation under a Framework Decision and not an existing ECHR obligation. If that provision in the proposed FD is adopted, Member States will be free to agree on the language requirements they consider will best improve judicial co-operation (ie Official Community languages or a wider scheme).

7.3 There is no need to define “where necessary” in Article 6(2) for reasons similar to those given in paragraph 7.2 above, that is to say that the requirement to provide interpretation stems from the ECHR which states that interpretation must be provided if the defendant “cannot understand or speak the language used in court”. Levels of understanding are necessarily subjective and the ECtHR has interpreted this requirement very generously to defendants, with instances where the defendant who was held not to understand the language sufficiently had lived, and sometimes worked, for several years in the country where the proceedings were held²⁰. This is because it is acknowledged that a more sophisticated linguistic knowledge is required to follow court proceedings than to carry on one's day to day business. Any definition could have the effect of reducing entitlement rather than ensuring that all those who need it receive it. It will be for the actors in the criminal proceedings to determine where interpretation is necessary, starting with the defendant himself and his lawyer having the primary responsibility for requesting an interpreter. The custodian of the fairness of proceedings is the judge and the onus will be on the judge in each case to ensure that the defendant understands the language of the court enough to follow the proceedings²¹. Furthermore, the Commission is convinced that once detained persons receive a written Letter of Rights on arrest, they will be aware of the right to an interpreter and will be more likely to ask for one if they do not understand the language sufficiently well to understand of what they are accused. Consequently, it is not desirable or necessary to define the circumstances in which interpretation is to be provided.

7.4 Many, but not all, Member States have national organisations that train, certify and accredit translators and interpreters working in courts and police stations. The existence of such a national body makes it easier to regulate the professions and ensure quality control. There is some ECtHR case law on minimum acceptable

¹⁵ Eg *Goddi v Italy* (1984—Application no 8966/80).

¹⁶ Eg *Luedicke, Belkacem and Koç v Germany* (1978—Application no 6210/73).

¹⁷ Eg *Kamasinski v Austria* (1989—Application no 9783/82).

¹⁸ ECHR Article 6(3)(e).

¹⁹ ECHR Article 6(3)(a).

²⁰ Eg *Cusani v UK* (2002—Application no 3277/96).

²¹ *Cusani v UK*, cited above.

standards for interpretation which gives Member States guidance and makes it clear that linguistic professionals should be qualified and not simply volunteers with some level of knowledge of the relevant language²². As regards the way in which individual Member States operate a mechanism to replace translators and interpreters who do not provide accurate translation and interpretation, that is something for them to determine in accordance with the principle of subsidiarity and in collaboration with their professional translators' and interpreters' associations. The Commission's proposal includes a mechanism for *ex post facto* verification of the accuracy of the interpretation in Article 9, but it is for Member States to decide how to use this tool.

8. SPECIFIC ATTENTION (ARTICLES 10–11)

What do you understand the obligation (in Article 10(1)) to give "specific attention" means in practice? Should "specific attention" be limited to the matters set out in Article 11?

Should all suspected persons have the rights set out in Article 11?

8.1 A fair trial under the ECHR demands equality of arms. This means that there must be a "fair balance" between the parties and that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent"²³. The Commission's thinking behind Articles 10 and 11 is that certain defendants are inherently at a disadvantage, especially on arrest, in the early part of the detention and most importantly during police questioning. The prosecution will have the whole of the State apparatus at its disposal whereas the defendant has only his lawyer. The purpose of these provisions is therefore to attempt to redress that balance and to ensure that the defendant who cannot understand or follow the content or the meaning of the proceedings owing to his age, mental, physical or emotional condition is given practical assistance. That practical assistance should be tailored as far as possible to palliate the person's particular disadvantage and should be specific to that disadvantage so that, for example, a person who is ill receives medical assistance and a minor is allowed to have an appropriate adult with him. That is what is meant by specific attention.

8.2 Throughout the consultation period, the question of defining who should receive specific attention or what categories of persons should be eligible for it presented as very problematic indeed. Any list of categories of "vulnerable" persons invariably had omissions since it could never be exhaustive. There is no intention to limit specific attention to what is set out in Article 11 since Article 10(1) simply states that specific attention shall be given to "anyone who cannot understand or follow the content or the meaning of the proceedings owing to his age, mental, physical or emotional condition", so the idea is for the appropriate step to be taken in the light of the defendant's condition. Article 11 should be construed as additional to Article 10. The added value of these two articles lies in the obligation to consider where such attention is needed and also in the obligation, under Article 10(3) to record such a step in writing, those steps not being limited to the examples given in Article 11.

9. THE LETTER OF RIGHTS (ARTICLE 14)

Is it sufficiently clear when and in what circumstances the Letter of Rights should be handed over?

Are you content with what is proposed to be included in the Letter of Rights?

The Letter of Rights will be translated in all official Community languages. Is this sufficient? Might there be cases where the suspected person does not understand an official Community language?

9.1 Article 14 states that the Letter of Rights should be given to a suspected person and Article 1(2) specifies that a person becomes a "suspected person" from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence. The Commission wants the Letter of Rights to be given ideally upon arrest, but there are instances where it would be appropriate to give it before arrest. The variation between both the criminal justice systems of the Member States (different ways of breaking down the phases in the proceedings according to national legal traditions) and also the different use of terminology and concepts mean that it is not a simple matter to determine exactly at what point the Letter of Rights should be given. This will have to be determined by Member States individually in their implementing legislation once the Framework Decision is adopted.

²² Eg *Cuscani v UK*, cited above.

²³ *Dombo Beheer v Netherlands* (1993—Application no 14448/88).

9.2 The content of the Letter of Rights was discussed at great length. The Commission concluded that what is proposed in Annex A is the best possible option, since it allows the “EU” rights to be set out, and possibly be added to if and when further instruments are adopted covering other procedural rights, in Section A, and it also enables Member States to retain the flexibility of conveying information about national rights in Section B. This means that rights that are culturally important in a particular Member State, but that may not be widespread throughout the EU may be included in that State, together with rights that are conferred on defendants in all or most countries but which are not the subject of this proposal. This has the advantage that there is in fact no real limit to what can be included in the Letter of Rights since each Member State will draft its own version and may include what they wish in section B, yet the finished document will retain the desired European uniformity since the format and first section will be the same throughout the EU.

9.3 The Commission has gone some way to answering the question relating to official Community languages in paragraph 7.2 above. Article 31 (1) of the Treaty on European Union, the legal basis for this measure, envisages that the EU may develop “common action” on judicial cooperation in criminal matters and specifies:

“Common action on judicial co-operation in criminal matters shall include:

[. . .]

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

[. . .].

Throughout the preparation of this proposal, the Commission has been mindful not to go beyond what is allowed by Article 31(c). Furthermore, it is not practicable to require Member States, *ex ante*, to produce and disseminate a document that must be translated into a potentially unlimited number of languages. That does not prevent a Member State, or the police or judicial authorities of a Member State where there is a large community whose primary language is not an official Community language, from producing a version of the Letter of Rights in that prevalent language. The Commission considers it likely that this practice will develop, especially if translations of the Letter of Rights become available on the internet. However, it is not appropriate to place such an obligation on Member States in a proposal for a Framework Decision.

10. EVALUATION (ARTICLE 15)

What value do you believe the evaluation and monitoring procedure would have?

Who should carry out the evaluation? Should publication be optional or mandatory?

10.1 The Commission sees the evaluation and monitoring component of this proposal as an integral part of achieving high standards of protection of fair trial rights throughout the EU. Evaluation and monitoring serves a dual purpose; it enables the performance of an individual Member State to be assessed, so that lacunae can be identified and remedied, and it will be an important tool for promoting mutual confidence once statistics have been compiled and disseminated showing the level of compliance, since the criticisms of countries for allegedly having poor criminal justice systems tend to be based on anecdotal evidence and one-off examples whereas national statistics give a truer, fairer and more reliable picture. If the results of the evaluation and monitoring are made publicly available, and the Commission thinks they should be, the pressure on Member States to meet their obligations will be even clearer.

10.2 The evaluation and monitoring should ideally be carried out by an independent body under the supervision of the Commission. One avenue that could be explored is to extend the role of the Network of Independent Experts on Fundamental Rights (referred to in paragraph 1.5 above) to cover evaluation and monitoring of this Framework Decision. The attraction of this idea lies in the fact that the Network already exists and is already considering how well Member States comply with their fair trial rights obligations since these are laid down in Article 47 of the Charter of Fundamental Rights of the European Union²⁴. The primary function of the Network is to assess the performance of Member States in relation to their Charter obligations. However, other possibilities for evaluation and monitoring will be explored.

²⁴ “Article 47 CFREU

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.”

10.3 Publication of the results of evaluation and monitoring should be mandatory. The principal aim of this proposal is to increase trust between the Member States in each other's criminal justice systems. It is therefore imperative not only that Member States apply common minimum standards of safeguards in their criminal proceedings, but also that nationals of other Member States know that they are doing so. The Commission recognises that, despite reassurances and the best endeavours of Member States, there is insufficient trust currently. This was clear in the press reaction to the publication of the proposal for a European Arrest Warrant, whereby the media of some Member States presented worst case scenarios and invidious (and often inaccurate) comparisons in which the criminal justice systems of other countries were portrayed as inferior to their own. It is important that consistent failures on the part of certain Member States to provide satisfactory fair trial rights be identified and remedied and it is equally important that the general picture of good standards and proper compliance with rights also be presented to the public. Publication of the outcome of evaluation and monitoring is the easiest and most transparent way of fostering mutual trust.

Gisèle Vernimmen

October 2004

Examination of Witnesses

Witnesses: MME GISÈLE VERNIMMEN and MS CAROLINE MORGAN, Criminal Justice Unit, Directorate-General for Justice and Home Affairs, European Commission, examined.

Q1 Chairman: Madame Vernimmen and Ms Morgan, thank you both very much indeed for coming here to help us with our inquiry into the proposed Framework Decision on procedural rights in criminal proceedings. You have received, I know, a copy of the questions we had in mind to ask you and you have very kindly provided us with written responses already and that has certainly assisted our task in formulating how we put the questions to you and I am very grateful to both of you for the effort and trouble you have put into that, so thank you. Perhaps for the benefit of the other Members of the Committee, I am not sure whether they are aware that Madame Vernimmen is the head of the Criminal Justice Unit of the Directorate-General for Justice and Home Affairs with the Commission and Ms Morgan is the desk officer in the same unit. That makes you both very well qualified to give us the assistance we are looking for in the inquiry into this proposed Framework Decision. As to the timing of the proposal, the Commission has recognised that there has been some criticism of the delay in bringing forward measures intended to enhance justice and freedom and I wonder if you could just tell us what sorts of factors have contributed to the apparent delay in bringing forward the present proposal and whether we are to take it that there is any difficulty in the political will in Member States to deal with this problem.

Mme Vernimmen: Thank you very much, my Lord Chairman, for inviting us. It is very much appreciated also from our side to have the facility to explain a little bit the origins and the reasons for our proposal. You mentioned yourself that it might be an apparent delay, indeed I think it is just apparent in the sense that it is work which has been very thoroughly prepared. You might remember that the mutual recognition programme was adopted in late 2000, and in that programme there is a list of, if I remember

correctly, twenty-four different measures to be addressed. Approximation of certain common standards and procedural rights. Is not a measure itself, it is rather a kind of pre-condition or a condition which might determine the effectiveness of the measures. We at the Commission, and indeed experience so far has demonstrated that it is really a condition. That is what we see day after day. We started working on this issue of procedural rights as from the spring of 2001, first of all by putting a discussion paper on the website and then issuing a questionnaire to the Member States and on the basis of that, organising an experts' meeting. That brings us already into 2002. We then issued a Green Paper in February 2003 which is probably familiar to you, and after that Green Paper and on the basis of the contributions received to the Green Paper, we organised a hearing in June 2003. So it is not that it was a completely forgotten subject. As to the possible difficulty, obviously it is a matter which is very close to the concept of sovereignty and it is reasonable for Member States to be very careful in entering this area of possible approximation, but I think that progressively they have come around to our way of thinking. In the recent discussions in the Council and in the contributions to the new "multi-annual" programme (what we call Tampere 2, or it may be more likely to be the Hague programme adopted at the next European Council) there is more and more openness to that subject and less reluctance because the link between implementing the mutual recognition programme and limited approximation becomes, I think, obvious. It is certainly an area which has received quite a lot of support from NGOs, academics and defence lawyers.

Q2 Chairman: I am sure it has from defence lawyers, and academics as well, but are you confident that after these proposals have been scrutinised and

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suggestions have been put forward they are likely to get support from the Member States?

Mme Vernimmen: I am confident that there will be a result. I am also pretty sure that it will not be exactly the proposal we have put on the table. As you know, these subjects are to be approved by unanimity and sometimes the price of getting unanimity is to compromise on certain subjects, but there is a minimum on which we cannot really compromise. There must be added value and it must reach the objective.

Q3 Chairman: This is a unanimity proposal?

Mme Vernimmen: Yes.

Q4 Chairman: And it is not co-decision?

Mme Vernimmen: It is not co-decision. In fact it is what we call in our jargon a Third Pillar matter where there is no co-decision procedure and no majority basis.

Q5 Chairman: Yes. Thank you. You will have seen, I think, the written evidence we have had from a number of organisations and individuals and you will have seen that a number of witnesses have been somewhat critical of the degree to which Member States are in compliance with ECHR requirements in regard to how individuals should be handled in the period between their arrest or apprehension and the trial to which they may eventually be subjected and you will have seen that Fair Trials Abroad summarised the position in their evidence and they referred to injustice caused by non-compliance with rights in this sort of area being infrequent in a number of countries, among whom I am happy to say the United Kingdom falls, but that there was a “systematic failure to protect these rights in Belgium, France, Greece, Portugal and Spain” and then they referred to “insufficient experience of cases in the accession states” to form a judgment about how they will stack up in this matter but they question levels of access to justice in countries (I imagine they are referring to accession states here) where there are serious problems for under-funding. The Commission will have done some research and have some experience of these matters. Do those comments correspond with the research and experience of the Commission?

Mme Vernimmen: Not exactly, my Lord Chairman. We have of course conducted, as I have said, a lot of research and we have had many contributions from all parts of civil society. We have also looked at the Strasbourg case law and we are certainly attentive to signals of dysfunction in criminal justice, but we have not conducted systematic research into breaches of human rights law, particularly in the context of fair trials, and that was not really the idea. I tend to deplore the approach of identifying certain Member

States as being better or worse in implementing rights than others. In fact the case law of the Human Rights Court shows that there are violations to be found against all Member States at different times, including those which are identified in the list by Fair Trials Abroad as being infrequently non-compliant. Probably different legal systems do produce different types of problems, but the problems are not confined to the countries cited by any means and I think it is slightly incorrect. If you look at the case law, for instance, you will find that Belgium, which is quoted as a bad example, in 2003 had only seven findings. There were eight in Spain and there were many more in Italy, for instance, and that is not mentioned.

Q6 Chairman: Yes, I saw that.

Mme Vernimmen: It might be that an organisation like Fair Trials Abroad clearly fulfils a very useful role campaigning on behalf of individual victims of injustice, but the positions expressed are probably based on anecdotal information but not on a systematic approach.

Q7 Chairman: One of the problems here, it seems to me, is that every one of the countries in the European Union, every one of the Member States, is a signatory to the ECHR. If every single country observed its obligations under the ECHR there perhaps would not be a need for a Framework Decision by the European Union on this matter, but the experience is that that does not happen. So we have a proposal for a Framework Decision setting out minimum standards—and it must be emphasised that they are minimum standards and it is to be hoped that a number of countries will have higher standards—but probably those are all subsumed into the rules that anyway ought to be being observed pursuant to the ECHR and what perhaps matters more is observance of fundamental rights rather than setting them out in a document and saying, “This is what you must do.” It is observance that is important. So at the end of the day—and this is a matter I am going to come back to so do not bother to go into it in depth at the moment—is it not the case that one is going to be looking particularly to evaluation and monitoring of whatever emerges here and without the evaluation and monitoring one is probably wasting one’s time?

Mme Vernimmen: You are perfectly right, my Lord Chairman. The ambition is not to fix new standards but to make the standards of the European Convention on Human Rights more efficient, more concrete, making them more transparent and providing the tools for them to be effectively protected. I am pretty sure that often the rights are not deliberately violated but people do not really know what their rights are and this is certainly an aspect on which we could place quite an emphasis. On the question of evaluation, as you might have

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seen in the proposal for a Framework Decision we have provided for systematic evaluation, which should be of great value.

Q8 Chairman: These proposals have been described as the first step in harmonization of rights in a criminal procedural context and the selection of the particular rights to include in the first stage, I suppose, is inevitably to some extent arbitrary but there have been some criticisms by some of the witnesses of particular rights which they regard as of particular fundamental importance and I just wanted to invite your comment on whether there was any particular reason why those have been left out. I have in mind particularly access to a doctor of the individual's choice if he/she is in need of medical attention as soon as apprehended and audio/video recordings of everything that takes place, not just in relation to those who have some special status because of their mental disability or age or anything, and thirdly bail. Those are the three rights which seem to have featured in the criticisms which have been expressed in the written evidence. Is there a reason why those cannot be included in this first stage, or one or other of them may not be included in this first stage?

Mme Vernimmen: Well, first of all, these fundamental rights are all fundamental. There are no rights which are more fundamental than others. But the choice of rights to be covered in the first proposal was made on the basis of extensive consultation and in fact the first document produced on the website covered a much broader spectrum of rights. We are indeed preparing other initiatives, sometimes preceded by a Green Paper and in particular there will be a Green Paper next year on the question of the presumption of innocence and there was a Green Paper on alternative measures to pretrial detention, so those issues are far from being forgotten. The rights identified, not the most important but the first ones to be addressed in this initiative, are those which are in our view very important because they activate other rights, if I can express myself like that. It means that the fact that you have access to a legal adviser, the fact that you have the facility of having quality translation and interpretation is a precondition for all the other rights –

Q9 Chairman: Access to a doctor seems to be independent of that?

Mme Vernimmen: Access to a doctor is something which is covered here by what I could call, to summarise, “the provision on vulnerable persons” because we feel that if a person deserves specific attention, attention should be given and there should be a record. There might be a demand for certain attention and no follow-up is given if that seems not justified. So there should be a record of that.

Speaking, for instance, on the question of access to a doctor, I fully appreciate the necessity for that but if it is included it should be drafted very carefully not to be a kind of right which might be exhausted if there is an examination by a doctor at the very first moment. There must be access to a doctor whenever the need arises. There might be a need for that at different times.

Q10 Chairman: Exactly. I quite understand that, but there is not a provision for that at all, is there, in this first stage?

Mme Vernimmen: There is a provision on specific attention, yes, Article 10.

Q11 Chairman: Physical or emotional condition?

Mme Vernimmen: Yes, and also Article 11(2), “Member States shall ensure that medical assistance is provided whenever necessary.”

Q12 Chairman: But it does not speak about a doctor.

Mme Vernimmen: Well, medical assistance is probably to be provided by a doctor. That is part of the specific attention, which is not once and for all at the time you are arrested but whenever there is a need for that.

Q13 Chairman: Yes. I mentioned also audio or video recording of all questioning, not just in relation to these special category people.

Mme Vernimmen: Yes, the two categories for which there is a special requirement for video are those Article 10 people –

Q14 Chairman: But should not the audio/video requirement apply to everybody?

Mme Vernimmen: That would be an ideal world. I think that would be certainly an added value, but from the consultation we had we received the reply that that could be very costly and very difficult to organise also in terms of installation.

Q15 Chairman: Who was your consultation with?

Mme Vernimmen: We had a consultation with the practitioners and so on, but also with the Member States themselves. Coming back to the issue we raised in the beginning, since we are in an area where we need unanimity to have the text adopted there is obviously a certain consideration to be given to the fact that if there is a very strong hesitation or concern from a large number of the Member States about a certain provision it is most complex to put it in. So we have considered that video recording is particularly necessary in those two categories. Obviously this is the minimum. As you said yourself, because the installation would be there for those kinds of people, if the video recording is extended to all categories of

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persons and in all circumstances that would certainly be very welcome.

Q16 Chairman: Certainly our experience in this country has been that the video recording of all interviews between police and suspected persons is one of the most important features in ensuring that there is confidence on the part of the public in those procedures. Before that happened there were frequent disputes as to what actually had happened in the course of the questioning, with the individual saying he had been unfairly treated, the police officers saying no, he had not, and this is an impossible issue to resolve. Video recording settled it. It assisted not just in the provision of fairness for those who were being questioned but also in ensuring that spurious complaints of ill-treatment did not carry credence when made as part of a defence. Speaking for myself, it seems to be a very important feature and perhaps the Commission could consider whether something in relation to that should not be included in the first stage. If the Member States think it is too expensive then of course they must say so, but that would be rather shaming, would it not, to have to say, "Well, we can't afford to have these procedures, even if they are necessary for the fairness of procedures in criminal cases"?

Mme Vernimmen: You are perfectly right that fairness is a duty and even if it is costly it remains a duty. I am certainly open to that suggestion and I can just say that I take your point and we will have your concern in mind in the negotiations.

Q17 Chairman: The third matter I was going to ask about is bail. Again, I think that the beliefs—and they may sometimes be false, but I think often they are not—by people in this country of what the bail position is like in other Member States is one of the greatest reasons for mistrust of criminal proceedings in other Member States. They think that if they are arrested and are going to be charged they will be unable to obtain bail and will have to sit in custody until such time as the case comes to trial, which may be some considerable period thereafter.

Mme Vernimmen: Yes, but precisely for that reason the Commission itself considered that bail is such an important issue that we have decided that it should merit separate consultation on its own, and a separate instrument is to be prepared that will be covering that issue, instead of including it in the margins of another proposal. So there has been a Green Paper on bail which was issued this summer, in mid-August. There will be an experts' meeting early in November and the deadline for submission of comments is the end of November. Actually, the paper specifically envisages the possibility of recognising (meaning the enforcement in another Member State) of non-custodial pre-trial supervision

measures precisely because there is a risk that someone who is not a resident in a Member State may be kept in prison, in detention, in circumstances where a resident would benefit from bail because he is directly available. So for that reason the prospect is rather to see whether there is the possibility to have other kinds of supervision measures which could then be enforced in the country of residence.

Q18 Chairman: At the moment, here we are in October 2004 scrutinising the proposed Framework Decision on the first stage of procedures. When would you expect we will be scrutinising the bail proposals?

Mme Vernimmen: Well, actually it is within the Commission's legislative work programme for next year, so we expect to produce a draft proposal for the Framework Decision by the spring.

Q19 Chairman: By spring next year?

Mme Vernimmen: By spring next year.

Q20 Chairman: We will hold you to it! Thank you for that. You have helped us on the matters which have been included. Is there a reason why the right to communicate with the consular authorities was given the priority of inclusion in the first stage? Most of the witnesses seem to have thought that it was not really a matter of huge importance.

Mme Vernimmen: I am not sure. There were submissions going in the other direction and supporting that. It is something which is relatively easy to achieve because there is already a convention which gives Member States the possibility of access to prisoners from their countries. What we would like to have is reciprocity, the possibility for prisoners to have access to their consul, and I think that would facilitate, for instance, the possibility of finding a legal adviser of their choice speaking their language and the possibility also to facilitate communication with their families or their employers in another country as a channel for communication essentially. It is a measure which is easily achievable.

Q21 Chairman: I certainly follow it would be easily achievable, yes. Can I now come on to one or two points of definition. The rights which are set out in the proposal apply in criminal proceedings and they apply to a suspected person. Is it the view of the Commission that "criminal proceedings" is sufficiently self-explanatory? I know the European Court of Human Rights has taken the view that "criminal proceedings" for the purposes of the convention has an autonomous meaning, which does not necessarily correspond with what criminal proceedings would mean in individual Member States. Is that likely to be a problem here too, and if so might we not need further definition?

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Mme Vernimmen: Definition is always a problem, of course. I do not think we have, to my knowledge, a worldwide agreed definition of what are “criminal proceedings” and you mentioned the case law of the Strasbourg court, and indeed some rights are considered there not to apply in the context of extradition because that is an administrative proceeding. We have tried to define the scope, *ratione temporis*, in terms of the moment the rights are to apply up to the moment the case is finally settled. The danger of having a definition is, of course, that we might be stuck as a precedent with that definition. Later we will consider other rights, for instance the question of admissibility of evidence, where there might be issues before the date where you have access to a lawyer because there is collection of evidence when people do not even know that there might be suspicions about them. Obviously for us it covers also the proceedings in which mutual recognition will apply, so it will cover, for instance, measures like the European Arrest Warrant, to take an example, which is, by the way, specifically mentioned in Article 3, so *a fortiori* it applies to all—

Q22 Chairman: Is it not right that some proceedings which we would call in this country administrative proceedings would be classified as criminal proceedings in some Member States?

Mme Vernimmen: Yes, that is right. In a number of instances it has been considered that administrative proceedings which are subject to an appeal before a court which is competent in criminal matters would also fall within the scope of that. So we are defining them as “proceedings aiming to establish guilt” and that might well be administrative proceedings, by the way. So I think it is wide enough to encompass the intention and for us the intention is clear; it is from the moment the person is really a suspect up to the moment the case is finally decided upon. There might be further efforts to be clearer in definition. It is always difficult, as I said. It is precisely, extensively discussed in council and actually for the time being the issue is, as I understand, left to the end so that the scope could be adjusted to the rights agreed upon. The Commission is obviously open to any clarification provided it does not limit the intention.

Q23 Chairman: A question has been raised as to how one would categorise the proceedings in the execution of the European Arrest Warrant. That would, of course, be a preliminary stage in some criminal process. Would you call that criminal proceedings?

Mme Vernimmen: That is certainly covered because the European Arrest Warrant is necessarily issued between the time the person is suspected and the time the person is finally sentenced, unless of course the warrant is for the enforcement of a decision already

taken, but that would be necessarily also covered. In fact, if you take Article 3 of the proposed Framework Decision you will see that there is an obligation to provide legal advice and there are listed a number of tiers. The third tier is the question of the European Arrest Warrant. So it means that that comes within the scope of Article 1.

Q24 Chairman: Yes, I see. Thank you. Finally, the definition of a suspected person, which is fundamental. That comes in Article 1(2). The rights apply to any person suspected of having committed a criminal offence from the time when he is informed by the competent authorities that he is suspected. So the rights would not apply until he was informed. Is that satisfactory? That would enable the police authorities to postpone the coming into force of the requirements of the provisions by simply postponing the moment at which he was informed he was suspected. They have got him in the police station and they are asking him a whole lot of questions but they have not yet told him that he is suspected.

Mme Vernimmen: I think in all Member States, in all countries, there are preliminary investigations by police where people might be considered as suspects in the sense that it is worth looking at some aspect of their activities, for instance, but they are not yet arrested, they are not detained, they are not *gardés à vue* in French. There is always a moment where the person is informed, “We have a suspicion about you,” but obviously if you take the example of a covert investigation, for instance, there are plenty of examples where of course there is a preliminary phase where no one knows.

Q25 Chairman: But if an individual is under investigation, whether or not the individual has been informed that he is a suspect, should he not have the rights provided for by this proposed Framework Decision?

Mme Vernimmen: If he is under judicial investigation, yes.

Q26 Chairman: Well, “judicial investigation” is a particularly continental expression. If he is under investigation by the police in relation to a suspected crime should he not be informed of and have the rights that this proposal affords him?

Mme Vernimmen: We have, of course, to deal with the obligation to inform a person that there is a suspicion about that person, but that is part of the reflection about the admissibility of evidence and the value of what has been obtained before that.

Q27 Chairman: Would you not accept that in any case where the individual who is about to be questioned by the authorities, by the police presumably, is an individual who may end up in the

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dock in a criminal trial (not will but may) these rights should be applied?

Mme Vernimmen: Yes.

Q28 Chairman: It should not depend upon him being informed that he is a suspect?

Mme Vernimmen: I think maybe I misunderstood or I was not clear enough. As soon as a person is questioned, obliged to reply to certain things and under a certain form of constraint, obviously he must be informed that he is under suspicion.

Q29 Chairman: But this does not impose an obligation to inform before the questioning begins?

Mme Vernimmen: That is precisely one of the subjects of the question of admissibility of evidence, which is the next step. The question of the right to silence and the presumption of innocence will be dealt with in a Green Paper which is due to be issued by the end of next year.

Q30 Chairman: Do you not think that the questioning authorities should observe the requirements here from the beginning and before questioning, given that they have informed him in terms referred to in 1(2)?

Mme Vernimmen: It could of course be that some persons might be questioned as witnesses, not as suspects.

Q31 Chairman: He may start as a witness but there will be witnesses and witnesses. There will be the witness who was at the side of the road who saw what happened and there will be the person in the car who will be being questioned.

Mme Vernimmen: Yes, and there might be witnesses who suddenly are seen to be indeed suspects, who might at the first stage appear purely to be witnesses but at a certain stage they are suspects. At that moment they should be informed and all those rights apply.

Q32 Lord Borrie: Just to pursue that point a moment on the wording of paragraph 1(2), would it not be a better and a more objective test as to when the rights apply if it is said that he must have those rights from the time when he is suspected of having committed a criminal offence? In other words, it would be better if you omitted the words "when he is informed" etc because that depends on the subjective decision of people in the situation in the police station deciding that he should be informed, whereas an objective test would simply say, "If he is a suspect, then he should receive these rights."

Mme Vernimmen: I can only say I take your point and we will reflect upon that remark.

Q33 Chairman: Can I now come on to the requirements for translation and interpretation. I gather from the written evidence that you supplied us with that there is a question about the extent of the competence of the community to impose requirements for translation into any language other than the community language. Am I right?

Mme Vernimmen: Yes. There is obviously an obligation to inform persons in a language they understand under the European Convention on Human Rights. I am sorry, maybe I am confused. The language of the Letter of Rights you are speaking of?

Q34 Chairman: There is a number of community languages but there are also languages which a lot of people speak which are not community languages and the obligation of interpretation and translation seems to me to be limited to community languages. Is that satisfactory?

Mme Vernimmen: Well, Articles 6 and 7 are not limited to community languages. The interpretation must be in a language that the person understands. What is at the time being limited in language is only in regard to the Letter of Rights, in Article 14, where it is said that in a police station there must be copies or forms of the Letter of Rights in all official languages of the community.

Q35 Chairman: Yes, Article 14(3), is that the one?

Mme Vernimmen: Yes, because obviously that is the kind of anticipation, if I might say so. You cannot really imagine that in police stations there will be that form, that Letter of Rights, in existence in all languages of the world, whereas in fact the necessity to inform the person of the right to free interpretation and the translation of all the relevant documents in Articles 6 and 7 is not limited to community languages. Then, of course, the Letter of Rights might well be translated in other languages and I am sure it will because in a number of Member States there is a large community of people speaking Hindustani, or whatever.

Q36 Chairman: Well, we all have immigrant communities and some of them do not speak any of the community languages.

Mme Vernimmen: Of course. Then as soon as there is a translation it will be easy to provide the Letter of Rights because it will be a standard letter for that Member State. It will be easy to provide it if there is a new case, but the first time you come across a language which is not a community language you will have to go through the duty of interpretation in Article 6.

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Q37 Chairman: I quite agree it would be unreasonable to expect police stations to have a stock of the Letter of Rights in every known language on our globe, but it would not be unreasonable, would it, to expect them to have a stock of the Letter of Rights in languages which a substantial number of people in the country in question speak? For example, nobody could complain if a police station in this country did not have the document in Inuktitut because we do not get too many Eskimos in this country, but there is no reason why they should not have the letter in Urdu, which is the language which a very large number of people in this country speak although it is not a community language. I am simply taking that as an example.

Mme Vernimmen: It is totally relevant as an example, but this will probably depend, as you said, on the situation in each Member State. So it is for each Member State to decide what will be more convenient. They will be led to that situation anyway because if they have many people speaking a particular language there will be certainly one first case in which immediately they need a translation of that and as soon as the translation exists that will be ready.

Q38 Chairman: I follow, but I am just suggesting that the Framework Decision might with advantage require the authorities to have available the Letter of Rights in all community languages certainly and in all other languages spoken by a large number of people in the country in question.

Mme Vernimmen: Why not? Yes. Obviously it is not easy to measure. A large number of people in one community might be different in the northern or in the southern part of the country.

Q39 Chairman: Yes, you would need more accurate drafting and I am not drafting off the seat of my pants, I am just expressing the concept.

Mme Vernimmen: Yes. I am sure it will happen, even if it is not said like that, because of the combination of Article 14 and Article 6. That is my understanding of it.

Q40 Chairman: Thank you. Articles 2 to 5 deal in different ways with the requirement of the right of access of suspected persons to lawyers and Article 2(1) says that the right to legal advice is the right to have legal advice as soon as possible. Do you think “as soon as possible” is an appropriately governable term to include in an instrument of this sort? It is a little elastic, is it not?

Mme Vernimmen: It is indeed a little bit elastic. Several Member States have systems whereby a suspect may be held for a short period without access to a lawyer without this being considered by the European Court of Human Rights as a violation of

the right to legal advice. It is difficult to put the right moment when it becomes a violation because it will depend on the situation and in fact there have been cases like the Murray case or the Murphy case where forty-eight hours was considered to be too long by the Strasbourg court. We considered that the term “as soon as possible” means exactly that, that it cannot be delayed. If it is possible within two hours, it should be given within two hours and with no abuses. There is obviously advantage in fixing a particular deadline but there is also a risk that if we put a maximum it could be a period which in certain cases might be longer than “as soon as possible”. So we think that fixing a moment is always a little bit risky, but it is certainly an issue which might end up in the context of discussion.

Q41 Chairman: Would it, do you think, be practical to have a requirement that the individual be told of his right to legal advice and be told also that if he wishes the questioning can be postponed until he has got legal advice?

Mme Vernimmen: Yes.

Q42 Chairman: Do you think that should be perhaps written into the Framework Decision, or is it there already?

Mme Vernimmen: That is certainly something which is a way of dealing with that and in fact if you look at Article 2, paragraph (2), it says that a suspected person has the right to receive legal advice before answering questions in relation to a charge.

Q43 Chairman: Will the Letter of Rights say that?

Mme Vernimmen: Yes.

Q44 Chairman: Thank you. He will get the Letter of Rights before the questioning begins, I take it?

Mme Vernimmen: Yes.

Q45 Chairman: That would be necessary, would it not? That is Article 14 again, I think, is it not?

Mme Vernimmen: Yes.

Q46 Chairman: Article 14(1) does not actually state the time at which the information must be given.

Mme Vernimmen: No. I think for the timing you have to come back to Article 1 and that is the point you have raised before, the question of when are you informed that you are in fact a suspect.

Q47 Chairman: Yes, but this has to be the information which is the trigger for the rights under 1(2). The trigger does not have to be information, but here it does have to be information. He has to be told of his rights either in writing or orally and I suggest that the Framework Decision would be improved if

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it spelled out that he must be so informed before any questioning starts.

Mme Vernimmen: I take your point. I think it is an excellent suggestion and I am sure that it might be forwarded to the UK government.

Q48 Chairman: Yes. I was going to ask you a question on Article 8(2).

Mme Vernimmen: That is on the quality of translation.

Q49 Chairman: There have to be translators and interpreters and then Article 8(2) says: "Member States shall ensure that if the translation or interpretation is found not to be accurate then a mechanism exists to provide a replacement." By "found not to be accurate" do you mean found in the course of court proceedings? What is envisaged in this notion?

Mme Vernimmen: It is not necessarily in the court proceedings because it is as soon as there is the need for translation that it might be accurate or not, of course.

Q50 Chairman: But it will be a bit late by then, will it not?

Mme Vernimmen: Well, it can only be found to be accurate or not accurate when the translation is given, it cannot be 100% granted before, but I think there will be vigilance about that from, for instance, the lawyers or the person himself as soon as the person realises that there might be a misunderstanding. You are perfectly right, my Lord Chairman, in what you said about the recording. That is why where there is a need for translation we thought that recording was important to check whether that was absolutely accurate or not. But as to the way Article 8(2) will be implemented by Member States, I agree there is a certain level of discretion and we did not consider that it was for the Union to be absolutely directive in this matter. We can indeed imagine that either the suspected person himself or someone involved in the proceedings, like the lawyer, will become aware of deficiencies and ultimately it is also for the judge to exercise control of the fairness of proceedings. So if there is a controversy about that it will be for the judge to decide it and there will be, obviously, another translator. But it is also true that in some exotic languages (and I repeat this is not limited to community languages obviously) it might be very difficult to find perfect translators.

Q51 Chairman: Well, that is obviously true. Can I go back to Article 4. There is a point on that which I wonder if you can help us with. Article 4(1) says that Member States must ensure that only lawyers described in Article 1(2)(a) of the Directive 1998 CEC are entitled to give legal advice in accordance with

this Framework Decision. Without referring to the text of Article 1(2)(a) of the 1998 Directive, that is the Article which says the individual has to be qualified under the law of the country concerned, I think. Is that right?

Mme Vernimmen: This provision contains the list of persons who are qualified.

Q52 Chairman: I wonder if this should not be put round the other way, that Member States should ensure that lawyers who are thus qualified are available to give legal advice. To say that no one else is entitled to give legal advice seems to me to be unnecessary. Suppose you have a case where it is not possible to get hold of a lawyer immediately but you do have some paralegal or perhaps some social worker available with plenty of expertise in the area who is prepared to give advice. Is the intention that that advice should be made unlawful so that that individual is not entitled to give advice?

Mme Vernimmen: There are two things which I can reply. First of all, Article 4 is not to be seen in isolation from Article 3. It means that Member States are obliged to offer legal advice. They must be sure that there is legal advice available, so that qualified legal advice is available. So I hope that responds partly to your first question. The aim of those provisions is obviously to protect the suspected persons from unscrupulous advisers and to make sure that this is done not by amateurs but by really qualified persons. I think the point has already been raised also in the context of the Council discussion. It is not excluded that there might be schemes in operation in Member States which offer legal advice from people who are qualified but do not correspond to that kind of qualification listed in the Directive, and I think we would not object to that provided it is properly regulated and that the quality is still guaranteed.

Q53 Chairman: Do you anticipate any difficulty in, for example, the accession states having in place the sort of infrastructure that will enable them to comply with this as it stands and as soon as it comes into force? They may have some sorts of arrangements which do not come up to these requirements but which they would have to go on using until they had put in place sufficient facilities for legal advice that corresponded with these requirements?

Mme Vernimmen: Yes, my Lord, Chairman, but I think this is a potential problem for almost all the Framework Decision and it is probably also true for the interpretation for the possibility of having in place systems for video recording, and so on. All that is to be applicable to all Member States, new and old Member States. They are in exactly the same position as soon as it comes into force. I may submit that the obligation to provide legal advice is not something

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which is invented by the Framework Decision, it exists already under the ECHR, so it is already an obligation in those Member States. So it is not a revolution in a sense. It might be that there are still less qualified lawyers in those countries or communities but I have no evidence that there is really such a lack of lawyers in those countries.

Lord Thomson of Monifieth: Just on this point, if I may, I am becoming a little puzzled about what is being sought really in this proposal. It is the harmonization proposal. It is the first stage of a very ambitious harmonization proposal and I just wondered if in this document, and indeed in some ways in our cross-examination of it, we are not at the point of laying perfectly the enemy of not merely the good but perhaps an improvement on the present situation, but not solving all the problems. For example, on Article 4 that you have just been dealing with, Member States shall ensure that a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective. Would that apply strictly in the courts of this country, bringing a number of them to a standstill, with enthusiastic defendants, of whom you are much more familiar than I am? I am bound to say also, just on the doctrine of perfection, that the police station in Monifieth, which I used to know quite well (speaking as a Member of Parliament, not as one incarcerated in it), might find it very difficult, I think, to fulfil all these provisions of video and statements in every conceivable language. Should we not be a little more modest in our ambitions?

Q54 Chairman: Lord Thomson is raising the question whether some of these requirements, although excellent in theory, are going to be impracticable and he drew attention to Article 4(2), to provide a replacement lawyer if you have a qualified lawyer who in the particular case turns out to be no good. That happens in this country and it happens, I should think, in every single country from time to time that the client feels let down by his lawyer, and maybe justifiably feels let down by his lawyer, but what can be done about that is really quite difficult. Article 4(2) says that the mechanism must exist to provide a replacement lawyer—on appeal perhaps—if the legal advice given is found not to be effective.

Mme Vernimmen: There is a duty for the Member State to provide legal advice under Article 3. Obviously if the person is selecting his lawyer and if he is not happy with that lawyer he has, of course, the facility to change his lawyer. If he does not change, it is not for the Member State to decide that. If the lawyer selected under Article 3 is not effective then he should be replaced *ex officio* by another one. It is in relation to the obligation to provide legal advice and that kind of scheme exists in most Member States.

Q55 Chairman: We can test it by reference to an example. Suppose you had a lawyer who advised his client in a particular case to waive the right of silence and to disclose the story and it turns out that the disclosure of the story was actually very disadvantageous to him and no competent lawyer would have given that advice. Is that situation supposed to be addressed by this?

Mme Vernimmen: No. I think that might be an interpretation of the word “effective” which in fact comes from the case law of the Strasbourg court, the Court of Human Rights. It is not that the advice is not the right advice, that which should have been given at the end of the day, if one discovers that in fact one should have adopted another defence, but non-effectiveness is, for instance, the case where the lawyer simply does not appear. We all know that there are such situations where even people who are qualified as a lawyer, at a certain moment they are not effective, they simply for personal reasons are not effective any more. That is the kind of situation which can arise, of course.

Q56 Chairman: If that is the intention, do you really need it because is that not dealt with under Article 3, which says that Member States shall ensure that legal advice is available? If the chap does not turn up then legal advice has not been made available.

Mme Vernimmen: Yes. You might have discovered, my Lord Chairman, a redundancy in the text.

Q57 Chairman: As Lord Thomson pointed out, I think 4(2) suggests that the target of the provision is something rather different.

Mme Vernimmen: No, it is clearly not a question of quality, it is a question of being really available, really effective. Then, yes, you might be right. It is confirming or repeating the obligation of Article 3.

Q58 Chairman: Perhaps the Commission could look at it and consider whether it is not confusing to have it there.

Mme Vernimmen: Yes.

Q59 Chairman: Thank you. Could I ask you about Articles 10 and 11, please. This is the specific attention provisions. Article 10(1) sets out the categories of people who are entitled to the right to specific attention and the categories are age (I suppose that may be very old or very young), mental, physical, emotional condition given specific attention. It has been suggested that there may be other categories who deserve specific attention because otherwise the fairness of the proceedings against them may be in question and one of the suggestions was that those suspected of a political offence might be included in these categories and be

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given special attention to ensure the fairness of the proceedings against them.

Mme Vernimmen: Well, this provision, when we were discussing the Green Paper we had in mind the kind of list, as you said, a child is a typical example. Elderly people might be in certain circumstances not necessarily be people requiring particular attention. They might be people with low IQs. There might be plenty of other examples like that. We have discovered in the course of our research that there are categories of persons to whom this right could apply that could not have been thought of unaided. One such example was a person suspected of a fraud, threatened in fact by the Mafia. Those persons might be particularly weak, particularly in need of protection and they were not on our list. So that is the reason why we have decided to make reference to age, mental, physical or emotional condition, which I think is broad enough to cover all those circumstances. We have not contemplated in particular persons suspected of political offences, one of the reasons being that we think this provision has to be linked to the circumstances of the suspected person rather than to the circumstances of the particular offence to be dealt with.

Q60 Chairman: One of the categories is age. I notice that in Article 3 the fourth bullet point refers to a person who is a minor. Does age here in 10(1) mean either a person who is young, a minor, or a person who is very old, or does it only mean people who are young?

Mme Vernimmen: No, both types, but in the case of a child I would say it is automatic that a child is always weak up to a certain age. In the case of elderly people, it is very difficult to fix an age, so it is obviously very personal, I would say. A person might be vulnerable because he is old. He might be in such a situation at 50, but on the other side he might be in no need of specific attention at 80. It really depends on the person.

Q61 Chairman: Who is to be the judge of whether special attention is needed?

Mme Vernimmen: Ultimately, the judge is always the one who decides on the fairness of the trial.

Q62 Chairman: But in the first instance will it be the police authorities who will be making the assessment?

Mme Vernimmen: Yes, exactly. I think for that it is Article 10(2) we have to look at, that Member States must instruct the police, for instance, to record whether there is an issue like that, whether the person, for instance, may say, "I need absolutely certain assistance," or whether the lawyer may say, "That person needs assistance," and to record that and to also record the kind of measure which has

been taken or the absence of measure because the complaint is obviously unjustified.

Q63 Chairman: What will be the criterion that the authorities will apply in deciding whether age, mental or physical condition means that they need special attention? Is it a doubt whether they will adequately understand the proceedings, and if so should that not be expressed? There is no criterion here.

Mme Vernimmen: The criterion is that the person cannot understand or follow the content or the meaning of the proceedings, which is in the first line of paragraph (1).

Q64 Chairman: I see. You are quite right, yes.

Mme Vernimmen: Someone has to express that. It might be the lawyer or it might be the person himself. If there is such an argument, that argument must be recorded together with the measure which is taken or not taken, and if the measure is not taken and it appears that such a measure should have been taken, it will be for the judge to—

Q65 Chairman: Just going back to Article 3(1), the reference to a minor, is it right that there is no uniform age throughout the European Union at which people attain majority?

Mme Vernimmen: That is true, there is no such definition. So it will be a minor under the rule of the Member State concerned, each Member State where the Framework Decision is implemented. There is only one instrument which speaks of the age of 18 as a criterion and that is the Framework Decision on the sexual exploitation of children. It might be used as an example, but it is a completely different context, of course.

Q66 Chairman: Would it not be better to specify an age here, 16, under 16 or under 17, or whatever it was?

Mme Vernimmen: In Article 3 there is the obligation to provide legal advice—

Q67 Chairman: To ensure that legal advice is available to these people?

Mme Vernimmen: Yes, otherwise, of course, it is always possible to have access to a lawyer under Article 2. Article 3 is the fact that the legal advice is offered as of right.

Q68 Chairman: I am trying to get my mind around this. In 10 you have "age which leads a person to be unable to understand or follow the concept or meaning of the proceedings," and then he gets special attention, but in 3 you have a minor who gets legal advice. The point of giving legal advice to a ten-year-old would not be very clear.

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Mme Vernimmen: He is obviously in need of legal advice. He might also be in need of specific attention on top of the legal advice. The legal advice is that the lawyer will defend his rights before the court and in the investigation process. He might need specific attention. He might need, for instance, the presence of an adult, his father, his mother, whatever, on top of Article 3.

Q69 Chairman: Then it says “a minor or appears not to be able to understand owing to his age”. That is a separate category. Do you need the reference to a minor here if he does not come under the last category?

Mme Vernimmen: If I understand correctly, what you just said, my Lord Chairman, is that the fourth indent in Article 3 is just a sub-category of the fifth one. But it could also be argued that even if the minor who is 17 years old might very well understand and therefore is in the fifth category, he might nevertheless be entitled to be provided with legal advice because he is a minor.

Q70 Chairman: Does “legal advice” include legal assistance and representation where necessary?

Mme Vernimmen: Yes.

Q71 Chairman: Is that clear? Does it say so anywhere?

Mme Vernimmen: For me that can be deduced from Article 2, the suspected person has the right to legal advice as soon as possible and through the criminal proceedings.

Q72 Chairman: Legal advice is oral or written advice to the individual about his rights or liabilities, but does it also include assistance in representing himself in court?

Mme Vernimmen: Yes.

Q73 Chairman: Should it not say so?

Mme Vernimmen: I think that is clarified in the explanatory memorandum, but of course the explanatory memorandum is something which does not appear when the text is adopted, but I think that is just a question of wording. It is certainly clear for us. I do not think it has been contested that legal advice is including—

Chairman: In this country there is a composite phrase “legal aid and advice”. Legal aid, legal assistance (the same thing), is not quite the same as legal advice; it is something additional to legal advice, I would have thought, and I wondered whether that might be a point of drafting that the Commission could consider?

Q74 Lord Borrie: Is there a relationship here with Article 6 of the European Convention which does talk about legal assistance and representation? I am not disagreeing with you, my Lord Chairman, in thinking that there may be advantages in this legal document in making it clear that the phrase “legal advice” is meant to cover also representation.

Mme Vernimmen: I am afraid I do not have the text. You quoted the text of the Convention. I think it is really a question of terminology, but it is clear that we will want to encompass all the steps, legal advice, legal representation in court.

Q75 Lord Mayhew of Twysden: My Lord Chairman, could I just ask a related question? Does one cease to be a minor at the same age throughout the European Union or, as I think, is it a matter for individual Member States? If so, looking at Article 3, might one find, for example, an obligation to provide legal advice to somebody who was verging on 21, perhaps, if that was the legal limit in country X?

Mme Vernimmen: Yes, the question was raised before. Indeed, there is no unanimity in the determination of majority, the moment when someone is not a minor any more. So in a sense indeed it is true that Article 3, the fourth indent, the definition of minor will have a different effect.

Q76 Lord Mayhew of Twysden: It means a minor according to the law of the country?

Mme Vernimmen: Yes. If there is no common definition at that level it is the definition of the Member States, but even if someone is not a minor in a Member State (because the age of majority might be very low in that state and I cannot remember which is the lower one within the Union) that person nevertheless falls within the last category, “appears not to be able to understand”.

Q77 Lord Mayhew of Twysden: So the variability of what is meant by “a minor” is perhaps another reason for deleting this indent?

Mme Vernimmen: On the other hand, it might be that a person is perfectly able to understand but is still a minor, so the combination of both indents plays to the benefit of the defendant.

Lord Mayhew of Twysden: Thank you.

Q78 Chairman: Could I come to Articles 12 and 13. Article 12 deals with the right to adjudicate. It says that the person remanded in custody has the right to have his family and so forth informed of his intention. Does “remanded in custody” mean detained on the order of the judicial authority?

Mme Vernimmen: No, the right to communicate is envisaged as a right that applies as soon as possible after arrest and while the suspected person is still in

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police custody, in other words not released after the questioning.

Q79 Chairman: It is the word “remanded”. I think we would normally take the word “remanded” to mean remanded by a court rather than simply held by the police.

Mme Vernimmen: So you would prefer a wording like “detained”, I suppose, my Lord Chairman?

Q80 Chairman: As has been pointed out to me, Article 13 refers to “detained”. Would it be better if Article 12 said “a suspected person detained in custody” or “detained”?

Mme Vernimmen: It is an interesting suggestion to align the wording of the two Articles.

Q81 Chairman: But at any rate the Article is certainly intended to cover people who are held in police custody?

Mme Vernimmen: Yes.

Q82 Chairman: Thank you. Now can I come on to a very important matter. I think I mentioned it earlier on in the questions which I was asking you, the evaluation and the monitoring procedure, bearing in mind that it is the observance of these requirements that is going to be important in improving the manner in which criminal proceedings in foreign Member States are viewed by citizens of this country. I think you suggested that the Network of independent Experts on fundamental rights should carry out the evaluation, but as I understand it they have not really got the facilities to obtain information about what actually is happening in police stations and courts, they can just collect data which is prepared by the authorities. The suggestion has been made that either the Human Rights Agency, which was established by the Council of Ministers in 2003, or Euromos—do you know what I mean by Euromos?—might be preferable agencies to evaluate and monitor.

Mme Vernimmen: Well, I am not sure whether Euromos is better equipped to do that than the Network of independent Experts. But having said that, Article 15 provides for monitoring and evaluation under the supervision of the Commission, so it will be for us to organise the way the evaluation is conducted on the basis of the information provided and you have in Article 16 a number of elements for information to be provided by Member States. It could very well be that the Network of Experts might be entrusted with examining the information and might make also inquiries and surveys in a sense. It could also very well be the agency, but whether or not it will be the agency entrusted with that depends in a sense on the

chronological order in which the Framework Decision will be adopted and the putting in place of the agency in a sense. So this remains, at this stage, a very open question.

Q83 Chairman: It would be essential, would it not, that the evaluating and monitoring body would be a body which would have the facilities to obtain the requisite information?

Mme Vernimmen: Yes. I must indicate also that there is in the draft Constitution a mechanism for peer evaluation, which might also be very helpful in that context. So I think there is a number of tools. We do not know yet which one will be in place when this Framework Decision will ultimately enter into force and we will have to use all those tools and make the best use of them.

Q84 Chairman: In Article 15(2) it is said that the monitoring is to be carried out under the supervision of the Commission which “shall coordinate reports. Such reports may be published.” What would the Commission do with reports which are not published?

Mme Vernimmen: Well, I should maybe make a reference to all rules on transparency. We have extremely strict rules on transparency within the Commission and indeed within the institutions. So even if the reports are not drawn up in the form of a publication they are likely to be available to the public.

Q85 Chairman: Should there not be a provision which says that such reports may be published and shall be available for inspection or copies to be taken by anyone who asks for them?

Mme Vernimmen: Yes, you are right, but in a sense we do not need to say so because all our documents are available to the public by virtue of the rules, under the transparency requirements.

Q86 Chairman: We did once in this Committee ask for some documents (I cannot remember whether they were Commission documents or Council documents) and we were told it was not the practice to supply them, which made us extremely upset.

Mme Vernimmen: I regret that very much. I hope it was not recent because the rules are very strict now on openness.

Lord Thomson of Monifieth: My Lord Chairman, should it not say that such reports must be published?

Chairman: Shall be published, yes.

Lord Thomson of Monifieth: The verb is to publish. There are various ways of publishing these days, but they must be published.

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Q87 Chairman: Is there any reason why the “may” should not be taken out and substituted with “must” or “shall”?

Mme Vernimmen: My Lord Chairman, on many of those suggestions you are very usefully putting on the table I can, of course, express all my openness in the context of the discussion and there is a large number of points which I would certainly be prepared to recommend to my institution, but for the moment we are not preparing a revised version, if I may say so.

Q88 Chairman: But we will eventually in this Committee be preparing a report on the proposed Framework Decision and I take it that if we were to conclude—it is early days because we have lots of evidence to take still—that there should be an amendment requiring reports to be published that would be something you would be quite content with?

Mme Vernimmen: Yes.

Q89 Chairman: Thank you. There is one matter I have forgotten to ask you about. May I go back to Article 9, recording the proceedings. I come back to an interpreter. “A transcript of the recording shall be provided to any party in the event of a dispute. The transcript may only”—and I was going to ask about the word “only”—“be used for the purpose of verifying the accuracy of the interpretation.” Why “only”? It might be needed for the purpose of the proceedings themselves or for the purpose of an appeal.

Mme Vernimmen: No, because that simply alters the scope of this Framework Decision. This provision in Article 9 is there just to make sure that the interpretation is correct. It should not be used as a tool for further argument in court on the substance of the case.

Q90 Chairman: Why not?

Mme Vernimmen: Because in a sense that would create a discrimination since the recording is, as you underlined yourself, limited to the use of interpretation.

Q91 Chairman: But if the transcript throws up some point which bears upon the issues in the proceedings why can either party not say to the judge, “Judge, please look at this and see what this says. This cannot be right,” or, “This proves what I am saying”?

Mme Vernimmen: If the record is compulsory in the case where the person does not understand the language of the proceeding and there is no such obligation for persons who do fully understand the proceedings then you give a different kind of advantage to that person.

Q92 Chairman: But it just seems extraordinary to have this valuable record available and not be able to use it for any relevant purpose.

Mme Vernimmen: Yes. I feel a little bit hesitant to create an additional tool, an additional advantage to someone just because he happens not to speak the language.

Q93 Chairman: Well, it may be to his advantage or it may not. You cannot tell to whose advantage it is going to be. It will be for the purpose of trying to achieve a just result in the proceedings and that is something that everybody should want to happen.

Mme Vernimmen: I think I would feel more comfortable if the video recording or the audio recording would be applicable in all circumstances.

Q94 Chairman: By all means, of course. So would I.

Mme Vernimmen: But in the context of the Framework Decision as it is, I think it is the only purpose of that particular obligation to make sure that the interpretation is correct.

Q95 Chairman: Yes, but sometimes conversations between people are recorded, sometimes they are not. If they are recorded, the recording is available for use in the proceedings to show what was said by the parties being recorded. If there is not a recording, then there is a disadvantage because you then have to rely on oral recollection as to what was said. So of course where the recording has happened there is a great advantage. But no one would call that discrimination against people whose conversations are not recorded. Very well.

Mme Vernimmen: I must confess I am not 100% convinced.

Q96 Lord Mayhew of Twysden: Can I approach it in another way from another direction. It is surely in the interests of and to the advantage of every Member State that this Framework Decision shall be faithfully implemented by all Member States. There will, in the nature of things, be occasions where something goes wrong and a complaint is made. It is to the advantage not just of the complainant but of all Member States, surely, that there should be an objective record of what has taken place so that the matter can be properly dealt with? It is to everybody’s advantage, within the Union, is it not? I am just a little puzzled by your feeling that it is an unfair discrimination, do you see?

Mme Vernimmen: I was not speaking about discrimination between Member States, obviously, but I was more thinking about the fact that as it stands this proposal for a Framework Decision

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provides for recording in two different types of situations: where the person does not understand because he does not speak the language or because the person is in a particularly weak position and the recording is just there to make sure that the attention due has been provided or that the translation is correct. It is not just the situation of the different suspects, those who have been recorded and those who have not, which puzzled me a little bit and I would like to ask you for further time to think about that. The point you raised, my Lord, was more in relation to the monitoring system, that if there are breaches or failures or deficiencies in implementing it, it should be to the benefit of everyone to know what has worked well and what went wrong, and that I am pretty sure is a question of transparency, which I am very open to.

Q97 Chairman: Well, Madame, you have been very, very patient with us. We have kept you for a long time and you have answered all our questions very fully and we are extremely grateful to you. There will have been a transcript taken of the questions and your answers and we will supply you with a copy of it as soon as it is available. Please feel free to make any additions, corrections or supplementary remarks that you feel inclined to make. Those will all be valuable to us. I would like to thank you very much for your time and trouble in coming here this afternoon to help us with our inquiry.

Mme Vernimmen: Thank you very much, my Lord Chairman, once again and thank you also for the invitation and for listening to my English, which is probably rather poor.

Chairman: Your English has been very good.

WEDNESDAY 20 OCTOBER 2004

Present	Borrie, L Clinton-Davis, L Henley, L Neill of Bladen, L	Scott of Foscote, L (Chairman) Thomas of Monifieth, L Hope of Craighead, L
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Memorandum by Fair Trials Abroad

Fair Trials Abroad (FTA) is grateful for the opportunity to give evidence to this House of Lords' inquiry.

1. OVERVIEW

1. The Dutch Presidency of the European Council will hold a "Tampere II" summit on 5 November 2004 to debate a new programme on Justice & Home Affairs. Prior to this the European Commission submitted a communication containing their assessment of the original five-year Tampere programme and set up a public consultation process.²⁵ FTA responded to this request, with particular emphasis on the evaluation and monitoring section.²⁶

2. We do not consider that it is practicable to consider the proposed Framework Decision (FD) in isolation. The proposed FD lacks certain essential rights, eg the right to an independent and impartial tribunal which is dependant upon effective judicial standards, the right to effective legal assistance throughout a bi- or multi-national criminal case and, above all, a realistic programme for ensuring the standards proposed are attained and maintained.

2. FAIR TRIALS ABROAD

3. Fair Trials Abroad is a unique organisation concerned with the rights of EU citizens to due process in the administration of justice abroad. Our mission defines due process in accordance with international law and, in particular, the European Convention on Human Rights. Our particular concern is with the violations of current law and the changes to domestic or international law which might have adverse effects for European citizens facing trials in a foreign country. It follows that the subject of this Inquiry is a core mission concern.

4. Fair Trials Abroad has been campaigning for many years for the implementation of the decision of European Court of Human Rights in a landmark judgment "*The European Convention on Human Rights is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective*".²⁷

5. It should be noted that in the context of this Inquiry that FTA has many years of legal rights advocacy, of monitoring and achieving resolution to many cases of European citizens who have been denied access to justice in the criminal process, often simply by virtue of being "foreign".

6. FTA was founded in 1992 and relied on correspondents throughout the European Union who were practising criminal advocates in their own countries for advice on national justice systems and second opinions in complex cases.

7. In 2001 this system was formalised as the European Criminal Lawyers Advisory Panel (ECLAP). The Panel has adopted a code of practice and now consists of over 30 defence legal practitioners, some academic, invited to join the panel because of their experience, expertise and concern for the treatment of citizens, including foreigners, by their own national criminal justice systems.

8. The main collective activity of the Panel consists of a two-day seminar held in the spring and autumn of each year. The Panel has examined in detail the Commission's initiative to protect the citizen's procedural rights at all stages²⁸ and the collective viewpoint strongly expressed at the two experts meetings convened.²⁹

²⁵ "Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations" COM(2004)4002.

²⁶ "The future of European Criminal Justice: A Response to the Commission's communication "The Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations" August 2004. Copies available on request.

²⁷ Artico Judgment 1980, European Court of Human rights.

²⁸ cf Commission consultation paper (April 2002) Green Paper (February 2004).

²⁹ Eg Response to the Green Paper April 2003.

3. FTA'S COMMENTS:

1. *The Need for Action at Union level*

What evidence is there that procedural rights in criminal proceedings need to be harmonised? Does your experience confirm the Commission's statement (EM Para 22) that "there are many violations of the ECHR"? Are there, to your knowledge, significant failings by Member States? Are they failings which only the Union can address or which the Union could do better than individual Member States? Will the proposal remedy those failings?

9. Procedural rights, such as those set out in the Framework Decision(FD), are the same for all EU Member States as they derive from ECHR and from ECtHR case law. However, there is abundant evidence of the continual violation of procedural rights in most Member States to a greater or lesser extent³⁰ Member States have for many years had the opportunity of addressing these failings as a result of the judgments from the ECtHR, but they have signally failed to do so.

10. The proposed FD provides a mechanism for securing, and monitoring, the implementation of existing law and, with the exception of the provision for certain parts of the proceedings to be recorded, the FD does not go beyond what is already in case law. For those member states where fundamental rights are routinely observed little will change. However, for British citizens facing possible surrender under the European Arrest Warrant (EAW) to another EU member state, the FD should provide the security that their fundamental rights will be observed. The FD is the only measure emerging from EU JHA under the principle of mutual recognition (as proposed by the British Presidency at the Cardiff European Council in June 1998) to balance all the law enforcement measures arising out of Tampere I and is key to the successful operation of that principle. It is oriented towards the needs and rights of the citizens and peoples of Europe. We therefore submit that the FD must not be confused with harmonisation, but be seen as a need for compliance with existing obligations; we fully support the Commission's statement (COM 2004 328 Final Para 29) that the FD provides a mechanism for enhancing and increasing mutual trust where at present there can be little or none. As we stated in our response to the Green paper, convergence between the different systems in Europe has been ongoing for many years.

11. Mutual recognition rests on mutual respect, not of governments but of individual citizens, for the fairness of trial leading to judgment. This respect cannot be conferred by governmental dictat but must be earned by judicial authorities in each Member State in turn leading to general respect amongst the European public as a whole.³¹

12. To take but one example. The ludicrous handling of the case of the British and Dutch "planespotters" suspected of espionage on the flimsiest of evidence by junior Greek judges early in 2002 not only invoked general public derision of the Greek justice system, but it led to widespread public clamour against the imminent operation of the European Arrest Warrant. Events have not served to allay these fears.

13. FTA's experience can be summarised as follows:

Within the EU there is a variable geometry of practical implementation of the procedural rights guaranteed by the European Convention on Human Rights and supplemented by decisions of the European Court of Human Rights.

Injustice caused by non-compliance with fundamental rights is infrequent in Austria, Denmark, Eire, Finland, Germany, the Netherlands, Sweden and the United Kingdom. When such injustice occurs it is mainly due to human error rather than systematic failings. There is systematic failure to protect these rights in Belgium, France, Greece, Portugal and Spain; we have insufficient experience of cases in the accession states to form a judgment, but would question levels of access to justice in countries where there are serious problems of under funding.

It is therefore clear to us that there is a need for practical implementation rather than harmonization, and that the Commission is well aware of this need; only a comprehensive EU programme can effectively raise standards throughout the EU.

³⁰ "The Council of Europe-ECtHR, Survey of Activities 2003 reported 385 violations against the 25 MS. However, statistics do not reveal the full picture as only some of those who believe their rights to have been violated actually apply to ECtHR.

³¹ See FTA Evidence submitted to the European Scrutiny Committee of the House of Commons' inquiry on the European Convention Working Group "Freedom, Security and Justice" March 2003.

2. Relationship with ECHR

The Commission states: “The intention here is not to duplicate what is in the ECHR, but to promote compliance at a consistent standard”.

Why does not the ECHR (and the EU Charter) provide a sufficient common standard? Would the Framework Decision promote compliance with the ECHR?

Are you satisfied that the standards set out in the draft Framework Decision are ECHR compliant?

14. We would concur that the ECHR (and the EU Charter) does, in theory, provide a sufficient common standard; the problem is one of compliance. The FD, properly implemented, would be a vital first stage in obtaining compliance. Whilst national governments have been quick to take on board extra law enforcement measures, this is the first time that national governments are being asked to comply with the Tampere Conclusions that facilitate “the judicial protection of individual rights”(TC33) or ensure that the principle of fair trial should not be prejudiced by fast track extradition procedures (TC35). Not only is the FD ECHR compliant, but also it may actually improve regular implementation of ECHR standards.

3. Minimum standards

The aim of the proposal is to set common minimum standards. Are the standards proposed sufficiently high? Is Article 17 (Non-regression) adequate to avoid any risk that existing standards may be lowered?

15. The proposed minimum standards are, in general terms, adequate for cases that are purely national, but it has serious deficiencies in cross-border justice as it does not address the need for legal assistance throughout national and bi/multi-national proceedings, particularly having regard for the aforementioned deficiencies.

16. Should a national government wish to lower their own internal standards down to those in the FD the problem can only be resolved internally. However, there is no reason to suppose that existing standards under the national laws of any one member state will be lowered as a result of the FD. We would therefore argue that Article 17 by itself may be considered of no practical protection: the reality of the situation in the EU is that practical compliance with these standards is reliant on the monitoring and evaluation system contained in the FD and the power to take action pursuant to Art.31 TEU.³²

4. Scope of the Framework Decision

The Commission describes its proposal as a “first stage”. Are there any matters which should be included in the draft but which have not been? In particular are there any that might have immediate and direct cross border implications (such as bail)?

17. The Priorities guiding the selection of particular measures for the proposed framework are declared to be as follows.

“The decision to make proposals in relation to these five rights at this first stage was taken because these rights are of particular importance in the context of mutual recognition, since they have a transnational element which is not a feature of other fair trial rights, apart from the right to bail which is being covered separately in a forthcoming Green Paper.³³”

18. We would disagree not with the reasoning behind the choice of priorities but with the priorities themselves. In the Green Paper the Commission admitted that some of the rights proposed for future action such as presumption of innocence, fair provision of evidence and bail were as important in practice as the rights that have been given priority.

19. Of the five rights that have been given priority we would accept that four of them deserve priority, but we are somewhat mystified why the right to consular assistance has been included, since in general terms the Vienna Convention works well within the confines of the EU and should be irrelevant to concerns with

³² see COM 2004 328 Final Articles 15,16 and 17.

³³ see Para 24.

criminal justice if the procedural rights programme is effective. The novel provision to extend Consular assistance to long-term residents³⁴ whilst wholly desirable in third country situations (eg Guantanamo, the Philippines) has no relevance to the internal EU situation.

20. On the other hand, particular concern must be expressed as to the current position with regard to Bail. The Commission should have recognised from the outset that Europe required a system that provides answers to two obvious needs: an informed and impartial personal risk assessment coupled with an ironclad guarantee that the suspect would be arrested and returned to the court if he became a fugitive from justice.

21. FTA created the concept of Eurobail dealing with the problem of risk assessment nearly ten years ago. This requires the trying court to consider the gravity of the offence followed by transfer to the country of residence where a court would consider the personal risk factors and take responsibility for return on notice. Without such a provision the Union will lack a practical bail system that will be fair to its citizens wherever they may be. It may be recalled that in 1999 your Lordships' House recommended that Eurobail be considered for adoption in the "Tampere I" programme.³⁵ HMG with the support of the Commissioner Vitorino advocated the inclusion of the concept in the conclusions of "Tampere I": it is understood that it failed to be adopted because the concept was not comprehended by the Finnish presidency.

22. We are now five years on. Whilst the Commission admits the urgency of the topic it has failed to include it in the FD. Even though a Green Paper on the topic, referred to in the Explanatory Memorandum, was published last month it is primarily about harmonizing bail conditions (in itself a desirable objective) rather than the granting of bail.³⁶ Whilst it acknowledges the need for a FD regarding the problem of fugitive offenders, it makes no relevant recommendations for solving the risk assessment problem.

23. There is no reason why the European Council should not insert a further article in the FD directing the adoption of the Eurobail system, or alternatively incorporating it into the "Tampere II" programme.

24. There is a further crucial omission. Under the terms of the EAW, the accused is entitled to legal assistance. As mentioned above, there is no allowance for legal assistance between transfer, a period of several days or more where much can happen. Nor is there any mechanism for liaison between lawyers working on the same case across different judicial cultures, nor for payment of such legal assistance. Even in the UK Legal Aid is continually being reduced, further eroding the rights of the citizen; complex cases may not be fought on a private fee basis as assets are often frozen. There is also the growing problem of the risk for lawyers of being accused of money laundering. Cross border legal assistance and financial support remains an important topic yet to be addressed.

5. *Scope of application of Framework Decision (Article 1)*

The rights set out in the proposal apply in "criminal proceedings" to "a suspected person" and within the time limits as specified in Article 1. Is the scope of application sufficiently clear? Is it wide enough?

25. Article 1 unwittingly raises the question of the point at which a member of the public needs to be protected. There needs to be a clear, legal definition of the point in police investigation when a member of the public moves from being questioned as a potential witness to being questioned as a suspect. Whereas in some member states such as Germany and Holland, this point is clearly established, in other countries such as the UK and Spain it is not at all clear.

26. There must, therefore, be concern at the terms of Article 1. It appears to be wide open to abuse by relevant investigative authorities eg investigating officers may interview as a "witness" in a police station someone they already suspect of having committed an offence without applying the proposed safeguards. In our view, fundamental safeguards should apply from the moment of first questioning in the police station, and subsequently at all times throughout the investigation and judicial process. It is in the interests of justice that information is accurate and as clear as possible therefore such fundamental rights as an interpreter, an effective lawyer and an understanding of any documents used during questioning should be absolutely upheld. These procedures can then be tested in court.

³⁴ Article 13(3).

³⁵ Prospects for the Tampere Special European Council. September 1999 at para 55.

³⁶ Green Paper on "Mutual Recognition of non-custodial pre-trial supervision measures" COM (2004) 562 Final.

6. *The right to legal advice (Articles 2–5)*

How would Article 2 add to existing rights? What specific obligations does it impose on Member States? Should Article 4(1) be limited by reference to the 1998 Directive?

How do you envisage Member States giving effect to Article 4(2)? How, in practice, do you foresee the condition, “if the legal advice is found not to be effective”, being determined?

27. Article 2 emphasises the importance of having legal assistance from the point of first questioning in the police station. Police investigators are very skilled at questioning and can easily prompt someone to say something he may later regret. Further, in many EU member states much of the questioning by investigative authorities is done prior to calling a lawyer in order to keep full control; this should not be tolerated. Such malpractice could affect any British citizen travelling through the EU.

28. The motto over the Central Criminal Court in London states that the aim of Justice is to protect the children of the poor and punish the evildoer. This encapsulates the problem with the practical provision of legal services in the police stations and criminal courts of the EU. The rich (including members of organized crime syndicates) are those who can afford the legal services of specialist defence lawyers who are available and willing to attend such clients at short notice in all EU member states. The regular criminal knows his rights. It is the poor and vulnerable, amongst whom are likely to be found the innocent victim of circumstances, who will be dependent on the practical implementation of articles 2–5.

29. ECLAP discussions disclosed the complete absence of professional legal services to the needy in many, if not all, of the accession countries. It would appear that such services as exist are being performed by a network of citizens bureaus and local university law faculties which provide law students, usually acting under supervision of their teachers, to advise and defend. It is not only a question of money. There is a shortage of qualified and experienced professionals simply due to the relatively recent move to democratic justice from absolutist systems. It follows therefore that in some countries, immediate implementation of Article 4 will sabotage what legal advice provision exists. Compliance will take time and come at some expense to the State as it attracts new candidates into the profession. In the meantime there will be an inevitable continuation of current deficient standards and this will have to be closely monitored to ensure cases are as well managed as possible.

30. A suggestion put forward by ECLAP was to create a 24/7 “hot line” service in all police stations where individuals may be taken for questioning with duty lawyers participating by telephone. Such a service is really a *de minimus* mechanism for the protection of fundamental rights, but logistically unrealistic in the near future in most of the EU member states.

31. We would conclude that these eminently desirable Articles, especially Article 4, require an agreed monitoring programme to ensure that every State meets its obligation of membership of the EU and that citizens do not suffer from varying standards as they travel across the EU. Please note the inclusion of a Safeguard clause on JHA in the Accession Treaty.³⁷

7. *Rights to interpretation and translation (Articles 6–9)*

Are these provisions satisfactory? Will translation/interpretation be available in any language, not just official Community languages? (The Letter of Rights is limited to official Community languages —see question 10.)

Article 6(2) calls for the provision of free interpretation of legal advice “where necessary”. Should this be defined?

How do you envisage Member States giving effect to Article 8(2)? How in practice do you foresee the condition, “if the interpretation or translation is found not to be effective”, being determined?

32. Articles 6–9 contain the minimum support required for a non-native speaker. However, it is key that the word “effective” be used prior to “interpreter or a translator” to avoid the use of willing, but not necessarily able volunteers. There are at most two or three EU member states, including the UK, with national registers of professionally trained specialist legal interpreters and translators in a variety of languages including non-EU languages. It is up to these MS to try and ensure best practice in other MS, both at the political level as well as the judicial level.

³⁷ Green Paper on Procedural Safeguards. . . p 10.

33. Regarding the definition of provision of interpretation/translation services there is considerable case law which serves to guide judges (eg *Cuscani v UK* 2001)³⁸ as well as Privy Council precedent (eg Privy Council Appeal No 41/1992—*Radhakrishnan Kunnath v The State*). Further, we understand that every judge in the UK is provided with an aide memoire on the bench to guide him on the effective use of interpreters.

34. If an interpreter is defective, the judge must be alerted immediately (*R. v Smith, Smith & Sams* (1995) Old Bailey, Final Judgement Oct 1995). It is then up to the judge to halt the proceedings until further effective interpreting can be provided. If the interpreter is at fault, there exists in the UK a mechanism for reporting faulty interpretation services back to the profession to be dealt with by the professional disciplinary Board.³⁹

8. *Specific attention (Articles 10–11)*

What do you understand the obligation in Article 10(1) to give “specific attention” means in practice? Should “specific attention” be limited to the matters set out in Article 11 ?

Should all suspected persons have the rights set out in Article 11?

35. The Commission clearly recognises (Art 10) the difficulty of establishing who has a right to specific attention, be it a child, a blind person, a person with a mental or physical disability, an elderly person etc. The responsibility is clearly with the investigative authorities and the defence lawyer to determine whether the person to be questioned requires specific assistance or care during questioning. It will then be up to the judge, should the case go to court, to ensure that this has happened. There is clearly no need to limit specific attention to matters set out in Art 10 and 11, as this is a FD for minimum or fundamental rights. Member States with better practice should help those with lesser means to achieve a minimum standard.

36. Regarding Art 11 we can see no reason why all MS should not have an audio-recording system in all police stations as this is not an expensive, high-tech piece of equipment. Our concern is that this might not include the deaf and therefore video recording would be essential in these cases and special arrangements might be needed in some MS.

9. *The Letter of Rights (Article 14)*

Is it sufficiently clear when and in what circumstances the Letter of Rights should be handed over?

Are you content with what is proposed to be included in the Letter of Rights?

The Letter of Rights will be translated in all official Community languages sufficient? Might there be cases where the suspected person does not understand official Community languages?

37. The letter of rights should be presented to every individual from the moment of first questioning in the police station.

38. The contents of the Letter of Rights should be kept to the most simple and basic so that it can be easily absorbed by the individual who is often in a confused and distressed mental state due to the questioning or his arrest.

39. However, it should be remembered that as soon as legal assistance is provided the responsibility for ensuring that the suspect receives procedural protection is that of the lawyer who should act in his client’s interests without delay. The gap between providing a Letter of Rights and providing a lawyer should be minimal.

40. All that is required in all MS is the following:

- The right to silence until legal advice is available without this having any legal implication later in the proceedings.
- The right of refusal. This means the right to refuse to sign statements in a language that is not understood.
- The right to independent legal advice.
- The right to understand and be understood.

³⁸The judgment states, “The ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused’s interest with “scrupulous care”.”

³⁹Contact the Institute of Linguists for further information on professional codes of ethics.

Regarding translation and interpretation: logistical problems at local level may not make it possible to provide language services in all possible languages, but police stations could stock the Letter of Rights in the national language(s), those of local immigrant communities and the most commonly used EU languages in that particular region. Interpreters must be made available in all languages, by telephone if necessary.

10. *Evaluation (Article 15)*

What value do you believe the evaluation and monitoring procedure would have? Who should carry out the evaluation? Should publication be optional or mandatory?

41. In order for the fundamental rights ECHR and the Charter are intended to guarantee to be “rights that are not theoretical or illusory but rights that are practical and effective”,⁴⁰ the key to implementation is full monitoring and evaluation. The Commission itself recognises this.⁴¹ Additionally, it is recognised that monitoring is fundamental “if the framework decision is to achieve its stated objective of enhancing mutual trust”⁴² and “there must be public, verifiable statistics and reports showing that rights are complied with so that observers in other Member States (not only in government, but also lawyers, academics and NGOs) may be confident that fair trial rights are observed in each national system”.⁴³

42. The Commission suggests the Network of Independent Experts on Fundamental Rights be entrusted with analysing the statistical material supplied under Art. 16 FD or, if deemed more suitable, another independent team be employed to carry out the necessary research and analysis.

43. We consider that the Commission’s proposed course of action raises serious problems both of effectiveness and practicality eg whilst the Network’s membership may be qualified to evaluate statistical data, it is unlikely to be aware of violations unless these are recorded at appeal. However, too often violations never see the light of day. Given the availability of the Human Rights Agency, which appears not to have found a role, we would advocate considering it for this task. We believe publication of findings should be mandatory.

The Human Rights Agency

The European Council established the Human Rights Agency, also known as the European Agency of Fundamental Rights, in 2003, but as yet the Agency has no clearly defined functions. Originally conceived as a European Monitoring Centre on Racism and Xenophobia, it could now be broadened to encompass responsibility for the assessment and evaluation of both monitoring reports and statistics on the implementation of fundamental rights throughout the EU. There are currently various mechanisms for monitoring in the EU, including the Secretary General’s Monitoring Unit (Mon Dept DSP) of the Council of Europe, the European Commission’s independent Network of Experts and the NGO, Euromos.⁴⁴ Whilst monitoring is carried out on a national or an EU-wide basis, an EU agency should be capable of receiving information, analysing it, and where necessary, acting upon it in order to ensure that all Member States are working to the same standards of justice. This would provide the sort of robust activity expected from the EU institutions in order to make the principle of mutual recognition acceptable.

CONCLUSION

44. Whilst this Framework Decision is not comprehensive enough for the citizens’ needs, it is a vital first step on the lengthy and arduous road to the effective protection of citizens against injustice.⁴⁵ It is essential that the FD and the other measures on procedural rights be incorporated into “Tampere II”.

45. Whilst some MS may have difficulties with meeting the requirements for implementation by 1 January 2006, we would call upon those MS who would have little difficulty, such as the UK or the Netherlands, to support the FD and seek ways of sharing best practice. Under-funded justice systems create serious difficulties for others, but if we are to work with, and respect, the principle of mutual recognition as put forward by the UK in 1998, then it is crucial that this FD is implemented as soon as humanly possible. The European Arrest Warrant will otherwise cause havoc to the lives of innocent EU citizens mistakenly caught up in the wheels of

⁴⁰ Artico Judgement opp.cit.

⁴¹ Explanatory Memorandum to Framework Proposals SEC(2004)491; COM(2004)328; Para 82 relating to Art. 15 Framework Resolution.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ The Dutch based Euromos organisation, with which FTA is closely associated, has been established as a grass roots monitoring organisation. It is intended that Euromos will provide factual evidence of patterns of neglect or abuse of fundamental rights through its national units run by criminal law practitioners whose sole aim is to ensure access to justice for the citizen.

⁴⁵ See FTA “THE FUTURE OF EUROPEAN CRIMINAL JUSTICE: A Response to the Commission’s Communication “the Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations” August 2004.

law enforcement. The alternative is a continuation of the “theoretical and illusory” observance of the ECHR that still pertains throughout much of the Union after 50 years.

October 2004

Memorandum by JUSTICE

1. JUSTICE is an independent all party law reform and human rights organisation that aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE has been strongly involved in monitoring the development of a European area of freedom security and justice. It has, in principle, supported the decision made by the Tampere European Council that “mutual recognition”—of judicial decisions and judgments taken in other member states—should become the new governing principle in judicial co-operation in criminal matters. This support has, however, been conditional on the development and implementation of adequate EU-wide procedural safeguards for suspects and defendants in criminal proceedings. JUSTICE sees this as necessary to ensure that foreign suspects and defendants in particular are treated in a fair and comparable way wherever they face criminal proceedings in the EU, and to create mutual trust between member states so as to facilitate efficient co-operation.
3. Given the rapid pace at which prosecution-driven aspects of the mutual recognition programme have advanced since 11 September, the European Commission’s initiative for common procedural safeguards is highly welcome, if long overdue. JUSTICE welcomes the Commission’s assurance that this is only a first step towards addressing the current disparities in implementation and unacceptable levels of compliance with the right to a fair trial across the EU, notably those aspects that may be prejudiced in cross border cases such as admissibility of evidence, bail, and the presumption of innocence.
4. The UK has high standards of procedural rights in criminal proceedings and a good record of compliance. It should take the lead in Europe to ensure that its mostly enviable standards set the pace for EU-wide rules and not those of the lowest common denominator. British citizens facing justice abroad will only be guaranteed access to standards of criminal justice comparable to those in the UK if the government takes a stronger stance on minimum safeguards now.
5. If the Framework Decision is to meet expectations, it must guarantee a high level of protection that reaches at least that of the European Convention on Human Rights (ECHR). It must also be drafted in sufficient detail if it is to add value to the ECHR and ensure consistency across the EU. Finally, its implementation must be regularly and independently monitored, and the conclusions made public, in order to promote compliance and inspire mutual trust between all those involved in the criminal justice process in the EU. JUSTICE’s assessment at this stage is that the proposed Framework Decision does not meet all these requirements as presently drafted.
6. The main points to which JUSTICE wishes to draw the Select Committee’s attention are as follows:
 - This Framework Decision is vital as a first step towards redressing the current imbalance in favour of prosecution-led measures to enhance judicial co-operation on the basis of mutual recognition in the EU. It should produce both greater equivalence of procedural safeguards between member states and greater compliance with the ECHR. In particular, it will address some of the special legal, linguistic, financial and technical difficulties experienced by foreign suspects and defendants and make rights more visible. In turn, this will encourage more efficient co-operation.
 - The Framework Decision must, at least, meet the standards of the ECHR and the EU Charter. To add value to these instruments, it must be drafted in sufficiently precise language that will promote greater conformity amongst EU member states.
 - It is imperative that monitoring be regular and independent to successfully tackle the issue of non-compliance with the ECHR. The results should be published to demonstrate improvement and foster mutual trust, or to indicate problem areas.
 - To ensure the Framework Decision applies to the same kinds of cases and from the same point in proceedings, “criminal proceedings” must be treated as an “autonomous concept” in line with the case law of the ECtHR. The point at which a person is treated as having been “informed that he is suspected of committing a criminal offence” also needs to be clarified.
 - The right to legal assistance can be considered the most crucial procedural safeguard since it facilitates all the others. Articles 2–5 of the Framework Decision do not, however, meet the standards of article 6 ECHR. In particular, the right is unjustifiably limited to legal “advice”, it does not adopt the “interests of justice” test and the right to confidential communications with a lawyer is not protected.

- In the interests of consistency, clarification of when it is “necessary” to provide free interpretation of legal advice is needed, as well as which documents are “relevant” for the purposes of providing free translations.
- Technical training and accreditation for translators and interpreters needs to be provided by member states to ensure there are adequate numbers of suitably qualified professionals to meet the special requirements of those to whom the Framework Decision will apply. National registers of competent translators and interpreters should be established and made publicly available.
- Member states should set up a visible complaints mechanism to assist the detection of unsatisfactory legal and language services.
- The Framework Decision unjustifiably limits the specific attention some suspects/defendants may require to instances where by virtue of his “age, mental, physical or emotional condition” he “cannot understand or follow the content or meaning of the proceedings”. The categories of those entitled to such attention should not be exhaustive, nor should the specific attention be limited to those who cannot understand the proceedings. In particular, all suspects should be entitled to timely medical assistance.
- Greater precision is needed to ensure that the Letter of Rights is given to a suspect before he answers any questions in relation to the charge.
- To give real value to the Letter of Rights, further detail in its content is necessary. In particular, the circumstances surrounding the suspected offence and the possible penalties that could be incurred in the event of conviction should be specified, as should the legislative source of any powers relied on to detain the suspect. The suspect’s right to remain silent must also be included.
- Member states need to give a firm financial commitment to implement the provisions of the Framework Decision if it is to make a real difference to existing practice.

NEED FOR ACTION AT EU LEVEL

7. EU judicial co-operation in criminal matters has been developing rapidly to remove barriers to investigations and prosecutions since the Vienna Action Plan was agreed in 1998 and further expounded by the Tampere European Council in 1999. The introduction of the European arrest warrant⁴⁶ marked the debut of the mutual recognition principle in this field. Subsequent measures have included the draft framework decision on financial penalties,⁴⁷ a draft framework decision on confiscation orders,⁴⁸ a framework decision on freezing orders to prevent the destruction, transformation, moving, transfer or disposal of evidence⁴⁹ and a proposal for a European evidence warrant⁵⁰ as a first step towards replacing the mutual assistance regime in the EU. These instruments simplify and streamline prosecutions and investigations on the basis of the principle of mutual recognition.

8. The success of the mutual recognition programme largely depends on the existence of mutual trust between all those involved in the criminal justice systems of the 25 EU member states. To achieve this mutual trust, a high and comparable level of procedural safeguards must be shown to apply in practice in all EU member states so that people will not be treated unevenly according to the jurisdiction dealing with their case. There is a particular need to address disparities in the way that the special legal, linguistic, financial and technical implications of cross border litigation are presently dealt with in the different member states. This was specifically envisaged from the inception of the mutual recognition project as a precondition for both protecting the right to a fair trial in cross border cases and achieving greater efficiency in prosecutions.

9. Such safeguards have so far, however, failed to receive the same attention as moves to enhance the efficiency of investigations and prosecutions. In its response to the Home Office consultation on the European evidence warrant in June 2004, JUSTICE highlighted that

In the absence of equivalent safeguards in all member states, mutual recognition may in fact breed mistrust, suspicion and uncertainty rather than fostering the culture of trust and co-operation necessary to effectively tackle cross-border crime.

10. The ECHR is frequently, but falsely, assumed to supply the requisite level and consistency of safeguards across the EU. That all EU member states are signatories to the ECHR indicates a common commitment in principle to a set of fundamental rights. In practice, however, variations in standards and key differences in

⁴⁶ OJ L 190/1 18.7.2002.

⁴⁷ OJ C 278/4 2.10.2001.

⁴⁸ 6229/04 LIMITE COPEN 20,13.2.2004.

⁴⁹ OJ L 196/45 2.8.2003.

⁵⁰ COM (2003) 688 14.11.2003.

the application and interpretation of the ECHR provisions prevent the ECHR from being able to provide a sufficient basis for the mutual trust implicit in the EU's mutual recognition programme.

11. Moreover, the application by the European Court of Human Rights (ECtHR) of the margin of appreciation doctrine to determine the appropriate means of compliance reflects the broad membership of the Council of Europe and the need to accommodate the different legal cultures, historical traditions and moral values of 45 countries. This approach will not, however, achieve the consistency necessary to substantiate the mutual trust at the heart of greater judicial co-operation in criminal matters between EU member states.

12. There are also issues of compliance with the ECHR. The case law of the European Court of Human Rights provides ample indication that there are serious violations by all EU member states.⁵¹

13. Persistent violations of the ECHR will continue to undermine trust between member states and so block co-operation based on mutual recognition. This is also confirmed by recent case law in both France and the UK where extradition has been refused on the basis that the prosecution case was based substantially on information obtained by means of torture.⁵² These cases illustrate that the only way to expedite extradition requests is by ensuring individual rights are in fact adhered to across the EU. The introduction of the European arrest warrant will not reduce this imperative.

14. Given the divergences in implementation of the ECHR and the present number of violations, it is unacceptable to remove geographical barriers to investigations and prosecutions while preserving national boundaries in relation to defence rights. This will neither secure equivalent protection for all suspects and defendants wherever they are in the EU, nor will it generate the mutual trust necessary to improve the efficiency of international judicial co-operation.

15. The principle of "subsidiarity" has often been raised in objection to the development of EU common procedural safeguards. However, from the point that the member states, including the UK, signed up to the mutual recognition principle as the cornerstone of judicial co-operation in criminal matters, deference to national rules in this field was no longer viable. The disparities in practice between procedural safeguards across the EU will remain unless tackled with sufficient political will at EU level.

RELATIONSHIP WITH THE ECHR

16. The ECHR is an international treaty that supplies a minimum floor of standards for 45 states. It was never intended to achieve the equivalence between parties that is warranted by the co-operation in criminal matters developing between EU member states on the basis of mutual recognition. Given that the EU has begun to remove safeguards and barriers in sole reliance on the equivalence achieved by the ECHR it must now incorporate the ECHR into EU law, as the new constitution proposes to do, and pin down the substance of those ECHR rights in the EU.

17. A binding Framework Decision that secures a high level of procedural safeguards, drafted in sufficient detail and supported by regular and independent monitoring will promote greater consistency and compliance with the ECHR amongst EU member states. It will also add value by improving the visibility of the requirements of article 6 ECHR whose full implications are not presently self evident to anyone unfamiliar with the case law of the ECtHR.

MINIMUM STANDARDS

18. The level of standards proposed does not, in every case, meet that presently offered by UK legislation, or even by the ECHR. Unless the standards are raised, as discussed below, British citizens facing criminal proceedings elsewhere in the EU will not be guaranteed protection equivalent to that in the UK. This may act as a barrier to further European integration and will, in particular, present an obstacle to greater judicial co-operation. Furthermore, a constitutional crisis in the EU will be created if ECtHR finds the Framework Decision is not compliant with the minimum protections of the ECHR. This is to be avoided at all costs.

19. JUSTICE welcomes the inclusion of the non-regression clause in article 17 of the Commission proposal. There will, however, always be an implicit danger of the legitimising effect of minimum standards and the downward pressure they may induce. This was, for example, the effect in Belgium of the minimum standards introduced by Council Directive 2003/86 EC of 22 September 2003 on the right to family reunification. The Home Secretary's proposals to reduce the burden of proof for serious crimes and to place restrictions on trial by jury demonstrate the strong interest of the state in securing convictions. There is a potential danger that

⁵¹ In an appendix to its publication on the European arrest warrant, JUSTICE highlighted the vast number of judgments against almost all member states and accession countries for breaches of articles 3, 5 and 6 alone in the years 2001–03.

⁵² Extradition request by France to the UK, *R v SSHD, ex p Rachid Ramda* [2002] EWHC 1278 Admin, Extradition request by Spain to France, *Cour d'appel de Pau, Irastorza Dorronsoro* (No 238/2003), judgment of 16 May 2003.

standards in the UK will be reduced to the minimum standards that are eventually agreed by the EU unless a stronger stance is taken now to ensure the level of protection is indeed that which is presently offered by the UK. Furthermore, this will be the only way to secure that same level of protection to UK citizens facing criminal proceedings abroad.

SCOPE OF THE FRAMEWORK DECISION

20. JUSTICE considers that there are other crucial areas that will have immediate and direct cross-border implications as a result of the EU mutual recognition programme. These include common rules on admissibility of evidence; the burden of proof in criminal trials; bail; double jeopardy; the presumption of innocence; common rules on data protection; and EU rules on detention and prisoners' rights. The Commission has argued that by virtue of their complexity these merit consideration in separate Framework Decisions. This does not imply that these areas are any less important than those covered by the present Commission proposal. Work in these fields should begin at the earliest opportunity where it has not already done so.

SCOPE OF APPLICATION OF THE FRAMEWORK DECISION

21. Article 1(2) applies the Framework Decision to all persons suspected of having committed a criminal offence in any proceedings to establish his guilt or innocence, or to decide on the outcome following a guilty plea in respect of a criminal charge "from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until finally judged". This includes any appeal from such proceedings.

Criminal proceedings

22. In the absence of an autonomous definition of "criminal offence" and "criminal charge", the limitation of the protections of the Framework Decision to "criminal proceedings" will not necessarily achieve equivalence across the 25 member states of the EU. The ECtHR has repeatedly emphasised that there is no common definition of these terms across the Union and has developed autonomous concepts to ensure the protections of article 6 apply in all the member states of the Council of Europe in comparable circumstances.⁵³ Three criteria are taken into account: (a) the classification of proceedings in domestic law; (b) the nature of the offence or conduct in question, including how the offence is regarded in other Council of Europe countries and whether the offence applies to the population as a whole or only to an identifiable sub-group; and (c) the severity of any possible penalty. The problem is illustrated in the UK by the concept of "civil penalties" in the draft identity cards legislation. The Framework Decision must therefore be interpreted in light of the jurisprudence of the ECtHR.

Suspected Person

23. More problematic still is the pivotal phrase "from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence". This is an ambiguous notion in UK law that may not, at present, entitle a suspect to the Framework Decision rights before a police interview takes place unless being cautioned is treated as being so informed. It is highly likely, therefore, to be an equally ambiguous notion in many other EU member states, with the result that the Framework Decision rights will apply at different points in the proceedings depending on where in the EU a person is being investigated. This is unacceptable both from the point of view of rights being "practical and effective" as required by the ECHR and for the purposes of mutual recognition.

UK example

24. In the UK, most of the PACE Code C rights only come into play when a suspect has been arrested and arrives at a police station. There is a duty to take a suspect to a police station immediately after arrest, though the Code C rights also apply to those who attend voluntarily. The major right available to those being questioned who have not been arrested is the duty of police to caution those who are suspected of committing an offence (Code C s 10). The leading case is *R v Absolam (Calvin Lloyd) (1989) 88 Cr App R 332 Times, 9 July, 1988* which is authority for the proposition that questions put by a police officer for the purpose of securing evidence and answers to them, are an "interview" for the purposes of the Police and Criminal Evidence Act 1984 and must therefore be conducted under caution.

⁵³ *Engel v Netherlands* (1979–80) 1 EHRR 706; *Benham V UK* (1996) 22 EHRR 293.

25. In JUSTICE's view, a person should therefore be entitled to the protection of the Framework Decision from the moment that he is cautioned, and not from arrest. Any other conclusion would give the police an incentive not to arrest suspects and bring them to a police station but instead to caution and question in a location other than a police station where the full Code C rights will not apply. The potential injustice of this is compounded by the fact that under section 34 of the Criminal Justice and Public Order Act 1994, a tribunal may draw inferences from a suspect's failure to mention a fact which he could have been reasonably expected to have mentioned when questioned. Under section 34 (2A), if the suspect was in an authorised place of detention, such inferences can only be drawn if the suspect had been allowed access to a solicitor.

26. A related problem is stop and search procedures. In most circumstances, searches can only be undertaken where there is reasonable suspicion that an offence has been committed and the reason for the search is communicated to the suspect (see Code A Pace). Again, this would trigger the Framework Decision rights but not all the Code C rights. JUSTICE therefore considers that, in UK law, a search warrant should be considered as informing a person that he is suspected of having committed a criminal offence for the purposes of the Framework Decision.

27. In order to achieve both the level of protection and the consistency the Framework Decision seeks, article 1 therefore needs to be more precise as to the proceedings to which it applies and at what point it comes into play. Following the case law of the ECtHR, it should clarify that it applies to all proceedings that are criminal in substance, with reference to the criteria employed by the ECtHR to make this determination. Reflecting the article 2 Framework Decision right to legal advice, it should specify that it applies before any police questioning takes place in relation to the suspected offence.

RIGHT TO LEGAL ADVICE

28. Articles 2 to 5 of the Framework Decision set out the right to legal advice, including the right to free legal advice. The rights guaranteed by these provisions are, however, significantly narrower than those protected by both the ECHR and the 1999 UK Access to Justice Act (AJA).

Definition

29. First, the very definition of the entitlement has been unacceptably limited to "legal advice" so that it does not comply with the ECHR.

Article 6(3)(c) ECHR reads

(3) Everyone charged with a criminal offence has the following minimum rights:

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

Article 2 of the Framework Decision reads

1. A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.
2. A suspected person has the right to receive legal advice before answering any questions in relation to the charge.

30. The wording of article 2 is repeated in article 3 in relation to free legal advice and neither matches the ECHR right to legal assistance nor the AJA 1999 categories of assistance to be funded by the Legal Services Commission, which distinguish between advice and representation. The Framework Decision refers only to providing legal "advice" which will not necessarily extend to advocacy assistance at trial, nor the presence of a lawyer during police questioning, the tracing of witnesses or the obtaining of expert evidence.

Entitlement to legal aid

31. Secondly, the article 5 Framework Decision right to free legal advice is restricted to those instances where article 3 of the Framework Decision applies, ie to any suspected person who

- is remanded in custody prior to the trial, or
- is formally accused of having committed a criminal offence which involves a complex factual or legal situation or which is subject to severe punishment, in particular where in a member state there is a mandatory sentence of more than one year's imprisonment for the offence, or
- is the subject of a European arrest warrant or extradition request or other surrender procedure, or
- is a minor, or

- appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition.

JUSTICE has hitherto argued that, in the interests of justice, the existence of an international element in connection with criminal proceedings should suffice to obtain legal aid, as should the possibility of a mandatory sentence of any period of imprisonment. Furthermore, there should be a presumption in favour of granting legal aid in all of these situations given the prejudice to the defence that may otherwise result.

“Interests of justice” test

32. Thirdly, the test of “undue financial hardship to the suspect or his dependents” does not reflect the article 6(3)(c) ECHR “interests of justice” test where a suspect or defendant “has not sufficient means to pay for legal assistance”. The Commission’s research revealed that not all member states (including the UK) applied a means test to qualify for legal aid, on the basis that it was more cost effective to provide legal aid than to carry out the means testing. Furthermore, those member states that do apply a means test will set different levels of income or capital assets to qualify for legal aid. A means test alone, therefore, will not only be unsuitable for some member states but it will also fail to establish parity of access to justice across the EU.

33. JUSTICE advocates the adoption of a means test that reflects the ECHR standard, where applicable, combined with a wide “interests of justice” test as applied by the ECtHR and the UK courts. Any means test must be transparent and must require the state to demonstrate that a suspect could pay for his own legal costs without his income or state benefits falling below the national minimum and without requiring the unreasonable sale of any capital assets.

34. The “interests of justice” test should be assessed by reference to the facts of the case as a whole and should not be restricted to a limited number of considerations as articles 3 and 5 of the Framework Decision purport to do. In particular, the criteria listed do not take account of the possible public value or importance of a case. Moreover, under article 3, the complexity of a case and the severity of potential punishment are only relevant for the purposes of entitlement to legal aid where a suspected person is “formally accused”. This will not protect suspects who are being investigated in connection with such an offence but who have not been formally charged, nor does it comply with the autonomous definition given by the ECtHR to “charge”.

Confidentiality

35. Fourth, no provision is made for an accused’s right to confidential communications, both written and oral, with his lawyer. This may also necessitate the provision of private interview facilities. This is an essential aspect of the right to have adequate time and facilities for the preparation of the defence, as guaranteed by article 6(3)(b) ECHR, and must be included in article 2 of the Framework Decision.

Children

36. Children are listed in article 3 amongst those entitled to legal aid as a category of suspect/defendant entitled to special assistance. This raises the issue of the very real disparities in the age of criminal responsibility between member states, ranging from eight in Scotland to 15 in Portugal and Finland. It provides an example of where substantive law may need to be harmonised if minimum procedural safeguards are to produce comparable results across the EU.

Lawyer of choice

37. A further shortcoming in article 2 of the Framework Decision is its lack of reference to the suspect/defendant’s right to a lawyer of his own choosing in accordance with article 6(3)(c) ECHR.

Compatibility of UK law

38. The article 2 requirement to provide legal advice “as soon as possible” does not appear to admit any exceptions. As such, PACE 1984 Code C section 6 6.6 and Annex B, which provide exceptions to the general rule that a detainee who wants legal advice may not be interviewed or continue to be interviewed until he has received such advice, may not comply. Annex B allows the police in cases of serious arrestable offences (defined in section 118(2) of the main Act) to limit a suspect’s rights to notify others and have access to legal advice where the police have reasonable grounds for suspecting that their exercise will lead to interference with evidence, harm to a witness, the alerting of other suspects, or hinder the recovery of property. Annex B, sections 8–12, provides special rules for persons detained under the Terrorism Act 2000, which extends the grounds to include “interference with the gathering of information about the commission, preparation or instigation of acts of terrorism” (section 8 (iv)) and “making it more difficult to prevent an act of terrorism” (section 8(v)).

Effectiveness

39. Article 4 of the Framework Decision reflects the case law of the ECtHR on article 6 ECHR, which requires legal representation to be “practical and effective” and not simply nominal.⁵⁴ In *Artico v Italy*, the ECtHR emphasised

[A]rticle 6(3)(c) speaks of “assistance” and not of “nomination”. Again, mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.

40. However, it is not clear at what point the state is required to intervene where a suspect/defendant is dissatisfied with his legal representation. The ECtHR has taken a relatively narrow view in such cases and has held that

[t]he competent authorities are required under article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is **manifest** or **sufficiently brought to their attention in some other way**⁵⁵ [emphasis added]

41. The most practical way of bringing ineffective legal representation to the notice of the authorities would be by the suspect/defendant himself. In order to make this workable, he would need to be made aware through the Letter of Rights of his right to *effective* legal advice, of the possibility of informing the appropriate authorities where he is unhappy about the legal representation he has been provided with and of his right to be given a replacement lawyer of his choice. Member states must be responsible for establishing a visible complaints mechanism to which all those involved in the proceedings can report.

42. The Commission identifies in its Extended Impact Assessment⁵⁶ that disparities in the levels of remuneration and training of lawyers across the EU is a serious problem but does not address these vital issues in the Framework Decision. Member states should be required to provide appropriate training to ensure that lawyers appointed under the Framework Decision have the necessary expertise to deal with the highly specialised types of case that may arise under EU co-operation measures such as the European arrest warrant. They must also be committed to adequate levels of pay for those participating in national legal aid schemes if they are to attract lawyers with the necessary qualifications. JUSTICE recommends that member states establish a register of suitably qualified legal representatives, including those who participate in national legal aid schemes.

43. As a further check on effectiveness, article 4(1) of the Framework Decision only allows lawyers as defined by Directive 98/5/EC to be appointed. The Directive limits the definition of a lawyer to advocates, barristers and solicitors. JUSTICE considers this an appropriate condition. There may, however, be two areas of incompatibility with UK law. Under the Courts and Legal Services Act 1999, although only these professionals have rights of audience in court, the right to conduct litigation—including the provision of advice—has also been extended to legal executives by s40 AJA 1999. Secondly, under sections 6.12 and 6.12A Code C PACE, “solicitor” is defined to include trainee solicitors, accredited representatives, and non-accredited and probationary representatives sent by or on behalf of solicitors. These categories of solicitor will be insufficiently qualified for the purposes of providing expert advice to foreign suspects and defendants under the Framework Decision.

44. In order to ensure the Framework Decision complies with the ECHR and that British citizens are adequately protected when abroad, JUSTICE urges the Committee to press for stronger guarantees to legal advice and assistance and free legal aid. These should conform to the UK standards set out in the AJA 1999 which extend to legal advice and assistance and advocacy assistance and adopt a broad “interest of justice” test of entitlement to legal aid. The elementary right to a lawyer of choice and to confidential communications with that lawyer must be incorporated in conformity with the ECHR. To ensure legal representation is effective, member states must establish a visible complaints system and publish a register of suitably qualified legal representatives. Current disparities in levels of remuneration and training across the EU must also be addressed.

45. In substance, article 2 does not add to the rights that already exist under article 6(3)(c) ECHR. As noted above, it does not at present even match them. It does, however, clarify when the entitlement to legal advice arises, namely “as soon as possible and throughout the criminal proceedings if he wishes to receive it”, and, in any event, “before answering questions in relation to the charge”. Combined with the Letter of Rights it will facilitate a suspect’s access to legal advice by alerting him to this entitlement, particularly in relation to pre-trial questioning. In *Imbrioscia v Switzerland*, the ECtHR held that articles 6(1) and 6(3)(c) do not require

⁵⁴ *Artico v Italy* (1981) 3 EHRR 1, para 33.

⁵⁵ *Kamasinski v Austria* (1991) 13 EHRR 36, para 65. See also *Imbrioscia v Switzerland*, *ibid*, for a similar decision in the context of a private lawyer.

⁵⁶ SEC (2004) 491 28.4.2004.

a state to take the initiative to invite an accused's lawyer to be present during questioning in the course of the investigation. However, where an accused or his lawyer request the lawyer's attendance this must be granted if, as will be highly likely, there is a risk that information obtained will prejudice the accused's defence. The Framework Decision will therefore improve access to legal assistance by both clarifying when the right arises and alerting the suspect of this right.

RIGHT TO INTERPRETATION AND TRANSLATION

Language

46. Translation and interpretation services should be provided in all Community languages, all domestic minority languages and Braille for those with sight impairments.

When is it "necessary" to provide free interpretation of legal advice?

47. Clarification of where it is "necessary" to provide free interpretation of legal advice received throughout the criminal proceedings is imperative to achieve consistency across the EU. It must surely always be "necessary" whenever a person does not "understand the language of the proceedings", the criteria used to determine entitlement to free interpretation of the proceedings in article 6(1) Framework Decision.

Which "relevant" documents should be freely translated?

48. JUSTICE also recommends providing a non-exhaustive list of "relevant documents" that should be freely translated for suspects who do not understand the language of the proceedings in order to limit disparities between member states. This will help promote best practice across the EU. This list should include but not be limited to:

- The police statement.
- Statements by the complainants and witnesses.
- Statements by the suspect/defendant to the police and judicial authorities.
- An indictment by the public prosecutor or other prosecuting authorities.
- A judicial order imputing the crime to the defendant.

Accuracy

49. In order to improve the accuracy of translations and interpretations, member states should be required to appoint a national accreditation body responsible for training and certifying translators and interpreters. Continuous technical training must be available that covers use of specialised terms that may arise in the context of criminal proceedings and the functioning of judicial systems. Member states should be required to publish a register of certified translators/interpreters. The register should indicate where translators/interpreters have undergone appropriate technical training and are certified for the purposes of the Framework Decision. In the UK, there is a duty on criminal justice agencies to use translators on the National Register of Public Service Interpreters whenever possible but, in practice, this is not always the case and there is no statutory requirement for court interpreters to hold the Diploma in Public Service Interpreting or any other qualification. In the absence of a requirement to provide such training and certification, or to publish a register of those who have completed such training, adequate provision of translation and interpretation services will continue to fall short of what is necessary to ensure proceedings are fair in accordance with article 6 ECHR.

50. Again, the issue of inadequate levels of remuneration across the EU was also identified as a problem by the Commission. This critical aspect is also left untackled by the Framework Decision. However, unless adequate training and fees are provided by all member states, with the implicit financial commitment this implies, the rights to free interpretation and translation in all criminal proceedings will continue to be violated in many if not all member states, denying those who do not speak or understand the language of the proceedings the right to a fair trial and inhibiting the success of the mutual recognition programme.

51. To check the accuracy of translation and interpretation services, lawyers, judges, suspects and defendants, and all those involved in the criminal proceedings should be made aware that they can report any concerns they have in this regard and be provided with a replacement. Member states should be required to provide a visible and effective complaints mechanism.

Compatibility of UK law

52. Under UK law, section 13 of Code C addresses the issue of suitably qualified interpreters, provided at public expense, for suspects at police stations. No provision is made for translators. This will need to be rectified to comply with the Framework Decision. Furthermore, there are exceptions to the right to interpreters (see section 13.2 Code C) and these may also be incompatible with the Framework Decision.

SPECIFIC ATTENTION

Entitlement

53. The Framework Decision provides for specific attention to be given to a suspect/defendant “who cannot understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition”. JUSTICE is concerned that those requiring specific attention may be able to understand or follow the content or meaning of the proceedings but nonetheless require special attention. This qualification of entitlement to specific attention is not broad enough to address the needs of all vulnerable persons in state custody to whom member states have a special responsibility. The categories of those entitled to such attention should not be exhaustive, nor should it be limited to those who cannot understand the proceedings.

Medical assistance

54. Timely medical assistance should be available to **all** suspects wherever a person appears to be suffering from physical illness; or is injured; or appears to be suffering from a mental disorder; or appears to need clinical attention; and if a detainee requests a clinical examination, not solely where a person cannot understand or follow the proceedings by virtue of his physical condition. This would bring the Framework Decision in line with section 9(b) of PACE, Code C.

Other specific attention

55. Other specific attention will, by its very nature, not be required by every suspect or defendant. The measures listed in article 11 should not be exhaustive and the appropriate measures to be taken must be assessed in light of the particular needs of the individual. More detailed guidance and examples could nonetheless be provided in the Framework Decision without losing the necessary flexibility of the provision.

Compatibility of UK legislation

56. Under UK legislation, PACE, Code C ss 3(b) and 11.15 make provision for special protection for juveniles and other vulnerable groups, primarily by requiring the involvement of an “appropriate adult”, such as a parent or guardian, an interpreter or registered medical practitioner. However, there are the usual exceptions to this provision, which may be incompatible with the Framework Decision. Furthermore, Code C does not require an audio or video recording of interviews as provided by article 11(1) to safeguard the rights of suspected persons entitled to specific attention.

LETTER OF RIGHTS

57. JUSTICE welcomes the Commission’s initiative of a Letter of Rights setting out the procedural rights to which suspects are entitled. This will improve the visibility of those rights and so contribute towards greater accessibility, compliance and consistency across the EU.

When should the Letter of Rights be given?

58. It is not, however, clear from article 14 of the Framework Decision when the Letter of Rights should be given to the suspect. From article 1 it can be deduced that a suspect is entitled to receive the Letter of Rights “from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence”. As noted above, this will not take place at the same point in criminal investigations across the EU. In the interests of clarity, therefore, it should be specified in article 14 that suspects are entitled to be given the Letter of Rights “as soon as possible, and before answering any questions in relation to the charge”.

Language

59. The Letter of Rights should be made available in all official Community languages as proposed by the Commission, but also in all the domestic minority languages of the EU and Braille. Audio recordings should also be kept of the Letter of Rights for those who are illiterate.

Compliance of UK law

60. Under PACE, Code C section 3.2, there is already a duty to provide detainees with written notice of their procedural rights. Article 14 of the Framework Decision should therefore be easy to implement in the UK. There may, however, be an issue as to when the rights under the framework decision arise, depending on whether being cautioned or presented with a search warrant amounts under UK law to being informed that a person is suspected of having committed a criminal offence. For this reason, it needs to be clarified that the Framework Decision applies before any police questioning in relation to the suspected offence. Written notice must be given in addition to any caution regarding the right to silence under PACE, Code C section 10. This should be specified in article 14 of the Framework Decision.

Content of the Letter of Rights

61. JUSTICE supports the structure of the Letter of Rights, set out in Annex A to the Framework Decision. However, greater detail should be added to its content. In particular, to comply with the article 6(3)(a) requirement to inform a suspect “promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”, to the first sentence “You [insert name], are a suspected person in connection with [X criminal offence]”, should also be added the circumstances surrounding the offence and the possible penalties that could be incurred in the event of conviction. An indication of the legislative source of the powers relied on to detain the suspect should also be given.

62. As mentioned above, the Letter of Rights does not replace the requirement to caution a suspect as to his right to silence. This right, inherent in article 6 ECHR, should be included in the Letter of Rights.

63. Finally, the suspect should be informed through the medium of the Letter of Rights of his right to medical treatment or check-ups.

64. It should be incumbent on member states to regularly update the Letter of Rights.

RIGHT TO COMMUNICATE*Compatibility of UK law*

65. Article 12 of the Framework Decision grants a suspected person the right to have his family, persons assimilated to his family or his place of employment informed of the detention “as soon as possible”. PACE, Code C, Annex B permits this right to be delayed in certain circumstances and may not, as such, be compatible with the Framework Decision.

66. Section 7 of PACE, Code C addresses the right to communicate with consular authorities which derives from the Vienna Convention on Consular Relations. However, there is currently no right to assistance from a recognised international humanitarian organisation as an alternative to consular assistance.

EVALUATION

67. Given that the principal problem has been identified as one of compliance and lack of consistency across the EU in the implementation and application of procedural rights, regular evaluation, at yearly intervals in JUSTICE’s view, is imperative. This will allow the Commission and, most importantly, all those involved in the operation of criminal justice systems across the EU, to gain a true picture of whether and how procedural rights are being respected on the ground. This is vital if genuine trust is to be established between the police and judicial authorities of the member states.

68. The Framework Decision states that the Commission shall supervise and co-ordinate reports on the evaluation and monitoring exercise. Member states are required to collect and make available certain statistics on the operation of the Framework Decision. The evaluations must not, however, be limited to the bare statistics collected by member states themselves. Independent experts should interview professional bodies, especially interpreters, translators and lawyers and carry out spot checks on courts and police stations to gain a fuller picture of how the Framework Decision is operating in practice. The Commission seems to imply in its impact assessment that decisions of the national and European courts should be excluded from the

evaluation. This would unjustifiably restrict any serious monitoring exercise and diminish the value of its conclusions.

69. One of the main purposes of the evaluation exercise will be to inform all those involved in the criminal justice systems of the 25 member states, as well as the media, of each others' practices and records of compliance. It will therefore be necessary to publish the annual reports.

FINANCIAL IMPLICATIONS

70. If the Framework Decision is to make a real difference in practice, it will require a firm financial commitment on the part of member states. Without the allocation of adequate resources, the requisite training and remuneration for lawyers, interpreters and translators will not be provided, denying the safeguards of the Framework Decision of any real value. This needs to be given serious consideration in all member states to ensure the Framework Decision is not reduced to another, well intentioned but empty, piece of rhetoric.

October 2004

Examination of Witness

Witnesses: MR STEPHEN JAKOBI and MS SARAH DE MAS, Fair Trials Abroad, MR ROGER SMITH and MS MARISA LEAF, JUSTICE, examined.

Q98 Chairman: May I start by thanking you very much indeed for coming here this afternoon and helping us with our inquiry. You have helped us already, and that is another matter I should thank you for, by providing us with written evidence from your respective organisations. It is extremely interesting in content and will be very helpful to us when we decide what we want to say in our report at the end of this inquiry. Thank you for that. I had a word with you outside as to how we will proceed and, unless any of you want to make any introductory statement, perhaps we will just get on with the questions. The proposed directive, the first stage in providing for rights for persons within the Union who are accused of offences, does not go beyond anything which would be required anyway by the European Convention on Human Rights and, in a way, is perhaps to be viewed as an underlining of specific elements which go into the requirements of the European Convention in regard to trials, for almost a presentational purpose of enhancing mutual trust between the authorities of Member States and members of the public from other Member States who may visit those countries and get into difficulties there. What value do you see in the proposal for the purpose of achieving that greater mutual trust and for the purpose of achieving an extra degree of compliance with obligations under the European Convention?

Mr Jakobi: Essentially, perhaps I can put this marvellous *Artico* dictum from the European Court of Human Rights, who said that the European Convention is not to be illusory or theoretical but practical and effective. The problem with the European Convention and European Court at the moment is that we have this theoretical and illusory problem: that what goes on on the ground has nothing to do with what everybody is signed up to—if I can sum it up. The compliance with ECHR being practical and effective is, in essence, what this Framework ought to be about. To a certain extent it is, but it depends entirely on the monitoring of what goes on on the ground and whether someone like the Commission has the teeth to enforce when there is systematic injustice and matters of this sort.

Mr Smith: I would agree with that. We support this initiative from the Commission. Certainly if you have been to the accession countries—the countries that have just joined the Union—and talked with lawyers and seen the courts, there is a long way to go in those countries in terms of complying with Convention standards. The better of those—and I have been involved in it—are devising legal aid schemes and so on; but there is much to be done to give bite to the Convention. The Union, rightly, through this

proposal is going some way to doing that. One of our concerns with the document is that it does not repeat the Convention wording and it does not repeat Convention standards in their entirety. One of the overall criticisms we make of the document, the way in which it should be improved, is that it should be more precise, particularly in relation to articulating standards which are the same as the Convention, and indeed in seeking to be more detailed about concepts which may well be variable or fuzzy throughout the Union.

Q99 Chairman: If I may say so, I agree with what both of you have said. Would the right way of approaching this, do you think, be to view each of the specific rights which is identified in this proposal as being something that, if breached, would be likely to involve a breach of obligations under the Convention? So that what the Commission is doing is picking out particular sub-parts of fair trial obligations which have to be observed under the Convention and requiring those to be concentrated on, and therefore perhaps achieving a greater degree of confidence that they will be observed, to be associated with a monitoring performance where the monitors—those conducting the monitoring—will be looking at these specific matters for that purpose. If you say, “You must monitor observance of Article 6 of the Convention”, it is all a little broad. It needs to be more narrowly focused, does it not, for the purpose of monitoring and ensuring compliance? Perhaps that is what this proposal does.

Mr Jakobi: You have to look at two sets of things. First, the Articles themselves and, the other, the decisions of the European Court of Human Rights. If you are looking at things like interpretation, it does not make sense—unless you look at one or two leading cases. My colleague who is with me has studied this and will no doubt be addressing it in due course. So we are looking at both these things: decisions of the European Court of Human Rights that nobody pays any attention to, and Articles that are too broad for anybody to pay attention to—theoretical and illusory, if I can put it that way. So, yes, my Lord Chairman, I think you have summed it up very well.

Ms de Mas: Perhaps I may add that, in terms of monitoring, there are so many different aspects that would need to be monitored. For example, effective legal advice. That would not come under ECHR necessarily. It might come under case law, but it would come under what the professional requirements are for a lawyer.

20 October 2004

Mr Stephen Jakobi, Ms Sarah de Mas, Mr Roger Smith
and Ms Marisa Leaf

Q100 Chairman: Would it not come under Article 6? If you do not have effective legal advice, you have at least a platform for saying that you have not had a fair trial.

Ms de Mas: Determining what “effective legal advice” is—because at the moment there are various different standards of what effective legal advice is in various different countries. There are huge differences in, for example, legal aid, and therefore the standard of the lawyer who goes to see his client for the first time in prison. When monitoring is implemented, therefore, it would be implemented on the ground, not only under Framework Decision, or indeed ECHR, but under a set of standards that would be devised specifically for that purpose, to look at every single aspect of the service that is given to the suspect.

Q101 Chairman: This is described as “first stage”.

Ms de Mas: Yes.

Q102 Chairman: Eventually, one imagines there will be subsequent stages, each time becoming more comprehensive in identification of things that should happen or things that should not happen in connection with the trial process in particular Member States. My inclination is to look at the whole of this as part of a process for trying to ensure compliance with fair trial obligations under the Convention. Does that seem to you to be an appropriate starting point?

Mr Jakobi: As a broad brushstroke, I think it is.

Q103 Chairman: As a broad brushstroke, yes.

Mr Jakobi: It is one, because there are all sorts of things that in fact are not dealt with in the Convention at all that appear in this particular Framework, let alone in the rest of it. Yes, the broad process is to get everybody actually complying with their obligations, one way or another.

Mr Smith: I think that is right. You take Article 6 almost line by line, and stage one in analysing this document is how well does it reflect the wording of Article 6? All these countries have signed up to Article 6, so you would not expect this document to deviate from the wording, or indeed set any lower standard than Article 6. Second, there are—I suppose particularly in relation to the Letter of Rights—new rights. They are probably not substantial but they essentially go to fair trial. There is the Letter of Rights and what is in that. Third, there is the monitoring structure and how that should be established.

Q104 Chairman: I suppose another way of looking at it is to say that if you have provisions of this sort and they are all implemented in each Member State, it becomes much more difficult for an individual who

is being tried in a foreign Member State to assert that he has not had a fair trial, unless he can show that one or other of these directions has not been observed. If they have all been observed, how is he going to say that he has not had a fair trial?

Mr Smith: That would be a negative assessment that a Court of Appeal judge might take! It could be put more positively.

Mr Jakobi: I think this is something that we have always tried to emphasise. It is the basis of my organisation that, unless things are working at police station and court of first instance level, there is no real justice. To get, after three years’ imprisonment, a triumphant vindication somewhere much higher does not do anybody any good.

Q105 Lord Hope of Craighead: I wondered whether the proposals that we have go a bit further than Article 6 in point of timing. There is case law, is there not, as to when Article 6 bites? It is the bringing of the charge, is it not? The moment at which somebody is charged with a criminal offence, whereas part of this is looking at an earlier stage, when somebody is a suspect. That will run into the way the trial is conducted, but it raises a question in my mind as to whether there is an order of events in the course of the process when one is looking at priorities for treatment, as one moves through the process from the initial stage—which is pre-Article 6—of suspicion, to the end of the trial. Where do you think the priority lies? Is it important to get things right at the very beginning, or should the concentration be on the trial process?

Mr Jakobi: Our typical client, whom we always bear in mind, is a semi-literate lorry driver who has been caught in a foreign kerfuffle about drugs or something. He has not a clue about anything very much. He is in a very nervous and confused state, because he is innocent. This happens frequently—lorry drivers and cargoes, and matters of this sort. It is very important for him to get the very clear and concise information contained in the shortest Letter of Rights possible, in his own language, and for it to be presented the moment he crosses the threshold of a police station for any purpose. We have been discussing a sort of typical practice, which is, “It’s all right. We’re not arresting you or anything. We just would like you to give us a witness statement”, when all along they have him in mind. So just to make sure that for anybody, for any sort of questioning, who crosses a police threshold—where there ought to be mechanical recording equipment so that people know exactly what is going on—that is where the rights begin. It is a practical point. Otherwise, things get very confused. The moment someone says, “In connection with a charge”, you are moving the whole process along the line, and you have certain police

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forces who will definitely indulge in foul practice—if I could put it this way—unless they have these very clear rules.

Mr Smith: In the form that you asked the question, there were two things I took from it. It is probably false to think that you could have a perfect prologue—the two are linked. If one deals properly with the situation in the police station and interrogation, you are more likely to get a fair trial. The most likely source of injustice, or a likely source of injustice, is false confessions—alleged confessions of one kind or another. I cannot immediately think of a better way of saying it, but cleaning up the police station has been a major success of the last 20 years or so, in relation to what I know of, which is England and Wales. I think that is a major concern: that it bites there. The second question, which you might have been implying, is when does this thing bite? How do we define when it bites? We did not like the way it is drafted to be that it bites when someone is—

Q106 Chairman: When he is informed—

Mr Smith: When he is informed.

Q107 Chairman: It is the information point, is it not?

Mr Smith: Yes. We thought—in a point that I am sure you would recognise—that it should at least be “is or is entitled to be informed”. We thought that you could spell it out. There is a genuine difficulty that these jurisdictions will all be different. We thought that if you put “is or is entitled to be informed”, you added “arrested”, and then you put “or otherwise affected by the compulsory powers of such authorities”, whichever is the earlier, probably you would cover the situation in the majority of jurisdictions.

Q108 Chairman: What is the criterion for being entitled to be informed?

Mr Smith: Under national legislation.

Q109 Chairman: That would depend, would it not, on what the individual state provided in that respect?

Mr Smith: Yes, and that is subject to an obvious difficulty, and there may be better ways of doing it. But we came up with these three criteria: arrest; you are entitled to be informed; the national jurisdiction—or you are otherwise affected by compulsory powers.

Q110 Chairman: Is there any practical way, absent very lengthy and tedious drafting, for distinguishing between witnesses who are never going to be anything but witnesses and individuals who are being questioned because the questioning may lead into some degree of suspicion or charge?

Mr Jakobi: I cannot see one.

Ms de Mas: Perhaps I may add something here. We have meetings with lawyers from various different Member States twice a year, and we raised this very subject. We were saying that, because legal systems worked differently and police forces worked differently, with judicial supervision at different stages, any questioning would have to treat the person as a potential suspect. All the rights would therefore have to pertain from the moment of first questioning at the police station, regardless of their status. While we were discussing that, and we were discussing what rights were actually being protected—such as the right to silence, the right to interpretation, the right to legal advice, the right to medical assistance if so required—what transpired was that in Germany, for example, the difference between a witness and a suspect is very clearly defined. There is absolutely no way that a witness can just slide into becoming a suspect. If the police suspect that this witness is more involved than at first thought, then they have to stop proceedings and there is a whole raft of procedures which take place, so that when he is next called in he is a suspect. They were very surprised—in fact they know what goes on in England. They are just waiting for a case to be taken to Strasbourg, to see how it will be dealt with. That was an interesting insight into the differences of approach which the Commission have to take into account—which is why we favour implementation of rights from the point of first questioning in a police station regardless of status.

Q111 Chairman: Are you recommending something of that sort to be put into the Framework?

Ms de Mas: We have been recommending that for a long time now.

Q112 Chairman: Something approximating to the German procedure?

Ms de Mas: We do not know enough about the German procedure, but certainly from the point of first questioning in a police station. Obviously, if you are stopped on a road that cannot happen, but when you are in a police station all your rights start straightaway.

Mr Jakobi: It is an easy place to determine what should happen and everybody can understand it, whether he is a Greek or a German; so we can have a common minimum standard.

Q113 Chairman: But only in a police station.

Ms de Mas: It cannot happen on the road.

Q114 Chairman: There is an accident on the road. The policeman has to be allowed, has he not, to say to the drivers, “What happened?”—or not?

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Mr Jakobi: I think then we are looking at value of evidence, and there will be a clear distinction made, as there tends to be in this country—or tended last time I practised British law, which is quite some time ago—that what is said on the way to the police station does not carry very much force necessarily; whereas what is said in it, once you are being recorded, is very much a serious business.

Q115 Lord Hope of Craighead: I am really interested in the practical side of it, as I am sure we all are. I think one has to face the fact that there are genuine cases where, in the course of questioning, the police view of an individual changes from that of being a witness to a suspect. Some completely unexpected remark may be made. Under Scottish practice, with which I am familiar, that would be the moment at which a caution would then have to be introduced, and probably the questioning stopped and resumed with a proper caution.

Ms de Mas: Of course, all the information that has been given before that, and before that caution, can still be used.

Q116 Lord Hope of Craighead: Certainly it can, but is it really practical to say that, every time questioning takes place in a police station, the person must be treated as a suspect?

Mr Jakobi: Must be given a letter of rights.

Ms de Mas: Must be given the rights, i.e. the right to an interpreter, the right to legal assistance, the right to silence, the right to medical assistance. Those basic rights.

Q117 Lord Hope of Craighead: So you are not elevating this person into the position of a suspect.

Ms de Mas: No.

Q118 Lord Hope of Craighead: Which an individual might not have. Then it is a question of information.

Ms de Mas: Yes.

Mr Jakobi: The other problem we have is this problem that we are constantly coming up against in our organisation, which is the variable geometry of police force standards, of judicial standards. So that what happens in premier league countries, like Scotland and like, shall we say, The Netherlands and Germany, does not necessarily happen in countries like Greece and Portugal. Unless we have something terribly simple and easily understood, some police forces will be playing games, and to other police forces it is unthinkable that they would. We have this constantly used phrase, “common minimum standard”, and this is what we are looking for, I think.

Q119 Lord Borrie: I can see the advantages of simplicity and clarity in saying that once a person is in the police station then certain rights should occur and not before. However, it could presumably lead to abuse: that if that rule is well known, then somebody who is clearly suspected by the police may be questioned beforehand. I am wondering, as I did a week or so ago when we discussed this with the Commission, why, in the provision, Article 1 of the proposal, we should not simply have an objective test: that if someone is—and it may be “has become”, having been previously a witness—suspected of an offence then, from that moment, these various requirements should apply.

Mr Jakobi: It is not an objective test, unfortunately. We are hoping there will be mechanical recording in all police stations for all purposes, and we agree with the various observations that have been made on that, and that it will be recorded that the rights have been given before questioning commences. Outside this, it is all the usual “verbals”—for people who know about police force practice in the old days—and in some countries I am afraid that we have serious problems. To try to get common minimum standards of practice, we need something easily understood and, moreover, easily monitored, with a recording system or something like that which gives this common minimum standard. You are given your Letter of Rights, I will persist in saying, the moment you get into a police station and they question you for anything. It may be that you end up as a witness. There is one other thing that is quite important, which is that the people who know their rights are, in general, either people who are members of crime syndicates who can get a lawyer on the spot immediately and pay for him in every country in Europe, or habitual criminals who know them—

Q120 Chairman: And lawyers!

Mr Jakobi: And it is the innocent, the confused, and the first-timers who need their rights.

Mr Smith: There has to be an objective action that occurs, which provides a trigger you can test. It is something about compulsion. In the domestic jurisdiction, I think that I would be relatively happy with a caution. We have got that fairly worked out. It is true, once the PACE codes cleaned up the police station, there was a rash of people who could not wait to get to the police station to confess their guilt. However, the point has moved forward. The best we came up with were these three alternatives. Caution or arrest, or some other compulsory intervention by the state; a search warrant or something like that, whichever is the earliest.

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Q121 Lord Neill of Bladen: We seem to be slipping into discussing the detail or particular issues. There is a sort of philosophical issue which I am interested in. JUSTICE mentions it in their paper at paragraph 19. That is, added with other evidence, they express the fear that we may not necessarily be going down the right route at all here, trying to set up minimum standards, because the effect of that may have a depressive effect on the countries which have higher standards. You mentioned Germany. There is a standard there which we ourselves do not comply with. I should have thought that the UK would, by common consent, have a higher standard than a lot of the 25 Member States. I suppose the argument is that what is really required is a fully fledged treaty which sets out with precision what the rights are, instead of having a minimum with which you have to comply. Do you have any thoughts on that? You have certainly touched on the point. JUSTICE has, and I do not know whether Fair Trials Abroad has thought about it. You probably have.

Mr Smith: There is of course a non-regression Article, for what it is worth, in the text. Yes, we would like to see the highest possible common standards. I suppose the way through that is the Convention. We are content with the Commission seeking to put more bite into Convention standards, because that is sorely needed. There are areas where the UK can be proud. For all the trouble and the debates that there are—and I am involved in them personally—about legal aid, we probably do have the best legal aid in the world. Certainly in the top three in Europe, the top three in the world. We should be proud of that and take a lead in it. Yes, I do think there is logic in having a document at an EU level which seeks to give the Convention standards bite, and to extend them so far as we can throughout the criminal process.

Mr Jakobi: Unfortunately, it is a practical problem. This is not a theoretical problem, in the sense that if anything is going to be enforceable within the new European legal space—and this is what it is all about—we have to get a unanimous consent of the governments to get proper monitoring and proper enforcement under present rules. Even with majority voting, which will come in in the European Parliament—which is good news, of civil libertarians coming in as part of the process—we will still have an almost impossible task if we try and get a high standard for now, enshrined in a treaty. It will not happen, and I think that this is our problem. Our problem is to try and start with the best we can get now and have a programme that raises standards, because some countries do not even have lawyers under legal aid. They do not have any such thing.

Q122 Chairman: You raised a very interesting and important question when you spoke of enforcement. If there is a case in which the rights, which are

required by whatever emerges from this Commission proposal to be observed, are not observed, then one has to say, “What happens next?”. One possible answer would be that any evidence obtained could not be used in the criminal case. Suppose the evidence was used in the criminal case but it was not central to the case, and suppose you had a conviction. There are cases where convictions get set aside for reasons that the evidence, although it is damning evidence, has been obtained in circumstances involving some sort of a breach of the rights of the individual concerned. There is a problem about this across the frontiers of all Member States, mainly because the public take a very poor view of criminals walking free on technicalities. What did you have in mind when you spoke of enforcement?

Mr Jakobi: Essentially, for our purposes justice is about the innocent; the guilty are just dealt with. It is none of our concern if people are guilty after a fair trial, and it worries us as much as any other concerned citizen when this sort of thing happens. We are concerned with the one innocent person in a hundred who needs a fair trial in order to determine guilt or innocence and fair procedure. This is all we, as an organisation, are interested in at all. If you look at that, the protections need to be absolute. Governments who perform injustices through a lack of proper procedure should themselves be responsible. Perhaps I may put it this way. A victim of crime is a victim of a criminal. They deserve our sympathy and sometimes, in rich states, they deserve compensation from the state, and we need to do what we can for them. However, a victim of injustice is a direct victim of the state and its system. I see nothing wrong with the state being made to pay for it, if things are going wrong, in the way of fines to the community, in the way community regulations are breached; and matters of this sort also going into the equation because, at the end of the day, we feel that systems are as good as the amount of money that governments are willing to put into justice in various ways. Poorly paid judges are just poor judges.

Q123 Chairman: So you are suggesting enforcement via financial penalties on the state—

Mr Jakobi: Sometimes, yes.

Q124 Chairman: Rather than enforcement via impeaching the trial that has followed the obtaining of evidence in some undesirable way.

Mr Jakobi: It depends if it is human error or a systematic breach. If it is a systematic breach, it is a government matter. They are not providing the right resources and matters of this sort. If it is human error things, we do have the European Court of Human Rights and the normal individual remedies under it. By and large, it does quite well by individuals; it is the

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problem of getting the decisions they make obeyed at this police station and grassroots level that we are constantly looking at and that we are trying to cure.

Q125 Chairman: May I move on to another topic? As you know the Commission have described the proposals they are now putting forward as “first stage”, and they have identified specific rights. There is a large number of rights one can think of which are very important and which are not mentioned in this first stage: the presumption of innocence, admissibility of evidence, the burden of proof in criminal trials, and so on. Is there a case for saying that their choice of what to start with is not very good and should be improved?

Mr Smith: Yes.

Mr Jakobi: Yes. Four out of five, I would give them!

Q126 Chairman: Nearly everybody seems to think that there is no obvious reason why one of these first-stage rights is the right to have your consul informed—which perhaps your lorry driver would not immediately think of.

Mr Jakobi: That was explained to us yesterday by the Commission.

Q127 Chairman: What would you put in? Bearing in mind that, if there is to be a first stage, you cannot put everything in. Is there a particular omission or omissions that you think should have gone into any first stage?

Mr Smith: There is no problem in the Commission breaking this exercise up if it wants to, for political or other reasons—complexity reasons. We would have liked to see it proceed on a number of fronts at the same time. If it is going to produce this document, then there does seem quite a lot to be said for saying that the least we want to see out of this document is the preservation of Article 6 rights. That is a definable core. I am therefore a bit nervous that this document does not have things in it like the presumption of innocence and the right to silence, and so on—which I think should be in there.

Q128 Chairman: You think it should direct itself, specifically and in terms, to ingredients of Article 6 rights?

Mr Smith: Being now met with this document which we did not draft, and seeking to make sense of it and seeking, as a critic—in the positive sense, as you will be of it—how do we make sense of what this should cover or not, and I use Article 6 quite broadly, I think that it should certainly cover everything in Article 6. One of the checklist is, “Does it cover everything in Article 6?”. If it does not, to be honest, I think that it should do. That is a good way of seeking to make sure

this document at least bites on some definable area of law.

Q129 Chairman: You probably know this better than I, but are there Member States where the presumption of innocence does not apply?

Mr Jakobi: For certain types of crime, yes.

Q130 Chairman: That is probably so in this country too.

Mr Smith: Reverse burdens of proof!

Mr Jakobi: In practical terms, if you are a lorry driver in France with drugs in your load, it does not matter that you had any opportunity of checking or knowing and you can prove it: you will be convicted. This is true to some extent in Belgium about some crimes. It is not a universal practice; it just happens for certain types of offence that the practice has grown up about forgetting about the presumption of innocence, and we come across these cases. It is not a central issue; it is a nasty issue that crops up. It has to be remembered that my organisation is not interested, by the terms of its mission, in what happens to natives inside their own countries. We are solely interested in trans-national aspects of justice.

Q131 Chairman: I understand that, but you cannot have two different criminal justice systems operating side by side: one for foreigners and one for domestics.

Mr Jakobi: I accept that. What we wanted to do was draw attention to two really practical problems of foreigners that have not been included, and we cannot understand why—because the whole thing is rather simple—one of which I will deal with, which is bail and which causes far more misery and demonstrable injustice in the European system than almost anything else you can think of affecting foreigners. Whereas the native goes free on conditions, the foreigner sticks inside jail, because there is not a Eurobail system of some sort in place—and your Lordships in fact said something about this five years ago and nothing has happened.

Q132 Chairman: Said something in a judicial capacity?

Mr Jakobi: No, in your deliberations on Tampere I you came to the conclusion that there should be a bail system, and nobody did anything about it. The other thing is practical problems arising out of the European arrest warrant as a trans-national thing. My colleague will deal with this.

Ms de Mas: It is something that we have been looking at for some time. It really comes up—probably concerning presumption of innocence—as a result of the European arrest warrant, which came in before these procedural safeguards are in place. The defendant will be sent across to another country on

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the basis of a series of boxes which have been ticked. The lawyer who is looking at his case has no idea why his client is being sent to—

Q133 Chairman: The lawyer in the extraditing country?

Ms de Mas: Yes, has no idea why he is being sent. All he has is a list of ticks in boxes. Then that person is transferred and there is a period of up to ten days it can be, in some cases—probably more—where he has not yet slotted into the system in the receiving country. During that period he is totally defenceless. He has no one supporting him in any way; whereas the prosecution have Eurojust, which is getting more and more organised, and that side of it has been carefully thought through, and there is a lot of work going into it to make sure that all the information travels with the accused or the suspect; that there is good liaison between police and between prosecutors; yet no one has given any thought to how the lawyers are going to defend this client. How will the first lawyer even find a second lawyer? How will the second lawyer be found, and how will the second lawyer then liaise with the first lawyer? How will information travel across, and who is going to pay for it? There is no legal aid for anything that is trans-border.

Q134 Chairman: What has been happening in such cases at the moment?

Ms de Mas: Again, through this panel of lawyers, we have been asking the lawyers who are actually dealing with European arrest warrants. They are absolutely desperate, because they really are chasing. For example, they are now getting together to draw up a protocol for lawyers to work on trans-border cases. However, the crucial thing is will there be legal aid? Without any sort of state intervention to assist this process of transfer of information and transfer of service, then the lawyers—much as they might want to—will not be able to function, unless of course their client is very rich and can pay for everything.

Mr Jakobi: There needs to be some sort of European defence agency which ties up the loose ends; which says to lawyer A, “There’s a colleague in country B who will be interested—

Ms de Mas: This is something they are thinking of sorting out.

Mr Jakobi: A way of sorting out the seamless flow and obtaining parity of arms again—which is really what this is all about.

Ms de Mas: And to give the sort of advice that a lawyer needs to advise his client, and also to prepare the case. For example, one lawyer will not know what rights he has in another jurisdiction. What can he say in court? Does contempt of court exist? In some countries it does and in some countries it does not. So

all this sort of information, which Eurojust does very nicely for the prosecution, there is no one looking after the interests of the lawyer; therefore the citizen has no one looking after the interests of the citizen.

Q135 Chairman: Euro defence should go side by side with Eurojust?

Ms de Mas: We would like something like that: a central body which is there to inform lawyers, and also some form of legal aid which will cross borders—trans-border legal aid. This has not been given any consideration either under the European arrest warrant or procedural safeguards, or indeed any of the other measures that are being thought of now.

Q136 Lord Hope of Craighead: To some extent you have answered the point that was troubling me. In the explanatory memorandum we are given some kind of an explanation as to why they chose what they did. They say that the decision was made because the rights that they have identified are of particular importance in the context of mutual recognition, because they cross borders. Then, as far as bail is concerned, they excuse themselves by saying that is to be covered separately in the forthcoming green paper. I wondered whether you felt they were giving a sufficient answer to the problems you have raised.

Ms de Mas: It has not been taken on board at all as yet.

Q137 Lord Hope of Craighead: The philosophy is right, is it, that they should be concentrating on matters which have, as they put it, a trans-national element?

Mr Jakobi: We would say yes. Of course we would.

Ms de Mas: Yes, we would say that. Absolutely.

Q138 Chairman: That is extremely interesting, your suggestion about a central Euro defence organisation which can act as co-ordinator. Can I now ask you about another topic—the electronic recording of police questioning? This is normally thought of in terms of police questioning of suspects, but again there is a problem as to the point at which a person becomes a suspect. I suppose if there is electronic recording equipment in police stations, then there is no reason why it should not be used for recording the questioning of all—whether witnesses of an ordinary sort or suspects. What are the problems about this? It is not provided for, as you know, in the first stage, except in relation to special types of people who are thought to be particularly vulnerable. What are the views of your respective organisations about that?

Ms de Mas: I suppose I could start with the experience of England, Wales and Scotland about 12 years ago, when we were looking at what happens when a non-English speaker is in court. The upshot of research

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that was carried out over two years and then many months of discussion with various different sectors was that not only was a recording essential at the police station as well as in courts, not only was it helpful for the defendant or the suspect or the witness, it was also helpful for the authorities—for the police, the courts—because if there was any doubt at any stage of the proceedings of what was said and by whom, across these barriers of language, there would be the tape, which was objective. The tape would be the final arbiter of who said what, to whom, how, and in what way. So we now have tape-recording spread across the procedures here. On the Continent, it came as a huge surprise when various other countries realised what we were doing. They thought that it was an infringement of human rights. For example, I was talking to several Dutch lawyers at the time, who thought that it was an infringement of human rights. How can you record someone's statement and then throw it back at them, when in fact they might want to change what they have said? However, I think that now, all these years on, there is more of a move towards the idea of recording: (a) it is inexpensive and (b) it does satisfy the requirement of, when it doubt, what was said and what did actually occur.

Q139 Chairman: We know that we are supposed to have electronic recording in all police stations in this country, and you have said that—

Ms de Mas: For example, in Austria they have video as well.

Q140 Chairman: I imagine there must be a number of Member States, perhaps particularly accession countries, where they do not have any of this recording.

Mr Jakobi: That is the rule rather than the exception.

Ms de Mas: I understand that in Poland they want to introduce it.

Q141 Chairman: Do you know whether this was anything which was discussed at the time accession was being negotiated? I know there was a very careful look being taken at the justice systems of the accession countries. So far as you know, was this ever looked at and thought about?

Ms de Mas: I do not know. We never did see the terms on which accession countries were being examined, if you like, in terms of justice.

Mr Smith: Since the UK—or England and Wales—has had audio recording, and largely has video recording now, it would be a good point for the UK Government to make, in terms of what should be here. Many of us are of an age such that we can remember when the police resisted this, and now I think they would say that it is of benefit to them.

Q142 Chairman: We still do not have video recording, do we?

Mr Smith: We do not have it everywhere, no.

Ms de Mas: It can be called upon for the deaf. I have heard of a case where it was brought in for a deaf suspect.

Q143 Chairman: Yes, because that would be a special need.

Mr Jakobi: I think that what we have, my Lord Chairman, is the problem of cost. We are trying to be practical. If you have mass-produced audio recording, this is a cheap item. Video recording is quite technical and expensive, and it seems to us that there ought to be two or three centres in a country where it is available if you have someone who is deaf—where it is absolutely necessary as a minimum—and that you do have audio recording throughout Europe. It is a safeguard for both, as our police are very willing to say. It is impossible to make allegations about police officers when you have got it all down and you can hear exactly what was going on. So it is a safeguard for them as well as a safeguard for the suspect, particularly people who are under a disability of one sort or another.

Q144 Chairman: I am not aware of there being any particular record of difficulties arising out of the questioning of people who are deaf, and therefore where there might have been some assistance if there had been a video recording. One can certainly conceptually see that that might happen, but I am not sure that in practice there has been too much problem in that area. Others might have a different experience.

Mr Jakobi: We have had one case outside Europe where it was definitely a terrible thing.

Q145 Chairman: Outside Europe?

Mr Jakobi: Yes, outside Europe. Cases of innocence and deafness do not seem to arise very often. We are in close touch with deaf associations, and there is very little problem in Europe as we understand it.

Q146 Chairman: I would doubt whether one could persuade government to install, at considerable cost, equipment which was going to be used very rarely.

Mr Smith: If we were talking about language which would be appropriate for an amendment to the Framework Decision, the furthest one might go would be to say that Member States should ensure that audio or video recording is available—and that would give them the choice.

Q147 Chairman: Video comprehends audio, of course. It does both.

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Mr Smith: Yes.

Q148 Chairman: I want to ask you about the scope of the proposed application for this Framework Decision. It is to apply in “criminal proceedings” and it is to apply to “a suspected person”. As to criminal proceedings, I think the jurisprudence of Strasbourg gives the expression “criminal proceedings” for Article 6 purposes an autonomous meaning. If we have a European Framework Decision using that expression, is it necessary for it to have a definition, so that in that context too it has an autonomous meaning, or is it satisfactory to leave it to the individual countries to categorise whatever the proceedings are that they would regard as criminal proceedings?

Mr Jakobi: I think that, again, it has a sort of practical answer, in the sense that you will not get very far if people do not cross the threshold of a police station for one reason or another, and are just summoned for drunken driving or lesser offences than that. So we are really looking at things where you are in a police station in connection with an investigation where there is a real prospect of imprisonment. Not just a maximum offence; any sort of offence where there is a real prospect of imprisonment must be dealt with with scrupulous care. So you work backwards, I think. That is what we propose as the test there.

Mr Smith: There seems to be no reason why this document should be different from the Convention jurisprudence. The wording we came up with is applied to proceedings which are essentially criminal in nature, and including extradition and surrender—which is not in there, although it is referred to later—and appeal, which is in there. We went through the Framework Decision and put in the drafting amendments we would make, to see our points in the draft, and we can give you copies if you would like. However, the important thing, here and elsewhere, is that this Framework Decision is yoked to the Convention.

Q149 Chairman: It would not apply to relatively trivial offences. You would not expect all these provisions to be relevant if you were caught smoking in a pub in Ireland, for example.

Mr Smith: If I remember the Convention jurisprudence, there are four or five *indicia* by which one decides, one of which is the nature and severity of the penalty. So it would depend if that gave rise to a civil penalty which was imprisonment—

Q150 Chairman: Yes, but the expression has to have a certain meaning.

Mr Smith: Yes.

Q151 Chairman: It cannot be left to depend upon some relative concept like severity of punishment.

Mr Smith: Absolutely, but it should be yoked to the meaning which it has in relation to the Convention.

Q152 Chairman: I think that we have already discussed the definition of “suspected person”. I understand your view to be that it is the wrong phrase. It should not be tied to being informed that you are suspected; it should kick in at an earlier point.

Mr Jakobi: Yes.

Q153 Chairman: And that should be made clear in the language.

Mr Jakobi: Yes, absolutely.

Q154 Lord Clinton-Davis: Have you considered this matter with the European Bar Association?

Ms de Mas: The European Criminal Bar Association? We have, yes.

Q155 Chairman: They have supplied us with some written evidence.

Ms de Mas: We have discussed both the issue of the witness becoming a suspect and how you deal with any information that was gleaned when he was still considered a witness. We have discussed that aspect, and we have also discussed the aspect of the gap between countries when a person is moved from one country to the other and the status is unsure. So we have been working with ECBA, the European Criminal Bar Association, on this.

Q156 Chairman: Can I ask you one or two things about Articles 3 and 4, which refer to the obligation to provide legal advice and to ensure the effectiveness of legal advice? Article 4 refers to lawyers. Only lawyers are the persons who are to give the legal advice that Article 3 is referring to. I think it was Fair Trials Abroad’s paper that said that, in a number of accession countries, there are arrangements for individuals to give advice to foreigners who are charged with various offences, but they are often not lawyers.

Mr Jakobi: Yes, there is a sort of CAB and university-linked system, where law students rush out and give what advice they can. There are not enough lawyers anyway—competent specialist lawyers—to go round, and there also is not any legal aid at the moment. So you have a situation where, if you insist on lawyers as such, you are sabotaging any form of system until it is all grown up. It does not answer what is going on now. We were using the words “independent legal advice” and hoping that

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standards could be raised by other mechanisms in the countries that needed it. It is very clear that in countries like Poland—even in what I call senior accession states—there was a very real problem, which I do not think had been taken into account in this discussion.

Mr Smith: Of course you get lay advisers a good deal nearer than Warsaw in Poland. You get them in the police station round the corner, because we use lay—

Q157 Chairman: That is what the CAB is there for.

Q158 Mr Smith: No, with respect, it is not the CABs that are doing it. We have accredited police station representatives, who may now be solicitors or they may be trainee solicitors, or they may be others; but they are people who have gone through a training and who are independently accredited—I think indirectly by the Law Society. We had four points on Article 4. There is a prior point before “lawyers”. The document uses the phrase “legal advice” which, certainly in the English context, might be taken and is sometimes taken as different from legal assistance or legal representation. Certainly in statute its use is occasionally different. So wherever the document says “legal advice”, I would hope that it means—and should say so—advice, assistance and representation. Second, in relation to the lawyers, we got to a similar point as Fair Trials Abroad. We thought that they should be lawyers “or otherwise independently accredited representatives of an equivalent standard”. You can see what we were searching for. Delete “of equivalent standard”, but the notion of independent accreditation seems to me to be important.

Q159 Chairman: Obviously the reference to lawyers as described in Article 1(2)(a) is a standard to which all countries should aspire.

Mr Jakobi: Yes.

Q160 Chairman: But your problem is that you do not want to insist on that before the infrastructure can provide it.

Mr Jakobi: That is correct.

Mr Smith: Nor, as a matter of policy, do you necessarily need lawyers in the police station. There is some evidence that the lay police station representatives are as good in doing their job as solicitors, so you do not necessarily have to be a lawyer. What you do have to be, however, is very expert in that particular area of law and practice which is relevant to a police station interrogation.

Ms de Mas: And independent.

Mr Smith: And independent, and independently accredited. England and Wales do that quite well, I think. Police station representatives go on training courses. They do tests of quite an advanced stage. A tape is played in front of them and they have to intervene, or say when they would intervene, stop the tape, if it were a real interrogation. So I do not think that it would be unfair for the UK—or at least for England and Wales, which I know about—if our standards here did not meet 4(1) because of a requirement for lawyers. I think that we should be relatively happy with police station representatives and should have a wording here which is broad enough to include our own practice. We did think that here might be an appropriate place to make a reference to proper remuneration and to an appropriate level of training. We thought that in 4(2) it would be appropriate to put mechanisms for a register of suitably qualified representatives for the making of complaints by dissatisfied clients, and the provision of a replacement lawyer. We thought that Article 4 could be expanded in those ways.

Q161 Lord Clinton-Davis: Where you have lay people purporting to have some expertise, do you agree that the essential thing is that the client should have some recourse against that person if wrongful advice is given?

Mr Smith: Yes. I think that anybody who holds themselves out to be an expert in an area and fails to meet that should be subject to recourse.

Mr Jakobi: I think I have to say yes, in principle, because if all you have is nothing better than university undergraduates doing their level best, this will not work. We are left, in some countries, with that possibility, and I do not know how to solve that by such a decision. The client would be left without any independent legal advice, if that related to some of the accession states—and perhaps nearer home. This is our problem. The situation varies so much from country to country that trying to get common minimum standards will be very difficult, and this is the headache we face.

Q162 Lord Neill of Bladen: Gray’s Inn, for example, has a Free Representation Unit, FRU, which has been going for some years, largely staffed by people who have not quite qualified or who have just qualified. To impose legal liability on them for giving erroneous advice in those circumstances is a very tough order.

Mr Jakobi: Yes.

Lord Neill of Bladen: They are doing their best, for nothing.

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Q163 Lord Hope of Craighead: I want to put a point to you which the Law Society of Scotland have raised about this. I think that it bears on what we see in Article 2(2), which says that a suspected person has the right to receive legal advice before answering questions in relation to the charge. The point they make is this. If you have a right to insist on a lawyer being present before you answer questions, then the counterpart of that is that they will keep you there until a lawyer turns up and these questions can be answered. Does one have to be careful here about setting too high a standard for the legal assistance at that early stage?

Mr Jakobi: You have the right to independent legal advice. They do not need to be physically present. Secondly, you can choose if you want to stay in custody for a few days to wait for a lawyer or just say, “I am not going to answer any questions at all”, and then there are other decisions to be made provided you have got some independent advice as to your courses of action. We were trying in our paper the *de minimis* practice that we could see would be an answer, which would be a 24/7 phone service for independent legal advice. Otherwise this prospect arises—a phone call with somebody who knows what they are doing to give basic advice, but it is going to be up to the client to decide what to do at the end of the day.

Q164 Lord Hope of Craighead: This would be in the letter presumably.

Mr Jakobi: Oh yes, but to do anything more—I quite agree with you there. There are some countries where you could sit for two months waiting for some sort of lawyer to turn up before you could get face to face.

Mr Smith: It is illogical, of course, saying you should have the advice before you can have it. Can I just come back on Article 2 because there was a point I wanted to make? What is important and could easily be put into here is that you are entitled to confidential legal advice, and that in a police station is really crucial, that you are able to see your lawyer with the police officers out of the room.

Q165 Chairman: I must say, and this is approaching it from a United Kingdom standpoint, that when there is a reference to the right to receive legal advice it is implicit that it is confidential, but maybe that needs to be spelled out.

Mr Smith: Were that the case there would be no harm in making it explicit. The other thing that could be added here, which goes to the point that we have been making and which is tying up with the Convention, is that this would be a good place to add in a (3) saying that you have the right to adequate time and facilities for the preparation of

your defence. This is part of an exercise where we would argue for ratcheting this onto the Convention right.

Q166 Lord Borrie: I sympathise very much with the view that has been put across by the two organisations for saying that Article 4 as it is expressed at the moment is a counsel of perfection with regard to certain parts of Europe, especially in relation to the new accession countries. I was interested that Mr Roger Smith spelt out the differences between legal assistance, legal advice and legal representation. I wonder if he would care to unpick that group because I feel rather more sympathetic to the views that have been put forward in terms of a student or a non-fully qualified lawyer assisting in various things, such as saying to the policeman that they should not switch off the machine and so on, which is not strictly legal advice at all but it is assistance in ensuring the probity of the process and all the rest of it. Legal representation strikes me as something where perhaps there is more justification in saying it should be strictly a qualified lawyer. I am not sure about this but I wonder if he does in any way separate out the different functions that he referred to with those three types.

Mr Smith: I suppose I was making two different points. There are a number of nouns which come after the word “legal”—“aid”, “advice”, “assistance”, “representation” and now in the Access to Justice Act we get “help”. Certainly in an English context we have been round the houses with these words. The basic point that I wanted to make is that the document refers consistently to “legal advice” and my fear is, though I would hope that it was implicit, that “legal advice” meant “legal advice” on a narrow construction, ie, no more than me telling you what your rights are, giving you advice, and that it does not imply (and in certain English uses it would not imply and would be distinguished from) me acting for you in court. My primary point is that wherever the document says “legal advice” it should indicate that actually we are talking about representation as well. English practice is to have accredited representation in police stations who are not lawyers, and I do not think that is a problem. I agree with you that there are more issues that arise in relation to representation. It is complicated because in this jurisdiction I do not know if defence lawyers would have rights of audience, but I think most certainly people who are not qualified as lawyers can act for the Crown Prosecution Service in a magistrates’ court. I would not really want to get into that in relation to this document.

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Q167 Chairman: Can I ask you particularly about Article 4(2), “Member States should ensure that a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective”. I have very great difficulty in understanding that. How does one decide whether the legal advice is effective? Every time a person is convicted one could say that the legal advice has not been effective.

Mr Jakobi: I think it is hopelessly impractical. When you look at when such legal advice is going to be found to be defective we are six months down the line at least, even in a well-conducted system. I do not think it is very meaningful.

Q168 Chairman: I wonder what they are aiming at. They must be aiming at something they think is important.

Mr Jakobi: I think they are aiming at competence in lawyers generally, you know, that you have a right to a competent representative, but I do not think this is a good way of getting at it. This is all I can suggest, my Lord.

Ms de Mas: I would just like to add that I think it probably was directed at other Member States, not necessarily this one, because there are countries—and we need not name them—where the lawyer under legal aid is given 25 minutes as a maximum to see his client and he is very rarely allowed in with an interpreter, so those 25 minutes are sometimes of no use at all, and that is the last time he will see his client until they appear in court, and quite often he does not have much of a role in court. I would support everything that Roger says about splitting up these forms of legal assistance and advice and representation to make sure that the suspect does get the full gamut of support that he automatically gets in this country. I suspect that the wording does not really apply here but it is looking at other countries where the lawyer’s role is very much less than it is here.

Q169 Chairman: Probably, so far as 4(2) is concerned, it can just go. It serves no useful function.

Ms de Mas: To be effective you obviously need to see your client a little bit more and if he does not speak the same language as you do you need to see him with an interpreter and that needs to be arranged and you need money from legal aid or from somewhere to pay for preparation time to prepare your case and you need to be standing in court and acting on behalf of your client, and that in various Member States is not happening.

Q170 Chairman: Of course, the client must be able to communicate with the lawyer, but 4(2) looks to me as if it is directing attention at the content of

the legal advice rather than at some communication problem. That is what I find it difficult to see is useful.

Mr Smith: It may be inelegantly expressed but I think what would be valuable here, if we think about this from the suspect’s or the defendant’s point of view, would be for the Union to say that there should be ways of taking advice if you are dissatisfied with your lawyer, and indeed ways of changing your lawyer if you do not have the necessary confidence in him or her. In an English context this ties in with issues about legal aid and it has been well explored when the legal aid authorities will allow you to change your lawyer or not. I think there is no harm in the document seeking to preserve or establish a right to make a complaint and a right to change your lawyer if you are dissatisfied.

Q171 Chairman: The other problem which occurs to me is that there are likely to be exceptional cases, and there certainly are in this country, where an individual does not get to choose his own lawyer, such as under the arrangements for some terrorist individuals to be detained. There is a class of people called special—

Mr Smith: Those are not criminal proceedings, of course. They are civil proceedings in relation to immigration.

Mr Jakobi: I think we have to make it pretty clear that if you are under legal aid arrangements in principle you do not have a free choice of lawyer unless you have a very good reason for changing him, and that is true here. You cannot change once somebody has been assigned, one way or another, except for the usual reasons that many of us are aware of from legal aid committees, and that is certainly true elsewhere. Once again we are thrown back on the professional standards in each country of advocates and lawyers who will both represent and conduct trials. Once again we are thrown back on the difficulty of the states that are poor in resources and the states that are relatively rich in resources. We are bouncing back to this particular problem every time, I would say.

Q172 Chairman: What about interpretation and translation? That is Articles 6-9 of the Framework Decision. Do these go far enough in safeguarding an individual who cannot understand the language of the country he finds himself in?

Mr Smith: The language of the Convention would be “understand or speak”, and it seems unnecessary to speak the language of the proceedings. Article 6(5) says you do not understand the language. The convention is “understand or speak”, so it is one of those examples of an area where there seems no

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reason why this document should not follow the language of the Convention. For most people understanding and speaking are the same but it seems illogical.

Q173 Chairman: Yes, and interpretation if he does not speak.

Mr Smith: We thought in relation to Article 8, which is related to that, which is the translators and the interpreters, that again this was somewhere where Member States might be required to ensure that mechanisms exist to provide registers of suitably qualified and trained interpreters, the making of complaints and the provision of replacements if they are not effective, and indeed we thought it would do no harm so they should be preferably remunerated.

Q174 Chairman: The only jurisdiction that I have any knowledge of where there is regular use of translators and interpreters is Hong Kong. What happens there is that the proceedings are all in English but a lot of the litigants speak only one of the Chinese languages. They have interpreters there but quite often there are disputes between the interpreters there as to what the meaning is, and then the official court interpreter is summoned and he says what the meaning is and that is the end of the argument and then you go on. It seems to me that that is actually a very sensible system.

Mr Jakobi: It is very heavy, if I may say so, on a rather scarce resource in many of the countries we are talking about, if there is any form of interpreter at all.

Q175 Chairman: What it does do is settle the issue very shortly and quickly.

Mr Jakobi: If you have got a recording the issue can be sorted at a later date at everybody's leisure because what is said and what is translated is there and the experts can come in and say—

Q176 Chairman: Not if you have got the man in the witness box speaking and the translator interpreting what he is saying.

Mr Jakobi: That is a problem that the international courts I think have solved, but Sarah may be able to give more information on that.

Ms de Mas: I suppose the most interesting court in terms of interpreting must be the court for the crimes of the former Yugoslavia in The Hague where they set up an interpreting team to work in the official languages plus all the languages where the alleged crimes have been perpetrated, plus the languages of the witnesses, so they could be dealing at any time with up to six languages in one session and up to 20 languages across the case. There the

interpreters were fully trained for the work in hand and the prosecutors and the judges and the lawyers all worked very closely with the interpreters to make sure that before the beginning of a session the interpreters knew what sort of language was going to be used and with any new terminology the terminology was explained if they had never come across the concept before, so that they could look for the appropriate word, and it works extremely well. However, this is one court with a large budget to perform one action. It is impossible to achieve those standards in your average court in any town across the EU.

Q177 Chairman: Let alone in your average police station.

Ms de Mas: Exactly; it just would not work. But what is happening in this country and Sweden and now, although it is several years behind, is certainly happening in Holland is an attempt to train interpreters specifically to work in court, so they do specialise in legal language. That does not mean to say that if the defendant comes in on aeronautical issues they are going to know anything about aeronautical language, but they are specially trained to work in legal aid, they are trained to work in courts and they know who the parties are, and every judge in the land, so I am told, has an *aide memoire* on his bench which tells him what to do if there is a problem with the interpreting. There is also, as I pointed out in our paper, sufficient case law both in this country and in the ECHR to ease out the difficulties. Certainly in the latest case, which was *Cuscani v The UK* about two years ago, it determined that the judge was responsible and therefore the judge must be very alert to what is going on in the court and work out whether the interpretation is working and do that by studying body language and so on, and Lord Justice Brooke did a lot of work on this area. In the UK things are working reasonably well in that the mechanisms are there; they are not always implemented properly but the mechanisms are there. This is not the case in the rest of the EU. They are a long way behind. However, the Commission is certainly funding work into seeing how standards of interpreting can become uniform so that interpreters anywhere in the EU will work to the same standards in a court anywhere in the EU, and to train police officers, prosecutors and judges on how to work with an interpreter when there is an interpreter in there. This is happening but it is very slow and, as Stephen pointed out some time ago, it is going to be ten years before it is fully implemented and here we are with the European Arrest Warrant sending people all over the place.

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Q178 Chairman: Do these provisions assist in resolving problems that there may be currently?

Ms de Mas: I think Roger is absolutely right, that in some cases the Convention is better than this. The Charter does not help very much. The only thing that this does is that it is a first stage in recognising that there is a problem, which the European Arrest Warrant, for example, did not. All these mechanisms that the Commission has introduced have not recognised the need for interpreting for the suspect. They recognise the need for interpreting for the prosecutor but not for the person in the dock. This is a first step, so I think if we have monitoring, for example, and training of judges, which has happened here on this particular aspect, then we can speed this process up.

Q179 Chairman: So far as the inclusion of these provisions in this first stage is concerned, I understand the thrust of what you say to be that you would support it.

Ms de Mas: I would support it as a first step, but I would agree with Roger that it does need tightening up.

Q180 Lord Hope of Craighead: This is really on the same point. The Law Society of Scotland again have a comment on this. What they believe is that the emphasis should be placed on appropriate accreditation of interpreters to ensure a common and minimum standard because, as my Lord Chairman has pointed out, this covers what goes on in the police station as well as in the trial. It is important for monitoring the trial but it is just as important, I would have thought, to have this sorted out at the police station stage.

Ms de Mas: Right from the very beginning.

Q181 Lord Hope of Craighead: I gather from what you have been saying that you would support the view that really this is an opportunity to put something in which has got a bit more bite to it.

Ms de Mas: Originally this did have more bite and there was a greater call for registered interpreters, for national registers of accredited people for disciplinary boards belonging to the profession of interpreters, and all that has been taken out and we would like to see it go back in again. The current document we are looking at has been weakened.

Mr Jakobi: From the green paper which originally came out, which had much more treatment of everything and other rights were being dealt with, it has been politically watered down, if I can explain it that way.

Mr Smith: Certainly we would have added “trained and independently accredited” at an appropriate place in 8(1) to make the point that Lord Scott has made.

Ms de Mas: And we know that the Commission has funded this sort of work, so the public sector and the private sector have been working on this issue, so really the Framework Decision should be picking up on that.

Q182 Lord Neill of Bladen: I have read these articles about interpretation applying throughout. Take a very heavy case where there is an international drug ring and one of the team has been caught in a particular country. As the prosecution develops its dossier against that accused person and the process of assimilating documents takes place, under our procedures you would expect that the accused would be getting copies of these, particularly as the case builds against him and particularly if it is going to be a heavy trial. That means another burden of interpreters not only in the police station but also, in the case that I have supposed, translating the documents, and then there is a team in court when this possibly extended trial comes on. When you think about all those aspects of it it is quite a serious burden that one is talking about. I am not saying that is wrong at all but I just thought I would mention the politics and cost—and I am sure we will come on to cost in relation to monitoring—and potentially it is a lot of money that has to be provided to make this system work.

Mr Smith: Yes, and it is unavoidable and in particular in three areas: in relation to lawyers, in relation to translators and interpreters, and in relation to monitoring. I can see no way round it.

Ms de Mas: No-one has ever worked this out but the cost of appeal is possibly greater than the cost of translation and interpretation in the first issue, and we have often wanted that test to be made but no-one has worked it out.

Mr Jakobi: Also, the wording is in the European Convention and decisions, “all documents reasonably necessary for the conduct of a proper defence”, not “all documents”, so the judge has really got to—

Q183 Lord Neill of Bladen: It is still a very substantial cost.

Mr Jakobi: Oh, yes, but then you cannot get below that and have a proper defence.

Q184 Chairman: Can I now move on to Articles 10 and 11, the specific attention articles—a suspected person who cannot understand or follow the proceedings owing to his age, mental, physical or emotional condition gets specific attention. Do you

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think it is clear what “specific attention” means or does that need to be spelt out in rather more detail? Article 10(3) says that “specific attention” includes ensuring that steps taken shall be recorded in writing. Medical assistance is provided in 11(2), a third person present at 11(3). Is that adequate as an explanation of what “specific attention” is to consist of?

Ms de Mas: Certainly in discussions with our group of lawyers from different Member States the discussion was long and fairly noisy and came to a conclusion that really it was impossible to have the full length because you cannot pre-determine what different forms of incapacity a person will have. Therefore it has to be the responsibility of the policeman with the defence lawyer to determine whether this person is a person with special needs and that this Framework Decision gives sufficient guidance for such a determination to be made.

Mr Smith: The tightening up we would like to see in the wording, and maybe this is a burden of being common lawyers, is that in 11(3) you get “where appropriate, specific attention may include ...”, whereas an English drafter would want to say “shall include”, although others might see that as rather nitpicking. It is a related point but we did think that this would be a good place, if you have a defendant or suspected person in custody, to repeat that they should have the right to receive timely access to medical assistance, whether or not they are requiring special attention; a general right to medical attention.

Q185 Chairman: The point on that is that it is difficult to see why the Article 11(2) obligation, “ensure medical assistance is provided wherever necessary”, does not apply to everyone.

Mr Smith: Yes, I have just put it in a different way.

Q186 Chairman: Of course it should where these special attention categories are concerned, but it is difficult to see why it is limited to them.

Mr Smith: Yes. I suppose there is an argument that if you need medical attention you will come within 10(1) but it is not very felicitously drafted.

Q187 Chairman: That is “cannot understand or follow the content or meaning of the proceedings”. You may need medical attention and still be quite capable of doing that.

Mr Smith: I suppose that is right. If you were having a heart attack you would have difficulty. It is an unnecessary complication which should be spelt out.

Q188 Chairman: The European Criminal Bar Association has suggested that the categories of people who should get this special attention should

include those suspected of a political offence. I am not sure myself that that is capable of sufficient clarity of definition to be useful but I wondered if you had a view on it.

Mr Smith: We did not see how it would work. If we are all operating within the European Convention I am not sure what value it has, saying “political offence”, so we did not think that that was a good idea.

Q189 Chairman: I suspect that every single Member State would assert with great vehemence that people were not prosecuted for political offences; they were prosecuted for offences under the criminal law.

Mr Smith: Yes.

Q190 Lord Borrie: In the light of the last three or four minutes’ discussion I wonder what are the views of our guests today on whether there is any point in Articles 10 and 11. My reasoning is that if medical assistance whenever necessary is required for everybody, and if, where appropriate at any rate, there should be a third person present during questioning, and if, as I think was said earlier, at least an audio recording should be required for everybody—I leave aside video—there does not seem to be much point in having specific attention, which is Article 10 and Article 11, as distinct from having certain basic requirements for everybody. I am not sure what case is left for anything significant beyond that.

Mr Smith: I think that if one had been the initial drafter of that and one had been discussing what one would put in a draft, that would be for me a very good point. Presented with the draft and therefore potentially presented with the argument to say we take out these provisions which are defensive of people in a similar situation, it seems to me that the balance of advantage shifts and so it would probably be regrettable to argue that they should be out, although logically I think it would be right in terms of if we were beginning this process.

Q191 Chairman: I do think that where children are concerned—I am not necessarily meaning people below the age of majority but young children—they should not be questioned without a third person there and people who have mental disability should not be questioned without somebody there either. On the other hand a person who has physical disabilities—why does he need a third person there? It is too diffuse as it stands. Nods. Thank you.

Mr Smith: For the record, we nodded.

Mr Jakobi: I see, my Lord, you are well used to these sessions.

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Q192 Chairman: The right to communicate is dealt with. You have the right to have your family and your employers, if necessary, informed of your detention. Amnesty has suggested that that should include a right of access to the doctor of one's choice. They have said that they think that would act as a strong safeguard against ill treatment, particularly torture.

Mr Jakobi: We cannot understand how, with our particular interest, this can work with foreigners. How are you going to choose a doctor in a strange country? The right to have independent medical advice is quite different. Secondly, our strategy, I suppose, is to keep it terribly simple: get somebody who is in a bewildered state to a lawyer who will look after all the other rights, and if he notices that somebody needs attention he will stand up and say, "This guy needs attention". The real way through is to get a competent native lawyer who will notice what is going on.

Q193 Chairman: You mentioned independent medical advice. As a lawyer I understand the concept of independent legal advice but who is the doctor independent of?

Mr Jakobi: The police.

Q194 Chairman: So a police doctor will not do?

Mr Jakobi: Prison doctors and police doctors, if there is a problem—

Q195 Chairman: They have all taken the Hippocratic oath, or I imagine they have.

Mr Jakobi: I have to say that, whereas in this country life is fine and in much of Europe life is fine because it works that way, there are countries that are now members of the Union where the state just determined what happened to anybody, and doctors also who are in the service of the state are perfectly used to being at the bidding of authority against the citizen. That was the system until ten or 15 years ago. We would say that there are many doctors who are still in practice who learned all they knew under that system. It is a sort of safeguard but somebody outside the official service could be called upon in need.

Q196 Lord Clinton-Davies: But the trouble is that the doctor may have rather aberrant views himself, as we have discovered in this country. I am not sure that we are dealing with this point effectively.

Mr Jakobi: It is terribly difficult, I think, because the concept of political offences and torture allegations within the European Union—it happens and we have come across cases where it has happened to British citizens, in countries like Portugal not too long ago, unfortunately, but it does not happen as

a systematic thing. It is comparatively rare. That is all I can say as a practical man.

Q197 Chairman: You can say that, can you, of all the members of the European Union?

Mr Jakobi: In general terms, yes. People get beaten up in Belgian police stations from time to time and we do get this problem as a sporadic thing that happens to foreigners suspected of nasty offences rather than everybody. Do not get arrested and be accused of child molestation in many countries. You will get beaten up.

Mr Smith: We could not think of a form of words which would cover the ill that Amnesty, understandably, focused on and would also meet the situation we have here where the medical examiner—

Q198 Chairman: We would be very grateful indeed if you would provide us with a formulation.

Mr Smith: No; I was saying we could not find a formulation and therefore we recommend you do not go there.

Q199 Chairman: Sorry; I thought you were telling me that you had.

Mr Smith: No. We looked at it this morning. We could not find a way which would keep English practice in here, which I think probably, if it has problems, is not really to be addressed in this document, and which would meet the Amnesty point.

Q200 Chairman: The Letter of Rights is dealt with in Article 14. I think you have already dealt with that. Short and soon is your recommendation for that—short and simple and hand it over at the earliest moment when the individual enters the police station.

Mr Jakobi: Yes. The confused, the innocent and the semi-literate are really what we are looking at. We are not looking at people who have done first year law and people who are well educated. I think the more you put in the Letter of Rights the more confusing it gets in these circumstances. You do not have to say anything. You have got the right to legal advice and the police will arrange it for you, etc—very short and sweet. You have got a right to an interpreter.

Q201 Chairman: Has Fair Trials Abroad got a suggested letter?

Mr Jakobi: We have really just put the points down in our document that need to be covered. However the form of wording it is going to be a quarter of a sheet of A4, maybe quite a long one, with the same simple message in 17 different languages, rather like

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when getting a European washing machine you have got the instructions in everything. There is no need even to have many documents in a police station. It is a question of having a very short message that says, “Here are very fundamental rights” and relying on competent lawyers or the good enough lawyer to be around to ensure that you have got rights, who is more likely to know about them than you do.

Q202 Chairman: And I suppose that you would put into it something along the lines, for instance, of, “You are not obliged to say anything”?

Mr Jakobi: Yes.

Q203 Chairman: Although that is not one of the rights expressly dealt with.

Mr Jakobi: If I could just put it in the expression “stay shtum” and interpret it into every different language I would. I would like to make it as short and as simple as possible—the right to silence. We do have a problem in that the UK is out of line with everybody else, which is why the right to silence is—

Q204 Chairman: Out of line on what?

Mr Jakobi: If I can put it technically, they are trying to get a framework article on the right to silence, and in general terms the problem with the UK is that you do not have an effective right to silence because judges can draw inferences from you exercising it, which is at odds in various technical ways, which I think we all realise, from most of Europe where the right to silence is absolute and there you are. To say you have got the right to silence and it can be used against you is effectively saying, “You have not really got a right to silence”. That is where we are out of step with the rest of Europe.

Q205 Chairman: You have got a right to silence but there may be a down side to exercising it.

Mr Jakobi: That in effect is circumscribing the right to silence, we would argue and the rest of Europe would argue. This is one of the problems.

Mr Smith: I would argue that too, but in relation to the Letter of Rights, the Letter of Rights it seems to me should summarise those rights which are in the Framework Decision as very minimal and I would hope that that presumption is that something about the right to silence would be included within it.

Q206 Chairman: If you are going to put anything in about the right to silence in this country it would have to be accompanied by the qualification that the usual caution gives the individual. You have the right to silence but—

Ms de Mas: We put “the right to silence until legal advice is available without this having any legal implication later in the proceedings”.

Mr Jakobi: But even that is very difficult for the uneducated to take at that particular time. I think it has got to be kept simple. I do not believe that the UK decision will stand in Strasbourg if it ever gets there. This is a contravention of basic European Convention proceedings and we have got a national problem, but that is a matter of belief and so far it has not been tested, as I understand it. The right to silence needs to be unqualified. That is the proposition that the rest of Europe understands, but this is a matter which makes drafting this particular right quite complicated for the simple man.

Q207 Chairman: This is a unanimity measure, is it not?

Mr Jakobi: Yes.

Q208 Chairman: Otherwise there would not be any prospect, I imagine, that the government would sign up to it, if it was going to be inconsistent with the primary legislation that is in place.

Mr Jakobi: We are meeting this sort of problem all over the place, which is why everything has been watered down, everything has been taken to the bottom level.

Q209 Chairman: Because of the need for unanimity?

Mr Jakobi: Yes, and no European Parliament input, so it is only governments deciding freedoms, which is really, to anybody who has looked—

Mr Smith: That is also the reason why the document is silent on it, I imagine.

Q210 Chairman: The final topic I wanted to raise with you, which for my part is perhaps the most important one of all, is this point about monitoring. If these rights that are to be identified and insisted upon by this Framework Decision and which all Member States will be required to insist upon is to be effective in achieving a higher degree of compliance with the ECHR than there is at the moment, there will have to be effective monitoring; otherwise you might as well not bother.

Mr Jakobi: Yes.

Q211 Chairman: It is the mechanism for effective monitoring that, speaking for myself, I find very difficult.

Mr Jakobi: Can we put it into three parts? What is proposed at the moment is that there is a network of experts in being reporting to the Commission and European Parliament on monitoring, but basically they are ensuring that legislation and court decisions

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are in place and we are looking at Court of Appeal and upwards. We are really looking quite a long way away from the problem on the ground.

Q212 Chairman: You are looking downstream, are you not? You are looking at what happens in police stations.

Mr Jakobi: Yes. They are upstream at the moment and most people never reach a Court of Appeal if they have got a proper grievance and, secondly, it is all many months if not years after the event that things arise. That is one problem. It is an essential part of monitoring that this is done and we would accept that, but only a part. The second idea that they had was the Statistical Office that collects statistics about things like whether interpreters are present or not, but our fundamental problem with statistics is this lovely story of the statistical expert who drowned walking across a lake with an average depth of six inches because it does not look at qualitative problems, like, “We had a bad interpreter” as opposed to an interpreter being present, and it does not look at the individual instances of injustice that will throw up patterns that are not really being taken care of. For that you are relying on practitioners, just ordinary lawyers, noticing what is going on, ordinary interpreters noticing what is going on. We are quite closely associated with an organisation that is Dutch based called EUROMOS, which is trying to set up monitoring units in each country.

Q213 Chairman: Is it a government organisation?

Mr Jakobi: No. It is an independent organisation of practitioners. In fact, the driving force was one of our trustees. We can only help and advice. My colleague is on the board and I am chief of their advisory panel but our (own) mission is very narrow. It is only relating to foreigners, whereas they are looking at national situations and natives as well, so it is a separate entity. We feel that this organisation, or something very similar, needs to be encouraged to get the ground level input into a monitoring system.

Q214 Chairman: If one views the provision of legal services or interpretation and translation services as something being given to a member of the public who needs those services, is there a model to be drawn from considering what airlines do, what hotels do? Every time you leave a hotel you are asked to fill in a form saying what you think of their service. Every time you get off a plane you are asked to say what you think of that service. What would happen if you asked the people who had been through the police station to say what they thought of the service?

Mr Jakobi: To say to somebody who has just been sentenced for three years, “What do you think of our service?”—

Q215 Chairman: You could ask his lawyers.

Mr Smith: If you are seriously grappling with quality what you do, as an airline would seriously do, is have a range of indicators. We felt that the evaluating and monitoring in Article 15 should be annual so that it is regular and periodic, and it should include not only the statistical basis but it should be done by independent experts who go out and do it proactively, so they look at judgments, they have interviews with professional bodies. I would have no problem in looking at an after-service questionnaire but in terms of what one can do with the Article 15 that we have got here you would make it annual, you would make it as fulsome as possible, you would have it done independently and you would put a burden of publishing the result in it because realistically we do not have enough weapons here, one of which is transparency and publicity.

Q216 Chairman: But you have to place the burden on the individual Member State to set up a monitoring system in that Member State.

Mr Smith: Or to see that it is done, yes.

Q217 Chairman: Most of the legal services, and I should think all the interpretation services, will be at the expense of that Member State?

Mr Smith: Yes.

Mr Jakobi: I think we have a problem here, if I can put it this way. What is being proposed to be set up has some of the disadvantages of the network of experts if you are going to have academics wandering round trying to do this. What we are hoping for is practitioners reporting incidents that happened to them so that—

Q218 Chairman: I was going to suggest something slightly different, which is that the practitioners who were being employed and paid for by the state could be required as a term of their employment to comment on the compliance or failure to comply on the part of the police or prosecuting judicial authorities with the requirements of the—

Mr Jakobi: They are very often part of the problem rather than part of the solution in our experience, if I can put it that way.

Q219 Chairman: The lawyers to the defendants.

Mr Jakobi: Oh, lawyers for the defendants? I thought you meant the prosecution.

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Q220 Chairman: No, no: for the lawyers to the defendant to fill in a quality questionnaire at the conclusion of the proceedings.

Mr Smith: I think you would want a variety of mechanisms and it would be entirely appropriate that that was one of them, and that the Framework Decision should push you as a Member State to setting out such arrangements.

Q221 Lord Neill of Bladen: In your experience do all defence lawyers conduct themselves perfectly properly?

Mr Smith: There is some question about how critical a defence lawyer would be exactly of their own performance. The important thing is that we get a variety of ways and we get some central body that is pulling together a variety of approaches.

Mr Jakobi: It is not going to be instant magic, if I can put it this way. Monitoring will have to develop over a number of years and we hope that defence lawyers will get more competent and skilled and more ethical.

Q222 Chairman: All we are looking at here is a proposal for a Framework Decision which will require implementation by Member States if it gets through its unanimity hurdle. Therefore there will be an obligation on Member States to put in a monitoring system and it will have to be a monitoring system which by some objective standard—if necessary Luxembourg standard—is adequate. Otherwise a complaint could be made that the decision has not been properly implemented.

Mr Jakobi: Yes.

Q223 Chairman: One cannot just let the thing bundle on.

Mr Jakobi: No. That is absolutely right. There are different ways of belling the grass roots cat. We have been suggesting them. What is important is that there is an effective mechanism that essentially is independent of the state prosecution system that sorts this out.

Ms de Mas: There is an important point here which is that the Commission is going to be looking at monitoring in the very near future and how it is going to deal with it. They are going to look at various different ways of evaluating it, as Roger says.

Q224 Chairman: In conjunction with this proposal or separately?

Ms de Mas: Separately. In fact, the person who is running it is the same person who drew up the green paper. That is why I would say that it must be encouraged in this paper, in the Framework

Decision, so that it goes through different measures here in order to carry on the work. Monitoring at national level will not improve things unless there is some sort of EU input. In answer to your question what powers do lawyers have, in some countries lawyers are told by judges not to disrupt the court. In other words they do not have much of a role in court because they disrupt the proceedings.

Q225 Chairman: They are told by judges not to disrupt the proceedings?

Ms de Mas: We have heard of two cases.

Q226 Chairman: Every judge has from time to time told counsel not to disrupt the proceedings.

Mr Jakobi: Inappropriately, Chairman.

Q227 Chairman: That is enough!

Ms de Mas: The lawyers were given no role at all.

Mr Jakobi: You are not allowed to “disrupt” the proceedings by conducting an effective defence.

Ms de Mas: What we really have to aim for is a multiplicity of evaluators and some form of reporting back at Commission level with then some form of enforcement back down to national level because if it is left at national level nothing will change.

Q228 Lord Thomson of Monifieth: Will it not be absolutely essential, as you have said, that the monitoring is done independently at the European Union level?

Ms de Mas: Yes, absolutely.

Q229 Lord Thomson of Monifieth: And there are precedents to say that we are all part of things like the OECD which has been monitoring our national performances vigorously.

Ms de Mas: And EUROMOS is working closely with the OSCE, because of course they have been monitoring trials for years, and the idea would be that there would be national units of Euromos made up of practitioners from the court clerk, interpreters and lawyers, reporting back to The Hague, which then reports to a central body in the Commission. How that is going to work is going to be looked at over the next months or years.

Q230 Chairman: Has a proposal of this sort been put in writing?

Ms de Mas: No. It is at the discussion stage now and it is going to be discussed with the Commission at the December meeting.

Q231 Chairman: That is very interesting; thank you. Does anybody want to raise anything else?

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Mr Smith: Can I very quickly put two points that I was hoping you would ask me about which are of concern to us? Articles 3 and 5 deal with the right to free legal advice but they use different words. There is no use of the magic “interests of justice” test and the wording in Article 5 about having insufficient income or capital to meet the cost is different from the European Convention which uses the phrase “has insufficient means to pay for legal assistance”. Article 5(1) says, “would cause undue financial hardship” and it seems to me difficult to justify using different language than that in the Convention. That is an inconsistency to which I draw your attention. I will not go into it in detail but Article 3 does not repeat the Convention either. The other point that concerns us in the preamble is that there is reference to these provisions not applying in cases relating to terrorism and serious

crime. That seems to be something that one would need to consider as appropriate, particularly because any case involving the European arrest warrant is likely to relate to serious crime.

Q232 Chairman: Thank you very much. Mr Jakobi, I must apologise because I had been told that you needed to be away by six and in my interest in what you were saying I have let the time slip my attention. I hope it is not going to be of great inconvenience to you.

Mr Jakobi: It is fine.

Chairman: May I on behalf of the committee thank you all very much indeed for giving us such an interesting and thought-provoking session. I am very grateful for your assistance which will be of value to us in considering what we want to say when we write our Report on this important proposal.

WEDNESDAY 3 NOVEMBER 2004

Present	Borrie, L Clinton-Davis, L Henley, L Mayhew of Twysden, L	Neill of Bladen, L Scott of Foscote, L (Chairman) Thomson of Monifieth, L Hope of Craighead, L
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Examination of Witnesses

MR RICHARD BRADLEY, Head of Judicial Cooperation Unit, MR RODERICK MACAULEY, Head of Criminal Law and Domestic and International Law, and MR KEVAN NORRIS, Assistant Legal Adviser, European Law, Home Office, examined.

Q233 Chairman: We had been expecting the Minister, Caroline Flint, to come and help us with our inquiries this evening, but she has been unavoidably required to attend in the House of Commons to deal with some responsibilities that she has there. We are fortunate that three officials from her Department, Richard Bradley, who is the Head of the Judicial Cooperation Unit, Roderick Macauley, Head of Criminal Law and Domestic and International Law, and Kevan Norris, Assistant Legal Adviser, European Law, have been thrown in the deep end to come in her place, and we are very grateful to you indeed for stepping into the breach so promptly. We are sure that you will be able to tell us everything that she would have told us, and perhaps you will be able to tell us some things which she might not have told us. What I propose to do is to address the questions to you as a panel, and it does not matter who answers, and it does not matter if one answers and then another supplements. I think it is convenient to leave that entirely to you. I do not know whether you have any preliminary remarks that you would like to make, or that the Minister would have made and you now wish to make. If you have not, I will ask you questions.

Mr Bradley: We did envisage that we would make a preliminary statement just to indicate the Government's position on the Framework Decision. It may be helpful. The Government is broadly supportive of the draft Framework Decision, as we believe it sets out appropriate minimum standards for the protection of important rights for individuals in criminal proceedings in the European Union. We believe that will help to promote the aim of enhanced mutual trust and confidence in that national judicial systems of the European Union, and this is necessary for aiding effective judicial cooperation founded on the principle of mutual recognition. We also think that these minimum standards will help to ensure that European Union citizens—and that, of course, includes our citizens—will receive an adequate standard of treatment during criminal proceedings within the European Union. Of course, although the Government is broadly supportive, that support is

dependent on certain conditions, and we are seeking to achieve certain modifications in the text of the Framework Decision in the course of the negotiations. But broadly speaking, we are content with the scope of the Framework Decision and, provided that we can achieve the necessary clarification of the terms of the instrument, the Government would wish to support its adoption in due course.

Q234 Chairman: Picking up your point about minimum standards, I think it is probably common ground that observance of ECHR standards in relation to criminal trials is uneven across the European Union. All states are, of course, signatories to the ECHR, but there are a number of Strasbourg decisions indicating breaches by member states on what one might think is an unacceptably large number of occasions so far as some member states are concerned. The minimum standards, would you accept, ought to at least bring each member state up to a point of more consistent observance of ECHR requirements? Do you think these proposals are adequate to do that, or should there really be something more, albeit at this first stage, to bring about a real improvement in ECHR observance?

Mr Bradley: The Government's view is that it is very helpful to set some minimum standards to ensure the acceptable treatment of citizens throughout European Union countries and to make sure that there are no unacceptable discrepancies in applying the European Convention on Human Rights, and of course, the Government is aware of cases where it is alleged that UK citizens have not received acceptable treatment in criminal proceedings in other member states. It is necessary that there is sufficient trust and confidence between member states to achieve effective judicial cooperation. I think it is clear that the Framework Decision addresses some core issues which would help to ensure greater visibility of existing rights under the ECHR and to make sure that those rights are applied in a more consistent way across the European Union, and we do believe that the basic content of the Framework Decision is right,

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that the areas of procedural law which it covers are those which are necessary as a first stage in setting minimum standards.

Q235 Chairman: What is your assessment of the extent to which there is political will by member states to agree some form of adequate minimum standards as proposed?

Mr Bradley: So far there has been broad support from the other member states for the Framework Decision, with some reservations. On this question, I would like to invite my colleague Rod Macauley to comment, as he has been taking part in the negotiations.

Mr Macauley: We have had only two meetings on this Framework Decision at working group level. The first of those meetings was largely concerned with the question of legal base. Broadly speaking, most member states believed that there was a solid, firm legal base for the Framework Decision. There were one or two states that disagreed with that position, of course. In the second meeting we turned to the first proper reading through of the Framework Decision, and whilst in common with the United Kingdom member states had concerns about some of the detail of the provisions, generally speaking, there was broad support for the establishment of minimum standards as set out in the Framework Decision as a first step in the provision of full procedural rights.

Q236 Chairman: I think you have been sent a copy of a paper that Professor Hodgson of Warwick University prepared, examining the French system in the context of such fairly basic rights as access by persons arrested and accused of crime to lawyers who would advise them before any serious questioning took place. She suggested that the French would be fairly adamantly opposed to a minimum standard which required access to be given to a lawyer before any serious questioning took place. Do you have a comment on that? I think you did see the paper I am referring to, did you not?

Mr Macauley: I do not in fact think I have seen that paper. I do not know whether Mr Bradley or Mr Norris have.

Q237 Chairman: I think copies were supplied. If you have not seen it, may I very quickly summarise her points. She said that France was very suspicious of their essentially inquisitorial criminal procedure being varied so as to move it towards the adversarial Anglo-Saxon procedure, which they regard as less likely to achieve justice than their own, one of the features of which they regard as the ability to question and get the truth from witnesses before the witnesses' lawyers are involved and able to advise the witnesses in such a way as, in their view, to possibly defeat the ends of justice. That they characterise as an

adversarial procedure which is not consistent with their own procedures, which they regard as preferable. That suggests to me, if that is an accurate view of their procedure and their views, that they would not sign up to anything which required as one of the minimum standards access by an accused to a lawyer before any serious questioning took place.

Mr Macauley: I have not read the paper and I cannot pretend to be an expert on French procedural law. I can say that during the course of the negotiations so far the French have supported the United Kingdom when we have suggested that there will need to be some amendment to the text in order to allow the flexibility that we would require in order to ensure compatibility of the Framework Decision with our domestic legislation. I am thinking of the Police and Criminal Evidence Act, the codes of practice, Code C and Annex B thereto. The French have indicated to me in the margins that they also would require some amendment to the Framework Decision in order to allow for the flexibility they require, but beyond that I cannot give any further information.

Q238 Chairman: What would Her Majesty's Government's view be if the flexibility that the French said they required were to be the removal of the right of the arrested/suspected person, whichever adjective is apt, to have a lawyer available before he was questioned?

Mr Bradley: We think that the right to legal advice during criminal investigations and proceedings is a very important one, and that it should form part of the Framework Decision.

Q239 Chairman: I think one is speaking of investigations. Proceedings, I imagine there is no problem about. We are speaking of investigations, the right to legal advice in the course of what is still an investigation.

Mr Bradley: In that case, as Mr Macauley said just now, we would be looking to achieve some compatibility with the provisions in the Police and Criminal Evidence Act and the codes of practice and generally speaking, that means that there will be a right of access to legal advice during the course of police questioning. But, of course, there are some circumstances in which that right of access can be delayed, for example, where giving immediate access to a legal adviser might lead to a person suffering physical harm or damage or alerting another person who may need to be arrested. So we do have some concerns about the issue of access to legal advice and we will need to ensure compatibility with our own legal framework in that respect.

Q240 Lord Hope of Craighead: You are, of course, talking about the United Kingdom, which has two or three separate jurisdictions, and the Scottish legal

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system, of course, is distinct and devolved. One of the points which the Law Society of Scotland made in their paper commenting on the decision is that Article 2 of the Framework Decision would actually improve the position in Scotland for the very reason that you have been mentioning. At the moment, interviews before a certain stage in the process is reached are conducted by the police and it is at the discretion of the police that a solicitor attends. There is no obligation to summon a solicitor at that stage. This is page 4 of the Law Society's paper. With that background, I wanted really to ask two questions: is it your position as a team that you are gathering ideas from the entire United Kingdom, and particularly taking soundings from the system north of the border, and secondly, in those parts of this Framework Decision, some of which we might come back to later, which appear to improve the standards, that is acceptable on both sides of our border, quite apart from the position in the wider community?

Mr Bradley: We have certainly been consulting the Scottish Executive and also the Crown Office on the Framework Decision, and we have been taking account of their views on the Framework Decision. They are carrying out their own examination of the text and their own consultations on its impact on their legal system, and that includes, of course, the point that you mentioned, the fact that they do not currently provide access to legal advice immediately after arrest but only after six hours. We are awaiting the results of their consultations and discussions to revisit the question of how we should factor the Scottish concerns into our negotiating position.

Q241 Lord Hope of Craighead: Is the aim to end up with a uniform negotiating position?

Mr Bradley: Yes. There is a uniform negotiating position, which takes account of the Scottish views, and we have to negotiate on behalf of Scotland, of course, as well as on behalf of England and Wales.

Q242 Chairman: Whatever the number of hours may be that are allowed in a particular case to elapse before access to a lawyer becomes compulsory under the minimum standards, may I take it that the Government will insist on the minimum standards including the right to a lawyer to be present during questioning?

Mr Bradley: Yes.

Q243 Lord Borrie: May I just ask how that can be reconciled with what seems to me to be an undue flexibility in Article 2, where the phrase is "as soon as possible"? The worry for me is that different people in different legal systems may interpret that very differently according to their customs and traditions. "As soon as possible" is so imprecise that it does not,

to my mind, provide a very useful minimum standard. Could I ask for your comment?

Mr Macauley: Yes. This issue has been raised during the negotiations to date. We agree that the phrase "as soon as possible" is somewhat vague. The Commission, who are grappling with a situation where they are seeking to find a text which is compatible with 25 different legal systems, are seeking to use language which is flexible enough to allow for some divergence, but we agree that this language is vague. We have not finalised our negotiating position on this but we are considering the possibility of introducing a fixed time limit in addition to the phrase "as soon as possible." I really cannot give any more detail on that at the moment.

Q244 Chairman: What time limit do you have in mind?

Mr Macauley: As I say, we have not finalised the position.

Q245 Chairman: What is the thinking?

Mr Macauley: The thinking is something along the lines of eight hours.

Chairman: That would be two more than in Scotland.

Q246 Lord Hope of Craighead: The Scottish system evolved after a very careful review of what was practicable in various police stations up and down the country and, as far as I know, it works reasonably well as a time limit, and one of the purposes of my questions earlier was to see whether we would try to achieve something that was acceptable right across the country. I hope that account will be taken of the experience in Scotland with the six-hour time limit.

Mr Macauley: Indeed. Consideration will be taken of the Scottish experience and, of course, the interpretation of these rights at the European Court of Human Rights. As I said, negotiations are at an early stage, and really what I have given you is the provisional thinking about this. We have not yet submitted any textual amendments along these lines. We are at the moment working on our position.

Q247 Chairman: May I come on to the question of vires? There have been some doubts raised as to the competence of the Union to legislate in this area, otherwise than in connection with cross-border crime. I think it is accepted that in relation to cross-border crime there would be competence, but the proposals at the moment are not limited to cross-border crime and would apply across the board. Of course, if the proposals came in in relation to cross-border crime, it would be open to each member state to extend the proposals to internal crime if it was thought fit to do that, but at the moment, the proposal is not limited to cross-border crime but applies across the board, and that is where the

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questions of competence are relevant. What is the Government's view on that?

Mr Bradley: I am going to comment briefly and then hand over to my colleague. Like most of the member states, we believe that the vires are sufficient for this measure and I will ask Mr Norris to expand on that.

Mr Norris: I think sometimes there is some confusion about what we mean by cross-border crime. If it means a case where you are involving a defendant from another member state or crime is committed in two member states, a proposal which was limited to those cases would not be sufficient to enhance mutual trust or mutual recognition for other judicial cooperation purposes because mutual recognition and judicial cooperation generally is not restricted to such cross-border crime. For example, if I was guilty of an offence and then went off to France, I could be subject to a European arrest warrant which brought me back to this country, even though the case until that point had been a purely internal one. So given the scope of mutual recognition and judicial cooperation generally, I do not think there is any necessity to restrict this mutual trust enhancing measure just to the cross-border case. In fact, it would leave a lot of mutual recognition cases without the benefits of these provisions.

Q248 Chairman: If the vires is being hinged on mutual recognition, which is expected between member states so far as judicial decisions in the member states are concerned, that would apparently allow the European Commission to legislate as it liked in harmonising criminal law and criminal procedure by the same token, and that I understand is something that the Government has always staunchly denied.

Mr Norris: On the limit on the legal base, first, it reads back to the scope of mutual recognition and judicial cooperation although, as I say this is not limited to cross-border crime in the sense of defendants from different member states.

Q249 Chairman: What do you mean by the scope of it? We have to recognise one another's judgments and convictions and so forth, human rights objections apart. That is all it means, is it not?

Mr Norris: It is, but given that mutual recognition can apply to cases which could be regarded as purely internal cases, for example, the example I gave where I commit a crime here and then go abroad, and would be then subject to an European arrest warrant which had to be mutually recognised, the vires will extend, as it says in Article 31(1)(c), to ensuring compatibility in rules applicable in member states as may be necessary to improve such cooperation, ie judicial cooperation generally and mutual recognition in particular.

Q250 Chairman: Can I press you? Forgive me for interrupting. It sounds to me as if the point that the Government is taking is that the vires is there for the European Union institutions because there is mutual recognition between member states of the judicial decisions of one another—am I right?

Mr Norris: Yes.

Q251 Chairman: If that is sufficient to give competence to legislate in the field of criminal procedure, how do you draw a line? How can the Government then say, as it does say very adamantly, that there is no competence to harmonise criminal procedure and criminal law across the Union?

Mr Norris: The European Union legislator can only do what is necessary to improve mutual recognition, so you have to look at those areas of the criminal procedure law which need to have certain minimum standards in order that the different member states are prepared to recognise each other's decisions without looking behind those decisions, so I think that is the restraint.

Q252 Chairman: The Government knows what is meant by the expression "creeping competence"?

Mr Norris: We do, yes.

Q253 Chairman: Is this not going to be an example of that?

Mr Norris: It is something which will need to be carefully studied. There is not a treaty base to legislate for criminal procedure per se, so the test is very much whether it is necessary to improve judicial cooperation. That is the restraint.

Q254 Chairman: Why is the proposal not simply limited to genuine cross-border cases, leaving member states to make up their own minds as to what they want to do apart from that?

Mr Norris: Because in that case we would have a system where, in what could be described as a purely internal case, where I commit the crime in the UK and move to France, the mutual recognition of the European arrest warrants sent from the UK to France would be subject to a different regime than the mutual recognition arrest warrant if I happen to have been a French citizen who had committed the same offence in the UK. The climate that the proposal is intended to create is a climate where member states do not look behind each other's judicial decisions, and that applies to any judicial decision which can be subject to mutual recognition.

Q255 Chairman: The Government signed up the European extradition arrangements under the present situation, satisfied that mutual recognition was a justification for doing that.

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Mr Bradley: The European arrest warrant, of course, was a very important security measure that was put in place as part of the package of measures that were taken to respond to the 9/11 attacks.

Q256 Chairman: Forgive me for interrupting. The list of offences which were able to be dealt with under the European arrest warrant was only minimally concerned with terrorism crimes. It was a whole range of crimes, the vast majority of which had nothing whatever to do with terrorism.

Mr Bradley: Yes. I was going on to say that in taking that decision, it was clear that member states were satisfied that, since all member states were party to the European Convention on Human Rights, the basic protections which were necessary across this whole range of criminal offences would exist, and that was supplemented by provisions in the Framework Decision on the European arrest warrant requiring legal advice and interpretation to be provided to persons subject to the European arrest warrant in accordance with national law. Furthermore, the measure was taken within the framework of Article 6 of the treaty, which means that it has to be compliant with human rights obligations, and the UK in its own implementation of the European arrest warrant has allowed for the possibility that an arrest warrant could be refused where executing it would be incompatible with human rights law. So in these various ways the basic protections of human rights law have been satisfied but what is now being done is to go a step further through the Framework Decision on procedural safeguards to underpin and clarify the existing rights under the ECHR and to enhance the competence which needs to exist in order to facilitate full application of the principle of mutual recognition and make it less likely that any safeguards for human rights might need to be invoked in particular cases.

Q257 Chairman: Do you have a copy of the proposed framework decision before you? In the context of what you are saying, I wonder if I could invite you to look at paragraph 8 of the preamble, which says that the proposed provisions “are not intended to affect specific measures in force in national legislation in the context of the fight against certain serious and complex forms of crime, in particular terrorism.” So there are going to be a raft of exceptions, a large number of which will be those specified in the European arrest warrant legislation.

Mr Bradley: This is one of the areas where we believe that the Framework Decision needs to be clarified. We do not think it is satisfactory to deal with this issue of the application of the Framework Decision to terrorism simply through a reference in the preamble, so we are considering whether it would be necessary to make clear within the text of the

operative provisions of the Framework Decision how it would apply to cases involving particularly terrorism.

Q258 Chairman: Is it proposed that there will be a list of what could be described as “certain serious and complex forms of crime, in particular terrorism” to which the provisions of the Framework Decision will not apply? Is that what is going to be done?

Mr Bradley: I cannot answer that question at the present time because I believe that is an issue that is going to be discussed with our Minister. As I mentioned just now, it is clear that the Framework Decision needs to be clarified in this respect.

Q259 Lord Neill of Bladen: It seems that Her Majesty’s Government is adopting as correct the legal basis advanced by the Commission in their explanatory note. If you have a look at paragraphs 49-51, section 7, Legal Basis, there in paragraph 50 is the treaty provision cited. That is set out, 31(1)(c), and there is a sentence, which is not quite grammatical because it does not have a main verb, but it seems to be saying that that provision does provide a satisfactory basis, provided compatibility can be achieved by approximation. It is an enormously broad basis, is it not, for saying there is jurisdictional power, vires, to deal with criminal law in general? It carries almost across the board. It is hard to think of anything to which that proposition would not apply.

Mr Norris: Yes. As I say, the restriction on the Community legislator is in terms of the test of necessity to improve mutual recognition, which in many ways subsumes the subsidiarity test. So whatever proposals there are in this document, they have to be shown to be necessary to improve mutual recognition, necessary to improve mutual recognition in the sense of creating a climate of mutual trust where member states are prepared to execute each other’s arrest warrants etc without looking behind those decisions. That is why, given that the member states are being asked to execute each other’s judicial decisions not only in cases concerning defendants from different member states but also in cases concerning a member state’s own nationals, this proposal will also apply to that type of criminal procedure.

Q260 Chairman: Thank you for helping us with this. Could I ask you to consider whether this approach does not involve a serious danger of this legislative initiative being treated as a precedent for what is commonly called “competence creep”?

Mr Norris: There is a danger, but I think the person who drafted the recitals, seems to have been aware of the restrictions because they repeatedly emphasise that this is based on the need to create sufficient

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mutual trust to create an environment in which mutual recognition can be improved and facilitated, so I think it is quite clear that the person who drafted the recitals is aware of the restrictions on the legal base that is being used to bring forward this proposal.

Q261 Chairman: You are quite right that mutual recognition has been used as the basis and justification not just for the European arrest warrant legislation but for other items of European Union legislation as well in the same fields. The proposed constitutional treaty expressly incorporates mutual recognition as a basis for European Union legislation, but that is not yet in force, and one view might be that this is slightly jumping the gun.

Mr Norris: I think the constitutional treaty does refer to mutual recognition whereas the existing treaty does not, but I do not think there has been any suggestion that the mutual recognition measures which have been brought forward under the existing treaty lack a legal base.

Q262 Chairman: It sounds to me as though you are saying that mutual recognition, even without the amendment in the treaty, is a sufficient base for legislation harmonising criminal procedure and criminal law.

Mr Norris: What I am saying is that the new constitution has made explicit what is already implicit in the existing treaty. So in the existing treaty there is no reference specifically to mutual recognition, but I think we accept that there is a legal base for mutual recognition. So the fact that the new constitution may make explicit what can be done under the existing treaty does not think casts doubt on the scope of the existing treaties.

Q263 Chairman: This is still an area, is it not, where unanimity by member states is necessary?

Mr Norris: Under the existing arrangements, yes.

Q264 Chairman: But that may change under the new constitutional treaty.

Mr Norris: Under the new constitutional treaty it would be a qualified majority.

Q265 Chairman: Is the Government content that the European Union under the new constitutional treaty should have competence in this area by virtue of the mutual recognition base?

Mr Norris: There is a safeguard in that legal base, normally referred to as the “emergency brake”, which allows member states to effectively block a proposal if they consider it affects a fundamental aspect of their criminal judicial system.

Q266 Chairman: Subject to that, there would be competence?

Mr Norris: Yes, and I think on the basis of that safeguard the Government was prepared to go in that direction.

Q267 Chairman: Can I move on to something else now? Some of the evidence which we have received has given examples of the need to have confidence in the fairness of foreign criminal laws and procedures. Does the Government take the view that the proposals that we are now considering will play a significant part in increasing that confidence, or are there going to need to be substantial amendments, additional rights, placed in this first stage before that desirable state of affairs is reached? What is the Government’s view about this?

Mr Bradley: There has been a generally positive reaction to the Framework Decision from governments, and from NGOs, experts and academics, and we hope that the improved clarity in individual rights in the European Union will help to improve public perceptions about the standards of justice across the EU as a whole.

Q268 Lord Hope of Craighead: I wonder if I can pick up a point which reflects back on evidence we heard two weeks ago. Some surprise was expressed at the rather tentative way in which the Framework Decision had gone about things, because it was suggested a much more fundamental approach was needed to ensure the protection of suspects, particularly at police stations, and so on. Am I right in understanding, particularly from paragraph 10 of the preamble, that the areas we are looking at in this Framework Decision have been especially chosen because they are the ones which are the most likely to relate to issues of confidence between the various jurisdictions in the European Union? If I am right about that, is it anticipated that there are other areas which should be the subject of attention in later decisions or is this likely to be the stopping point because these are such obvious international things such as translation and access to consular facilities and so on?

Mr Bradley: Yes, I think you are right in saying that these are the areas which the Commission considers are of particular importance to enhance public confidence in standards of justice across the European Union, and the reason for that is that they are the procedure issues which are particularly important in ensuring that a suspect or defendant understands the proceedings, understands his rights and the possibilities of consular assistance, legal advice and so on. This is particularly helpful in relation to investigations involving a foreign defendant, and when we bear in mind that there is increasing freedom of movement and exercise of rights of freedom of movement in the European Union and as a result also of enlargement of the

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European Union there are far more foreign nationals present in our member states than was previously the case, this selection of procedural issues does seem to be well adapted to address public concerns. You asked whether the Commission would be moving on to further proposals. They have indicated that they have in mind at least examining the possible need for further measures in areas such as admissibility of evidence, the means of obtaining evidence, the right of silence and so on, and we await the results of their examination, but at the present time we are not convinced that it will be necessary to adopt standards in those areas.

Q269 Lord Hope of Craighead: My question to some extent bears on the translation obligations in Articles 6, 7 and 8, because I think I can see the force of the requirement for interpretation and so on to be provided where one is dealing with the various member states within the Union but as expressed, without qualification, one might find that the jurisdictions in the UK were being required to provide translation facilities for people who have come here without coming through the EU at all and provide translation facilities in a wide variety of non-EU languages, and the whole burden of translation is a matter of some considerable concern and interest. Is it really anticipated that the reach of these Articles would be as wide as I am suggesting, that it is not just an EU problem that is being addressed here but a much wider worldwide one?

Mr Bradley: Under Article 6 there would be a right to interpretation which applies throughout criminal proceedings, and that has to be interpretation into a language which they can understand. That is already the case under Article 6 of the European Convention on Human Rights, so in that sense, the Framework Decision is not changing the basic safeguard that actually exists. I think it will probably be difficult to provide interpretation rights which would only be available for citizens of European Union countries or people who had travelled from other European Union countries. Just because of the practicalities of organising this, I think it would be necessary to provide it for any people who are subject to criminal investigation. To that extent, it will be necessary, as is the case at present, to provide interpretation in languages other than Community languages. This is not the case with the Letter of Rights which has to be handed to suspects under Article 14, and there has been some discussion in the working group about whether that Letter of Rights should be made available not only in official Community languages but also in other languages. This, of course, could be facilitated through the availability of the interpretation services which had to be provided anyway under Article 6 but we are considering whether it might be useful to clarify Article 14 to seek

to ensure that there is some mechanism whereby member states will be able to respond to requests to provide the Letter of Rights in languages other than Community languages.

Q270 Chairman: *Apropos* the rights which are included, a number of witnesses have drawn attention to the importance of the right to silence, not only for the person concerned, the suspected or arrested person should know that he has the right to silence but that it should be documented that that is so, so that the underlining is drawn to the attention of the investigating authorities. Is this not a right which it would be very important to include in these first stage rights?

Mr Bradley: We do not consider it necessary to include the right of silence because this right is already accepted by all member states, and it is underpinned by the case law of the ECHR, of course.

Q271 Chairman: That goes for other rights which this Framework Decision is dealing with. The ECHR rights are accepted by all member states, otherwise they would not be member states. That does not mean they are always observed, and they often are not.

Mr Bradley: But in this case we feel that the difference is that the other rights are ones which are particularly relevant for assisting foreign suspects and defendants.

Q272 Chairman: Why is the right of silence not equally relevant or more than the right that the consular authorities should know about it?

Mr Bradley: It seems to us that the right of silence is one of the core rights in criminal proceedings, and it is one of a number of rights which exist which are not particularly specific to the position of a foreign defendant.

Q273 Chairman: Is that because there would be resistance on the part of any of your negotiating partners to its inclusion in this first stage?

Mr Bradley: It has not yet been proposed so, as far as I know, it is not yet possible to know whether there would be resistance from any of our negotiating partners to this.

Q274 Chairman: Is it right that the Government's view is that it is not necessary that this important right should be included in the first stage?

Mr Bradley: Yes, that is our view, because if we were to add the right of silence, it would then be necessary to consider what other rights which are important in criminal proceedings, such as the right against self-incrimination or the burden of proof, should also be addressed at the same time. The Commission has said that they are examining those issues and studying the

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differences which may exist between legal systems of the member states before coming up with proposals, and we feel it is better to wait for this wider examination rather than to try and deal with the right to silence.

Q275 Chairman: But there are differences between the member states so far as the right to silence is concerned.

Mr Bradley: Although all member states accept the principle, there are some differences in regard to the possibility of drawing inferences from silence.

Q276 Chairman: That is for the trial. The admissibility of evidential inferences is for the criminal procedure of the country concerned but the right of the individual to say nothing is surely independent of that?

Mr Bradley: We are not sure at the moment whether it is possible to separate these two issues, because a statement to a person who is arrested that they have the right to silence which does not at the same time inform them that inferences might be drawn from that silence could be misleading, and of course, it is for that reason that the caution used by police in England and Wales does explain the consequences of maintaining silence.

Q277 Chairman: That is the reason why it is not included, because of the difficulty of the qualifications you have referred to being expressed in each member state?

Mr Bradley: It is a reason why the Government would have hesitation about seeing it included. We are not aware whether there is a reason why the Commission has not sought to include it. As I said before, the Commission is carrying out a wider study on a number of related issues, including self-incrimination and the burden of proof.

Q278 Chairman: So far as the Letter of Rights is concerned, there is going to be an enumeration of the rights which the Framework Decision requires to be made available and also an enumeration of important rights that the member state in question affords people in the position of the suspected or arrested person. Will that section, in this document, include the right to silence?

Mr Bradley: We have not yet started to consider what rights will be included in part B of the Letter of Rights.

Mr Macauley: There is nothing I can add at this stage. I am sorry.

Q279 Chairman: You do not have any view as to whether the right to silence might qualify to go there?

Mr Macauley: I would have to answer in the affirmative to that question at the moment.

Q280 Lord Neill of Bladen: Would you like to comment on the French position? Dr Hodgson tells us in her paper in paragraph 1.3 that the police in France are not required to tell the suspect of his or her right to silence, and she further notes that the French Government has rejected calls for tape-recorded interviews and for clearer guidance for police officers in the conduct of detention and interrogation of suspects. Is this thought to be a bit of a road block in the way of putting in anything about the right to silence in this document because the French do not agree to it?

Mr Bradley: I think it is possible, in view of what you have just informed us of, that there might be objections from France. I think it depends on the nature of the proposal that was put on the table. As I was trying to indicate just now, I think it is not totally straightforward to require that suspects are informed of the right of silence, because I think it is necessary at the same time to consider what will be the consequences of being silent and therefore, although we cannot pre-judge the reaction that France might make, certainly from our own point of view, we would have to look very carefully at any such proposal.

Q281 Chairman: There was reference made by Lord Neill to the electronic recording of police questioning. That happens in this country and I have heard it said that it has been the most important development for the purpose of reducing the number of miscarriages of justice that have sometimes taken place. Is that not an important right to include in the first stage? Would that not very substantially improve standards and enhance confidence on the part of the individuals being questioned in the fairness of the proceeding they might have to undergo?

Mr Bradley: I believe it is unlikely that there would be support from most of the member states for including the tape-recording of police interviews in this first stage proposal. This right could obviously be important but it would carry significant costs for those member states that do not carry out tape-recording at present. They might well ask why this particular English system, which does not apply in all cases throughout the United Kingdom, should be applied across the whole of the European Union, particularly in those member states where they have examining magistrates and therefore they have other ways in which they can control the reliability of evidence which is collected through police interviews.

Q282 Chairman: It is not suggested that the investigating magistrate is present during all police questioning, is it?

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Mr Bradley: The examining magistrate has the responsibility in most member states where there are examining magistrates to collect evidence by hearing the results of police inquiries, and in that hearing process the defendant is represented and has legal assistance normally. However, it is of course difficult to generalise across all member states because they have a number of varieties in their legal procedures.

Q283 Chairman: I follow that, and I follow the value of the representation, but the particular vice that electronic recording of questioning is directed to is the misrepresentation of what the accused person has said under police questioning where there are no witnesses to what has happened other than the policeman himself.

Mr Bradley: As I said, this has been found to be a very useful safeguard in England and Wales but I do not believe there would be support from other member states for adding it to the Framework Decision at the present time.

Q284 Chairman: I quite follow that there might not be support. That is not really a reason why the Government should not put it forward.

Mr Bradley: I do not think it would be helpful for the Government to put forward a proposal at this stage for this Framework Decision which is unlikely to be accepted.

Q285 Chairman: Can I ask you to expand on the Government's view as to the adequacy of the description in Article 1 of the proceedings to which these rights would apply as "criminal proceedings." The expression "criminal proceedings" in the European Convention is given an autonomous meaning. JUSTICE has suggested that the scope or the meaning of the expression "criminal proceedings" is insufficiently clear and has suggested that instead there might be a reference to proceedings "which are essentially criminal in nature and include extradition and surrender and appeal from these proceedings", something like that. Is it not necessary to be a bit more categorical as to what are the proceedings to which these provisions will apply?

Mr Macauley: The exact meaning of "criminal proceedings" has been raised in the working group. It is always difficult to agree a definition of criminal law matters for purposes of Third Pillar instruments. The clear intention of the Commission—and this is an intention that the Government would agree with—is that the provisions of the Framework Decision should apply to people who have been informed formally by the competent authorities of a member state that they are a suspect, that they are suspected of committing a criminal offence. In terms of the UK procedure, that would correspond to either an arrest for an offence or the receipt of a summons in respect

of an offence. We think that it would be very difficult to formulate a definition of criminal proceedings which would take account of all the differences, all the divergences, that may exist in the separate jurisdictions of the European Union. I think there is always going to be some slight friction between provisions of this kind and national provisions. I think the best we can hope to do is to make the Framework Decision as clear as possible as to the intention. As I have said, this is something that has been raised in the working group. We believe that there may be room for some further clarity but we agree with the basic intent, which is to have these provisions applying from the time when somebody is formally informed that they are subject to investigation.

Q286 Chairman: That comes on to Article 1(2), which says that the rights apply from the time when the person is informed by the competent authorities that he is suspected and so on. That would allow the competent authorities to postpone the application of the provisions by postponing the time of giving the information, which seems to me essentially undesirable, and moreover, would it not be desirable that these provisions should apply, for instance, to extradition and surrender proceedings?

Mr Macauley: We certainly think at the moment that they should apply to extradition, the European arrest warrant.

Q287 Chairman: That could be spelt out then.

Mr Macauley: As you know, there is reference to the European arrest warrant and extradition in Article 3. We have already noted that the Framework Decision will need some clarification in respect of these proceedings. There is a general desire, I think, that the Framework Decision does not cover very minor offending that might be described as "administrative" in some jurisdictions.

Q288 Chairman: Even if there is an arrest?

Mr Macauley: We would want to ensure, I think, that where someone is taken into custody and subject to a prolonged criminal investigation, the provisions of the Framework Decision cover those circumstances. This is a matter on which we have not finalised our position. What I am giving you now is our current thinking, but this is a matter that has been addressed already and I have no doubt at all that there will be further textual amendment to Article 1 in order to deal with these difficult issues.

Q289 Lord Hope of Craighead: Could I follow up on the Chairman's point about Article 1(2) with a very practical problem that has been the subject of judicial decision in Scotland and probably in England too. It relates to police questioning of somebody who is

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brought into the police station as a witness, and under police questioning it becomes clear from the course of answers to questions that this person in fact is suspected of the murder or rape or whatever serious crime it may be that is under investigation, and the whole tenor and purpose of the questioning changes. Under Scottish law at least it is not a matter of informing the person that he is a suspect; the police simply have to caution the witness at that point. It is not a matter of discretion; as soon as the person becomes a suspect because of the way the questioning is proceeding, there is an obligation on the police officer to give the individual a caution and he is then translated from the category of a witness to the category of a suspect, with very important legal consequences. If that is the position north of the border, that it is not a matter of choice at all for the competent authorities, and I think the Scots would be very disturbed if there were to be a weakening of that protection, which many cases have shown is absolutely crucial to a fair trial if a trial takes place.
Mr Macauley: I would agree. We would want to move towards language in Article 1 that was as clear as possible as to where the obligation to ensure that the rights set out in the Framework Decision began. As I say, we would need to be satisfied therefore that as much as possible of the language brings in such an obligation in terms that are not susceptible to abuse by jurisdictions that perhaps do not have at the moment very firm national law in this regard.

Q290 *Lord Mayhew of Twysden:* It is exactly the same position as Lord Hope has explained in English law, is it not?

Mr Macauley: Yes.

Mr Bradley: It is indeed, and I was going to add that under Article 17 there is nothing in the Framework Decision that limits or derogates from any of the rights and procedural safeguards that may be ensured under the laws of a member state and which provide a higher level of protection. So those protections which exist in English and Welsh law and also in Scotland will continue to exist and will not be reduced.

Q291 *Chairman:* But our citizens abroad would have a lower level of protection.

Mr Bradley: That is the problem.

Q292 *Chairman:* Is that a problem which the Government will address in the negotiations about the content of this proposal?

Mr Bradley: Yes. As my colleague said, we are looking to see whether we can clarify Article 1 and ensure that the protection will apply from the earliest possible stage when a person is suspected and not simply when the investigators choose to inform him that he is suspected.

Q293 *Lord Neill of Bladen:* Going back to the definition of Article 1(1), the scope of procedural rights and what are to be regarded as criminal proceedings, that definition will not do, in view of the provision in Article 3 about persons subject to the European arrest warrant, extradition arrest or other surrender procedure. The definition has gone wrong. You have to look at it and say what the procedures to which you want this to apply are. You have to redraft that.

Mr Bradley: Yes, we entirely agree with that. We think there is a problem of incoherence between Article 1(1) and Article 3, and we need to change the definition of “criminal proceedings” to make sure it does include extradition.

Q294 *Chairman:* So far as extradition is concerned, there is another problem, is there not? Let us suppose there is an application for the extradition of a citizen of this country. He is entitled to go in front of a court, a magistrate, with a lawyer, and take whatever points are available to be taken in trying to resist his extradition. Let us suppose he fails, and he is extradited. He will have told his story to the lawyer here, this being the requested country, but the requesting country to which he goes will then have to find a lawyer for him there, and the continuity of legal representation will be very difficult unless arrangements are in hand to connect up the lawyer in the country from which he has been taken to the lawyer in the country to which he is being taken. Is there anything that the Government has in mind to try and deal with this continuity problem in the context of the provisions of this proposal?

Mr Bradley: We consider that the responsibility for providing legal advice falls on the jurisdiction where the person is being held, and specifically, on that person’s legal adviser in that country. If that legal adviser believes it is necessary to make contact with the legal adviser in the country from which the extradited person came, then they should do so.

Q295 *Chairman:* It is an unattractive state of affairs. Here he is one moment with legal advice, the extradition proceedings take place, and from his point of view they are unsuccessful. He is then in custody and is taken across to wherever the country is that has requested his extradition, and there he is. What happens next from his point of view? Do we just wash our hands of him at that point and say it is up to that country, without trying to have down and documented some sort of rights with regard to legal representation that he can expect as soon as he arrives?

Mr Bradley: In this respect, there is no difference between what is proposed under the Framework Decision and what takes place at present under the existing extradition procedures. We do not have any

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ability to apply safeguards or require safeguards to be applied for the legal advice given to the person after he has been extradited. There are only quite limited safeguards; for example, to ensure that the death penalty cannot be imposed upon that person.

Q296 Chairman: Sure, but this is intended to set minimum standards. Should not the minimum standards include some assurance that he will get competent legal advice, or legal advice from a qualified person at least—one hopes it would be competent—within a short time of his arrival at his destination?

Mr Bradley: Yes, and we believe that the Framework Decision is a step forward because it will ensure that there is effective legal advice provided from the time when the person arrives in the country to which he has been extradited. But, as I said before, we feel that the responsibility for ensuring continuity of legal advice lies on the legal advisers in the country that has requested extradition, and I would like to add that it seems to us that the legal issues on which the person has to be advised in the requesting country are different from those on which he has to be advised in the requested country.

Q297 Chairman: I agree with that, but whether it is the trigger as at present drafted in 1(2) or whether it is a substitute trigger under an amendment to the drafting will already have happened in the case of an extradited person. He will have been arrested, he will know he is suspected, he will know he is going to the other country to face a trial—because I think it is accepted that extradition for the purposes of questioning is not permissible; it has to be extradition for the purposes of a criminal prosecution. That will be the state of affairs while he travels from this country to his destination, and in his case it will be necessary that he gets immediate legal advice. Is it not necessary to put something of that sort into these minimum provisions?

Mr Bradley: Article 2 sets out that legal advice should be available as soon as possible, and throughout the criminal proceedings, so we do feel this is already sufficiently clear.

Q298 Chairman: Fair Trials Abroad have argued in relation to Article 4, which says that member states should ensure that only lawyers with appropriate qualifications are entitled to give legal advice, that the immediate implementation of this would undermine whatever legal advice provision already exists in some accession countries, and that compliance will take some time. This is a problem, is it not? There will have to be a lead-in period. One does not want to render unlawful the arrangements, such as they are—they may be inadequate but better than nothing—that are in place in these countries at the moment?

Mr Bradley: Yes, we would agree that there is a problem here. It may be just a transitional issue and that greater time is needed in order to implement the requirements, or it may be that in fact greater flexibility is needed and there is a problem in requiring only lawyers to be used who meet the terms of Directive 98/5 EC. We are studying that problem at the moment because we are aware that in some member states legal advisers may not be legally qualified within the terms of that Directive.

Q299 Chairman: The expression “legal advice”, it has been suggested, is too narrow. “Legal advice” within the spirit of the proposed Framework Decision would include, I think, legal representation and legal assistance. Legal advice alone could be construed in too limited a way. Would it not be desirable to expand that and expressly refer to “legal advice, representation and assistance”?

Mr Bradley: We would agree with that. It would be helpful to make this clearer in the main body of the text.

Q300 Chairman: Going back to Article 4(2), the drafting of that needs attention perhaps. “Member states should ensure that a mechanism exists to provide a replacement lawyer if the legal advice given is found not to be effective.” I think I see what they mean but it needs to be redrafted, does it not, so as to indicate with more particularity the circumstances in which the obligation to provide a replacement lawyer will arise? Otherwise, there will be all sorts of problems arising when at the end of the case, the person says, “You are breaching my rights because my legal advice was useless and you did not provide a replacement.”

Mr Macauley: We would agree that the drafting of 4(2) is not perhaps as clear as it might be.

Q301 Chairman: What do you think it has in mind? What does the Government think it is aiming at? What is the intention there?

Mr Macauley: I think it is obviously aimed at seeking to ensure that, whoever provides the legal advice, it is of a competent standard. Of course, whether legal advice achieves a standard that is deemed to be competent is not always very easy to monitor. It may be that it is sufficient to simply have a mechanism by which, for example, as exists in England and Wales and in the United Kingdom generally, a client can decide that their lawyer is not up to the required standard and dismiss him, and require another lawyer. It is not clear at this stage whether this is a reference to some sort of objective standard or not, and this is something that we are seeking to clarify in negotiations.

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Q302 Chairman: It may be aimed at a number of different things. It may be aimed, for example, at ensuring that whatever advice is being given by the person who is giving it is able to be understood by the person it is being given to, and that may be a language interpretation problem. Legal advice is not effective if the person who is getting it does not know what the advice means because he cannot understand what the man is saying. Those sorts of points can be cleared up, but at the moment it would be useless in doing anything that needed doing in practical terms as it would suggest that you might be expected to do things which are really impracticable.

Mr Macauley: Yes, I think the text as it exists at the moment reflects a desire to include something that will require . . .

Q303 Chairman: The first essential is to decide what it is actually intended to achieve and that is what I am not sure is apparent from the present text. Then you can start drafting in order to do that.

Mr Macauley: As I said, this is something that we are seeking to clarify in negotiations at the moment.

Q304 Lord Hope of Craighead: I just wondered whether it was part of the thinking that this would provide a ground of appeal in the event of a conviction. You can probably identify the flaws in the legal advice at that stage, perhaps when a witness has not been properly interviewed or called, but if that is the aim of it, one needs to be very sure what the consequences are going to be of putting a provision of this kind in. Does it, for example, undercut the movement which is taking place for a public defender system? In some areas of Scotland there is a trial process under way where you are simply allocated to a public defender and you cannot choose your lawyer. If it is that kind of system one is having to contemplate and possibly undercut, we would need to be aware of the consequences for our experience with that idea.

Mr Macauley: All I can say at this stage is that these are all very apposite questions, and they are questions that we are seeking to gain answers to ourselves during the process of the negotiation. We would agree that the text, if there is to be some text that covers this issue, whatever it might be once it is clarified, will need to be much improved.

Q305 Chairman: You certainly cannot begin to improve it until you know what you are trying to achieve.

Mr Macauley: No.

Q306 Chairman: Can I ask you about Article 10 and 11, specific attention. We have been puzzling over what “specific attention” actually means. What does the obligation require in practice? You have to give

specific attention in order to safeguard the fairness of the proceedings, for example. For example what?

Mr Bradley: In England and Wales, for example, “specific attention” is provided to vulnerable persons, as set out in the Police and Criminal Evidence Act, Code C.

Q307 Chairman: To do what?

Mr Bradley: To assist them in the investigation, in the interviewing process, and particularly to ensure that they are not put in a situation where undue pressure is exerted or which results in undue pressure being put upon them.

Q308 Chairman: Do you not need to spell that out, so that it will be apparent to everybody (a) member states signing up to this and (b) the members of the police forces who may have to give effect to this what is required?

Mr Bradley: We would agree with that. The Article as it is drafted at present is not very clear and it does need to be spelt out in more detail what kind of attention is needed. Article 11, of course, has to be looked at in connection with Article 10, which refers to some specific requirements, making audio or video recording, providing a transcript, medical assistance and the right to have a third person present during the questioning, so we have to read these two Articles together. Nevertheless, it is not clear precisely what the relationship between the two Articles is and whether in fact Article 11 is exhaustive in listing the types of specific attention which are needed.

Q309 Lord Borrie: Earlier on one of you said something to the effect that certain other states, especially if they had examining magistrates system, would not wear audio or visual recording practices, and yet in relation to Articles 10 and 11, people are entitled to specific attention. There is a requirement in Article 11. Is it your impression that at least for some people, what I might call vulnerable people, various other states who are not generally keen on electronic recording would allow it, and if the answer to that is yes, and the Commission seem to think it is yes, what is the difference? Why should it be impossible to get other states to agree to that generally, and for this right, which to my mind has in my experience in England at any rate been so useful generally, be restricted to those who, because of age, mental or other emotional conditions are entitled to specific attention in the wording of Article 10?

Mr Bradley: I made the statement that you referred to earlier on but I will have to ask my colleague, Mr Macauley, to comment on whether there has been so far any reaction from other member states in the negotiations to the specific provisions in Article 11 on audio or video recording, because I am not aware of what reaction has so far occurred.

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Mr Macauley: I have to say that most, if not all of the discussion about the implementation of Article 11 and the obligation to ensure audio and video recording is made has focused on the resource implications, certainly for some of the new member states. The way that this may relate to member states that have examining magistrates systems and what their attitude towards this because of that has not been touched on at all. I cannot give you any information apart from the answer to the question on that today.

Mr Bradley: Following on from that, I think it is clear that there is concern about the resource implications of these requirements, and that tends to consolidate my view that if this has been perceived as a problem in providing the recording facilities for a small group of suspects who need specific attention, then it would be a larger problem if it had to be applied across the board.

Q310 Lord Mayhew of Twysden: I am interested to know what instructions the Government has given to its negotiators in this regard. The object of the Directive we know is to stimulate and enhance mutual confidence in procedures. In this country we have now substantial provision for audio and visual recording of interviews. It would surely enhance—it goes without saying—the confidence of our own citizens if it were a standard provision throughout the Union. We went into this with Mme Vernimmen, the Head of the Criminal Justice Unit of the Directorate-General. The Chairman said “Shouldn’t audiovisual requirement apply to everybody?” She replied, “That would be an ideal world. I think that would be certainly an added value but from the consultation we have received it would be costly and difficult to organise also in terms of installation.” Have we pressed as a government for this or have we simply been content with the limited provision that we are talking about at the moment?

Mr Bradley: We have not pressed for it. The reason for that is that we think this is a useful step forward in setting minimum standards for the first time. It may not be the last such measure to be taken. It may be possible to develop it further in future. But to date, we do not have clear evidence on whether the lack of tape-recording in police stations in other member states is one of the issues which particularly concerns our citizens. The evidence about problems that our citizens have encountered in other member states when subject to police investigations and court proceedings is actually rather anecdotal, but the problems which seem to take the highest profile are the lack of understanding of their legal rights, the lack of competent and effective legal advice and problems with interpretation, of understanding what is going on. We have not heard so much in this rather anecdotal evidence about problems of so-called

verballing of suspects by the police, which used to be a problem in the UK before tape-recording was introduced.

Q311 Lord Hope of Craighead: I wonder whether you could have a look at Article 9, the last sentence, and compare it with the last sentence of Article 11(1). Article 9, as you will see, calls on member states to ensure that where proceedings are conducted through an interpreter, then an audio or video recording is made, but it is in order to ensure quality control—I presume that is the accuracy of the translation—and then we are told that the transcript will only be used for the purposes of verifying the accuracy of the translation. So it is not available for the kind of protection that we would expect to be able to use our recordings for. That raises the issue as to what is meant by the last sentence of Article 11(1), because here we have the recording system brought in again for people in need of specific attention, and then it is said that a transcript of the recording shall be provided to any party in the event of a dispute. That raises a question as to what kind of dispute is being talked about here. Is it a dispute as to what the poor person in need of specific attention was trying to say, or is it there really more in the interests of justice, to see that words are not put in the person’s mouth or what? It looks as though some closer attention is needed to try to reconcile these two provisions, and of course, I suspect that we would all want to see a strengthening of the way the audio system is used in the case where an interpreter is used. In most cases I would have thought where people are vulnerable when they are abroad, quite apart from when specific attention is needed, it is because they do not understand the language and are at risk of having words put in their mouth or of being misunderstood.

Mr Bradley: I note that the words “a transcript of the recording shall be provided to any party in the event of a dispute” occur in both of these provisions, but there is the additional sentence in Article 9 that the transcript may only be used for the purposes of verifying the accuracy of interpretation, so that limits what types of disputes might arise. I think we see Article 11(1) as aiming at ensuring that if there are any disputes about the quality of the interviewing process and the reliability of any evidence collected from the person in view of that person’s physical or mental condition, then it would be possible to check by means of the audio or video recording the reliability of that information, whether it is possible that the person, because of their state of mind, might not have given evidence that could be relied upon. That, of course, is different from Article 9, where, as you have said, the issue is about the quality of the interpretation.

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Q312 Lord Hope of Craighead: Would it be possible to spell that out more precisely in Article 11(1) so that we know what the scope of the disputes would be?

Mr Bradley: I am sure it would be possible to do that. It is hinted at in Article 11 but not made clear. It would probably be useful to make it rather clearer.

Q313 Chairman: Following on from the reference to the last sentence of Article 9, if there is a transcript which has been made of an audio or video recording, what is the possible justification for restricting its use in that way? Why should it not be used to assist if there is any dispute as to the fairness of the proceedings?

Mr Bradley: I understand there has been quite a lot of discussion about this in the working group, and that it is not only the UK that considers that these provisions might need to be spelt out rather more clearly than they are at present. I suppose there might be a difficulty in making it possible to use the recordings under Article 9 for the general purpose of checking the reliability of the evidence if that only took place in interviews where the proceedings were conducted through an interpreter, because there might then be a disparity of treatment between those interviewees and interviews which do not take place through an interpreter, and it would then be argued that there ought to be a wider provision.

Q314 Chairman: Of course, that argument might be raised. I think we have already covered the ground of the general desirability of electronic recording of questioning, but if there does happen to be a recording, it seems to be extraordinary that the use that can be made of it is limited in this way. Would the Government not agree with that?

Mr Bradley: As I said before, we think these provisions need to be clarified.

Q315 Chairman: Can I ask you one or two questions about the right to communicate, which is Articles 12 and 13, Article 12 particularly? This is the right of a suspected person to have his family, persons assimilated to his family and so on informed of his detention as soon as possible. Why is the expression “remanded in custody” included there? “Remanded in custody” in an English context means that the person has been remanded by some judicial authority to remain in custody for the time being. That can be well after the detention began. If a person is in detention overnight his family need to know.

Mr Macauley: Indeed. The use of the word “remanded” in Article 12 is a mistake and it will be rectified.

Q316 Chairman: The other communication point that I was going to ask you about is whether the right to communicate should not include a right of access

to a doctor, and a doctor of the choice of the person concerned. An individual may or may not have a doctor that he knows about who he wants to come and inspect his black eye, but if he does, why should he not have the right to communicate with his doctor?

Mr Bradley: It is clear that the right to medical assistance is a very important one for a person in police custody but it is one of a number of very important rights, such as the right to food, wholesome living conditions, possibly exercise and not to be held incommunicado and so on. Some of these rights are addressed in the Framework Decision, but if we were to try to address all of the rights that are important for people held in police custody, it would be a much larger measure.

Q317 Chairman: We are talking about enhancing the confidence that citizens of one country are going to have in the authorities of another country where they are being held either because they were extradited or because they were there and had been arrested there. One of the fears I think people might have is that they might be asked questions they might not want to answer, and they might be beaten up. That may or may not be justified in relation to a particular country, but I am sure that is one of the fears that people might have. They ought to have access, surely, to a doctor if they think it is necessary to investigate their condition. Is that not a fundamental right?

Mr Bradley: I cannot possibly disagree with what you are saying. The only question at issue is whether it needs to be included in this particular Framework Decision, because if it were to be added, there might then be other proposals for adding further rights which are also considered to be fundamental and it might make the handling of the negotiation and therefore the achievement of something worthwhile within a reasonable period of time more difficult.

Q318 Chairman: That might be so if it were controversial but it is difficult to see how it could be controversial.

Mr Bradley: I think the element of controversy might arise from whether the medical adviser must be a person chosen by the suspect.

Q319 Chairman: Often the suspect would not be in a position to choose and would have to be put in touch with a doctor, but if he did happen to know a doctor in the locality, why not?

Mr Bradley: I think it would be possible to agree that as a basic minimum standard. What I was not sure about was whether all member states would be content with that or whether they would want to go further and to specify that the suspect must have the right to attention from a doctor of their own choice. I have no reason to believe that the Government has

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any objection to including a wider provision on medical assistance, supposing that this could be done without unduly delaying the whole negotiation.

Q320 Chairman: I think the suggestion need go no further than saying this is something the Government might bear in mind in the negotiations as an item which should be put forward.

Mr Bradley: I entirely agree.

Q321 Chairman: The Letter of Rights. You have already helped us with some of the aspects of the Letter of Rights that we have asked about, but the one additional matter is the time at which the Letter of Rights should be handed over. In Article 14 it says that the Letter of Rights has to be handed over when the person is arrested. It should be handed over, should it not, at the earliest possible opportunity and before any questioning takes place? That is the time element which seems important, so that before he starts being expected to answer questions, he knows the minimum rights that he is going to get under the arrangements in force in the country where he is being held.

Mr Bradley: Yes, we agree that this is a part of the text which is not as clear as it needs to be, and we hope it will be possible to achieve greater clarity, because it is important that a person who is arrested receives the Letter of Rights before any questioning takes place. That is what we will be seeking to achieve through clarifying the text.

Q322 Lord Borrie: I just draw attention to paragraph 80 of the explanatory memorandum, where the Commission says something which is much clearer than what is in the Article itself. They say, "The Commission proposes that the suspects be given a Letter of Rights as soon as possible after arrest." They say that in the explanatory memorandum but it is not at all clear from the Article itself. Would it not be better if something like that were in the Article itself?

Mr Bradley: We entirely agree with that, yes.

Q323 Chairman: The final matter we wanted you to help us with is the evaluation, the monitoring question. I think practically every single right that this proposal is going to draw attention to would be a right that the individual would anyway expect under the ECHR, with the possible exception of the information being given to his consular authority, which I am not sure would be reflected in any of the ECHR Articles but, broadly speaking, these rights are fair trial rights that would be applicable anyway, and the value of this is going to depend upon a proper monitoring arrangement being put in place in all

member states. Would the Government agree with that?

Mr Bradley: Yes, we do think it is important that there is effective implementation of this measure, just as many other measures that are agreed within the European Union. How that effective implementation is achieved is something that we are still considering. We are not totally convinced by the rather onerous data collection requirements under Article 16, and we have been considering whether some form of mutual evaluation process which could be built upon the existing mutual evaluation mechanisms which the European Union has in place would be a more effective way of carrying this out.

Q324 Chairman: Would there have to be some system of collecting and considering complaints made by individuals of alleged breaches of the rights that they are entitled to expect?

Mr Bradley: Yes, I think that is right, and in that respect, I think there are already in place some bodies that could receive such complaints. One of them is the Network of Independent Experts in Fundamental Rights, and there are other possibilities as well, and we would like to look at how a complaints mechanism which involves some of these existing bodies could work together with a mutual evaluation process.

Q325 Chairman: Something will have to be done to make the individuals concerned aware of their ability to complain to the right quarter of any inadequacy in observance of these rights that they contend has happened. Would it be practicable to suppose that this might be done via the lawyers who must advise them?

Mr Bradley: I think that is a very worthwhile suggestion, and it is the most likely way of getting reliable information on the problems that exist.

Q326 Chairman: This must plainly have a great deal of thought put into it in order to come up with a practicable and valuable monitoring system.

Mr Bradley: Yes, I entirely agree.

Q327 Chairman: Without it, I suspect that everybody is wasting their time.

Mr Bradley: Without effective implementation and some way of checking that the measures are being effectively implemented, then of course they will achieve nothing.

Chairman: Gentlemen, thank you very much indeed for the individual and collective assistance that you have given to us this evening. You have dealt with a number of questions and you have dealt with them very fully. I am very grateful to you.

Letter from Caroline Flint MP, Parliamentary Under Secretary of State, Home Office, to Lord Scott of Foscote, Chairman of Sub-Committee E of the European Union Committee

I am writing further to the Oral Evidence Session with Sub-Committee E of the European Union Committee on 3 November 2004. I am sorry that I was unable to attend.

It is important to stress that we have initiated a consultation process and are also liaising very closely with the Scottish Executive. We will provide you with further information on the outcome of the consultation process in due course.

During the Evidence Session the Committee raised a number of important issues. These included concerns about: the legal base; legal qualifications and effectiveness of legal advice; letter of rights; the moment in time at which legal advice is made available; “creeping competence”; whether the Framework decision will apply to terrorism; the right of silence; the continuity of legal advice; the mechanism for replacing unsatisfactory legal advisors; medical assistance; and the monitoring/evaluation process.

Officials provided initial views on these issues at the Evidence Session as is clear from the transcript, which we have just received. Given the number and in some cases complexity of the issues, I do not propose to set out our position now, but will write again in the new Parliamentary session.

For your information the instrument went before the Council Working Group on 16–17 November when Articles 1–9 were considered in some detail but without arriving at any firm conclusions.

24 November 2004

WEDNESDAY 10 NOVEMBER 2004

Present	Brennan, L Borrie, L Clinton-Davis, L	Scott of Foscote, L (Chairman) Hope of Craighead, L
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Memorandum by Jonathan S Mitchell, Treasurer of the European Criminal Bar Association

1.A. There is no need for harmonisation. The aim is to achieve “equivalence”, leaving the particular member state to build on the “common minimum standards” in order to improve on the rights within their own system. Some countries in Eastern Europe hardly have any system of justice, or any proper system of rights, and for them a start will have to be made almost from scratch. In many states the Tampere ideals of Liberty, Security, and Justice have been interpreted as the prosecution of terrorists and cross-border crime, with endless new legislation bringing in ever more repressive measures against citizens. There has been much about “Security”, and a little about Liberty and Justice. Within the last four years suspects’ fundamental rights have undergone a serious deterioration.

1.B. My experience confirms that there are many violations of the ECHR.

1.C. There are significant failings by member states, and deep cynicism about the need to maintain Convention standards. In most member states the Courts are aware of the development of a Strasbourg Jurisprudence of a high standard in the field of human rights, but these standards are not fully respected nor applied day by day.

1.D. Member states *could* address these failings, but they have shown no inclination to do so. Since the terrorist outrage in New York in 2001, most states have allowed the fears of their citizens and politicians to facilitate the destruction of age-old rights which have been part of their systems of laws for centuries. In my view only the Union can address these failings, and do better than individual member states.

1.E. The Proposal has the *capacity* to remedy only some of these failings, but in my view it falls woefully short of what is required.

2.A. The ECHR and the EU Charter go some way towards providing a common standard, leaving member states to build upon their own systems.

2.B. The Framework Decision would not in my view promote compliance with the ECHR, because the Decision is incomplete [*please see Section 3 below*].

2.C. I am not satisfied that the standards set out in the draft Framework Decision are ECHR compliant.

3.A. The standards proposed are not sufficiently high.

3.B. The fears and concerns of certain member states that there might be a lowering of standards are fully justified in my view. Article 17 does not even pretend to deal with these concerns, and is woefully inadequate. Only proper Monitoring backed by sanctions will have some chance of ensuring the effective implementation of these Proposals.

4.A. There are other matters which must be included which so far have been left out: the “ne bis in idem” [or double jeopardy] principle, which prevents a person being put on trial for the same offence twice; in absentia or default judgements; the right to silence, which, though it was formerly one of our ancient rights in the UK, has in effect been abolished by the legislation brought in by the last two Governments (both Conservative and Labour).

The right to bail. The Commission Green Paper on mutual recognition of non-custodial pre-trial supervision measures will be available in mid-October, and the time limit for replies is 30 November 2004. Unless we can expect speedy progress in the provision of Proposals for Bail, a person who is a “foreigner” in the eyes of the deciding Court, will routinely be locked up in prison until the trial.

4.B. A matter which has been deliberately and expressly ignored by the member states is the provision of legal aid in cross-border criminal cases. The Council Directive of 27.01.03 “*to improve access to legal aid in cross-border disputes*” [2002/8/EC], provides that the Directive shall apply to “*civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters*”. Not only is this a massive injustice to criminal defendants, but it will lead to “forum-hopping” by unscrupulous investigators and prosecutors.

5.A. The rights should not be limited to a “suspected person”, but also to “accused persons”, and those “under investigation”. The language varies in different jurisdictions. In my view, the scope is not clear enough, nor sufficiently wide.

6.A. In France the suspect can lawfully be locked up for 48 hours for interrogation about his alleged involvement in a crime before he is entitled to access to a lawyer. No doubt the French Judiciary would interpret “*as soon as possible*” to mean “as soon as we have got his confession”. Other states also have imperfect provisions. Article 2 is a vitally important right which in its present form is far too weak and imprecise, and it is open to abuse.

6.B. In Eastern Europe where there are few trained lawyers, many gifted members of non governmental organisations take on the representation of persons before the Courts and Tribunals. This should in my view continue, because it is better to have representation (where adequately skilled and qualified) than less or none. Article 4 needs to be completely re-written.

7.A. Interpretation and translation should be available in *any* language.

7.B. “Where necessary” must be defined, as otherwise, the police or investigator will make a subjective decision.

7.C. In practice it is the accused who will “find” that the interpretation is not effective.

8.B. Article 11 should apply to a wider group of vulnerable persons than is presently being considered. It should at the very least apply to a young person, a child, a mentally ill person, a foreign national, mentally handicapped or with a subnormal IQ or with a low reading or writing ability, and a poor understanding, because of your physical state (deafness, diabetes, epilepsy, speech impediment, heart problems or you have a pacemaker, or have HIV/AIDS), you are pregnant, you are a drug addict, or are dependent on alcohol or are someone who requires frequent medication, you are a single parent (mother or father) who has young children, persons with refugee status or who are seeking asylum, you are a member of a minority group, or you are suspected of a political offence.

9.A. *The Letter of Rights: Article 14*

I believe the letter should not just be available in official community languages, but in most of the languages that are spoken throughout the world. Since a problem will be identifying the correct language letter to give to the person detained, each letter should have at the top of the first page the flag associated with the language used. The police officer can then show the page to the person detained who may recognise the flag even if he cannot read the language.

9.B. “As soon as possible” is totally unclear as to the time the letter should be given. In the UK a person is notified of his rights after arrest and upon his arrival at a police station, but this would not work in some states where “investigation” may go on for some time before an arrest takes place. Careful drafting is needed for Article 14 to ensure the fairest and clearest result. My suggestion: “at the beginning of the investigation”.

9.C. The Letter of Rights must be one page of well-spaced and clearly intelligible information. I have restrained the urge to add further material at present.

10. *Article 15 Monitoring*

Evaluation and Monitoring are a vital part of the procedure to prevent back-sliding, and the watering down of fundamental rights. In my view, Defence lawyers are best equipped to carry out the monitoring throughout the member states since they see every day the Judges, the prosecutors, and the abuses that can take place.

Monitoring and Evaluation results must be published so that current states cannot evade their obligations. The monitoring must be backed up by sanctions ranging from consultation over breaches in minor cases, to monetary charges or compensation in worse cases, to the ultimate sanction of the exclusion of the member state from the system of mutual recognition.

4 October 2004

Memorandum by The Law Society of Scotland

1. *Need for action at Union level. What evidence is there that procedural rights in criminal proceedings need to be harmonised? Does your experience confirm the Commission's statement that "there are many violations of the ECHR"? Are there, to your knowledge, significant failings by Member States? Are these failings which only the Union can address or which the Union could do better than individual Member States? Will the proposal remedy those failings?*

The Criminal Law Committee of the Law Society of Scotland ("the Committee") supports the proposal to produce standards which will be applied throughout the EU in relation to those suspected of crime. All EU citizens should be confident that they will receive equivalent protection in all Member States.

At present, the Member States are parties to the European Convention on Human Rights ("ECHR") and the Treaty on European Union provides mechanisms to address serious violations of human rights by Member States. This does not, however, ensure that any existing or future State actually complies *consistently* with the minimum obligation set in the ECHR. The provisions in the Treaty on European Union which deal with breaches of human rights by Member States relate only to "serious and persistent" breaches.

The need for protection and the safeguards referred to in the Framework Decision are, therefore, important and of great significance in cases where a country seeking to join the EU is perceived as having a poor human rights record. The accession criteria, as agreed at the Copenhagen European Council in 1993, do, of course, provide that candidate countries must confirm that human rights will be respected. Article 6 of the Treaty on European Union endorses this by providing that the Union is founded on respect for human rights and fundamental freedom. However, the creation of specific standards which will apply throughout the EU will ensure that candidate countries have an understanding of what is required of them before they are admitted.

Furthermore, increased police, prosecutorial and judicial co-operation in criminal matters (through the European Arrest Warrant, European Evidence Warrant, mutual assistance and mutual recognition of criminal judgements) underlines the need for common standards of justice within the European Union. These initiatives proceed on the principle of mutual confidence amongst Member States in the criminal justice systems of all members of the Union. The adoption of standards, to be applied throughout the Union in criminal proceedings from the moment an individual first becomes a suspect, throughout the investigation, trial and post-trial period, is therefore essential.

In the Committee's view, this initiative should not be confined to a re-statement in general terms of rights which are already recognised within the Member States of the Union, such as those set out in Article 6 of the ECHR. Nor should the development of common procedural standards be confined to the statement of a set of *minimum standards*. The opportunity should be taken to build upon existing standards, to clarify areas of doubt and uncertainty and to strengthen existing rights. This is particularly so since it is accepted that existing international standards are interpreted and applied in different ways and to different levels in the various national legal systems of the European Union.

The Committee believes that common procedural standards should apply in all cases within the Union and should not, for example, be confined to cases with a "cross-border" element. Common procedural safeguards should likewise apply irrespective of whether the suspect or accused is a national of a Member State and should also apply irrespective of that person's residence status.

2. *Relationship with ECHR. The Commission states: "the intention here is not to duplicate what is in the ECHR, but to promote compliance at a consistent standard". Why does the ECHR not (and the EU Charter) provide a sufficient common standard? Would the Framework Decision promote compliance with the ECHR? Are you satisfied that the standards set out in the draft Framework Decision are ECHR compliant?*

The ECHR is open to interpretation by Member States and the margin of appreciation will apply. The advantage of the Framework Decision is that it should promote compliance with the ECHR, offers an opportunity to clarify areas of doubt and uncertainty and to strengthen existing rights. This is particularly so since it is accepted that existing international standards are interpreted and applied in different ways and to different levels in the various national legal systems of the European Union. Although the form and method of implementation will be left to individual Member States, the Framework Decision will implement at a practical level the duties and responsibilities contained in the ECHR.

3. *Minimum Standards. The aim of the proposal is to set common minimum standards. Are the standards proposed sufficiently high? Is Article 17 (non-regression) adequate to avoid any risk that existing standards may be lowered?*

The standards proposed in the Framework decision are higher in some respects than those currently applicable in Scotland.

Article 2, for example, extends the right of a detainee to have access to legal advice before answering questions in relation to the charge. At present, a person detained under section 14(1) of the Criminal Procedure (Sc) Act 1995 has the right to intimation of his or her detention sent to a solicitor. This does not confer any rights on the person detained to have access to the services of a solicitor before he is interviewed.¹ Access is in the discretion of the police officer in charge of the case. Article 2 could, if backed by adequate funding and provisions, ensure that all those suspected of crime would be entitled to parity of treatment and would introduce greater certainty in relation to detainees' rights in Scots criminal procedure.

The Articles in relation to interpretation and translation also provide a welcome extension to current practice adopted in Scotland. At present, a suspect will have the right to free interpretation during police interview and during the conduct of the criminal proceedings. If a defence solicitor wishes to discuss matters with his or her client, then he or she will have to instruct a separate interpreter and the client (or if legally aided, the legal aid fund) will have to bear the costs of such instruction. Article 6 provides that the suspected person shall receive free interpretation of legal advice received throughout the criminal proceedings and in these circumstances the Committee would envisage that this would extend the provision of free interpretation services to include communication between the solicitor and his or her client.

Article 7 provides clarification that the suspect will be entitled to be provided with free translations of all *relevant* documents to safeguard the fairness of proceedings.

Articles 8 and 9, however, provide the most significant extension of current rights. Article 8 places an obligation on Member States to ensure that translators and interpreters are sufficiently qualified to provide accurate translation and interpretation and to provide an appropriate mechanism through which a replacement interpreter or translator can be found if the existing provision is inaccurate.

The Committee believes that translators and interpreters should be subject to a vetting procedure and be in a position to provide evidence that they are accredited at national level. Consideration could also be given to the creation of a national register of legal translators and interpreters. It would be important to ensure that such a register would be comprehensive and include legal translators and interpreters for minority languages. It would also be helpful if Member States had access to the registers of interpreters compiled by other Member States. The Committee would also favour a system of accreditation and believes that there is considerable merit in adopting principles of renewable registration and continued professional development.

The Committee welcomes the inclusion of Article 17 in the Framework Decision which provides that the Framework Decision will in no way limit existing rights and safeguards which offer a higher degree of protection.

4. *Scope of the Framework Decision. The Commission describes its proposal as a "first stage". Are there any matters which should be included in the draft but which have not been? In particular, are there any which might have immediate and direct cross-border implications (such as bail)?*

The right to bail (provisional release) where appropriate—The Committee believes that reference should be made to the right to bail (provisional release) where appropriate in the Framework Decision. This subject raises important considerations, particularly in relation to the treatment of non-nationals or non-residents. It is clear that to refuse bail to someone because he or she is a foreign suspect would be incompatible with Articles 5 and 14 of the ECHR. However, fear of absconding can be put forward as a ground for opposing and refusing bail and this may appear to be more cogent in the context of a non-national and non-resident.

It would be helpful if an analysis were undertaken to examine whether bail is refused in some Member States more frequently in the case of non-nationals than nationals facing similar charges. Consideration could then be given to whether it would be better to have uniform criteria and conditions applying throughout the EU and, therefore, provision made in the Framework Decision in relation to the rights of the suspect in this regard.

¹ Paton-v-Ritchie 2000 SLT 239.

The right to review of decisions and/or legal appeal proceedings—The Committee would favour a uniform commitment to respect this right throughout the EU. The Committee notes that the UK has not ratified the seventh protocol to the ECHR which guarantees the right to criminal appeal. Some other EU States do not recognise full rights of appeal by persons convicted before juries. Accordingly, these issues would have to be considered in the context of this right and clarification given.

5. *Scope of application of the Framework Decision (Article 1). The rights set out in the proposal “criminal proceedings” to “a suspected person” and within the time limits as specified in Article 1. Is the scope of the application sufficiently clear? Is it wide enough?*

The nature of the right which is being protected by the Framework Decision is the right to a fair trial. The Committee, therefore, believes that the protection of that right should commence from the moment an individual first becomes a suspect, throughout the investigation, trial and post-trial period. Accordingly, the Committee believes that the scope of the application of the Framework Decision is appropriate.

6. *The right to legal advice (Articles 2 to 5). How would Article 2 add to existing rights? What specific obligations does it impose on Member States?*

As has been indicated in the response to question 3, the adoption of the procedure outlined in Article 2 could strengthen the existing rights of detainees. At present, a suspect has no statutory right to have access to legal advice before being interviewed in relation to the charge. Article 2.2 makes specific provision for this.

However, Article 2 must be read in the context of Articles 3 and 5. Article 5 makes it clear that the costs of the legal advice provided under Article 3 will be borne in whole or in part by the Member States if those costs would cause undue financial hardship to the suspect or his or her dependants. No reference is made in Article 5 to the advice provided under Article 2. If the suspect’s right to receive legal advice under Article 2 is to be real, then provision should be made to ensure that adequate funding is available to allow the suspect to engage an appropriately qualified lawyer. If no provision is made in regard to remuneration for such advice, then the suspect’s right to receive legal advice may be limited and variable.

The Committee appreciates that implementation of the procedure under Article 2 could also delay commencement of an interview with the suspect, while the solicitor is contacted, arrives at the police station and assesses the legal position. Member States may therefore wish to consider whether the current periods during which the police can detain a suspect require to be extended. In Scotland, the maximum period of detention is six hours². If the extended rights referred to in Article 2 were to become available, the Committee would question whether the six hour period would be sufficient to allow a full and complete interview to take place. The Committee would therefore suggest that the six hour period could be suspended during the period in which the request to have legal advice is made and the advice session concluded. This would preserve both the right of the police to investigate the matter fully for a period of six hours and the suspect’s right to obtain legal advice in terms of Article 2.

Article 2 states that a suspected person has the right to obtain legal advice throughout the criminal proceedings. The Committee would suggest that reference should also be made in this paragraph to the right to legal assistance in the form of representation. This would then correlate to the right provided under Article 6(3)(c) of the European Convention on Human Rights.

Should Article 4(1) be limited by reference to the 1998 Directive?

How do you envisage Member States giving effect to Article 4(2)? How in practice do you foresee the condition “if the legal advice is found not to be effective”, being determined?

There is a difficulty in practice in determining whether legal advice is effective. An assessment of the effectiveness of advice would be a highly subjective evaluation. Perhaps a better description of the advice to be given should be “appropriate”. The Committee believes that the best way to secure the delivery of appropriate advice is through access to independent lawyers, chosen by suspects and who are subject to the standards and professional discipline of an independent legal profession. Standards can then be enforced through regulation by the appropriate designated body.

² Section 14 of the Criminal Procedure (Sc) Act 1995.

7. *Rights to interpretation and translation (Article 6 to 9). Are these provisions satisfactory? Will translation/interpretation be available in any language, not just official Community languages? (Letter of rights is limited to official Community languages—see question 10)*

The Committee believes that all persons suspected of, or accused of a criminal offence should have access to a competent interpreter at all stages of the proceedings, where this is necessary to ensure that he or she fully understands the nature of the investigation, the charges levelled and the various steps in legal procedure in the case. If the provision of interpretation is to be effective, then it should encompass provision for minority languages.

9. *Article 6(2) calls for the provision of free interpretation of legal advice “where necessary”. Should this be defined?*

Yes. If there is to be consistent application of the procedural rights across the EU, then it is essential that the Framework Decision clearly sets out the situations in which these rights can be accessed. Reference to the phrase “where necessary” is vague and will be open to interpretation. Article 6(2) should clearly identify the circumstances in which the provision of free interpretation of legal advice will be available.

How do you envisage Member States giving effect to Article 8(2)? How, in practice, do you foresee the condition, “if the interpretation or translation is found not to be effective”?

Article 8(2) would be facilitated if there was a register of accredited interpreters or translators from which a replacement could be selected.

There is a difficulty in practice in determining whether the interpretation or translation is effective. The Committee, therefore, believes that the emphasis should be placed on appropriate accreditation of interpreters to ensure a common minimum standard which would apply and thereafter a system of re-accreditation and continuous professional development. The proposed introduction of the recording of proceedings under Article 9 will provide an additional safeguard for a suspect or accused person. It may be that a defective translation of the proceedings could be a ground for appeal.

11. *Specific attention (Articles 10 to 11). What do you understand the obligation of (in Article 10(1)) to give “specific attention” means in practice? Should “specific attention” be limited to the matter set out in Article 11?*

The Committee believes that the phrase “specific attention” would be worthy of further definition and non-prescriptive examples provided as to what is envisaged. The Committee would envisage that “specific attention” should extend beyond the matters referred to in Article 11.

In Scotland, the Vulnerable Witnesses (Scotland) Act 2004 is scheduled for phased implementation in the spring of 2005. This Act places duties on the parties citing witnesses to consider whether the witnesses will require any “special measure” to enable them to give evidence in court. Special measures range from the option of giving evidence by CCTV link, from behind a screen, on commission, with a supporter present or in some cases by affidavit for examination in chief. For the purposes of the Act, the accused can be a “vulnerable witness” and must be given the same level of consideration in relation to special measures as other witnesses. The Committee believe that specific attention could be extended to include consideration of the means by which an accused may wish to testify in appropriate cases.

12. *Should all suspected persons have the rights set out in Article 11?*

The Committee believes that all vulnerable suspects should have the rights set out in Article 11, and that those identified in Articles 11.1 and 11.2 should be available for all suspected persons regardless of vulnerability. The right to a supporter referred to in Article 11.3 should only apply where it is appropriate to do so in the interests of justice.

13. *The letter of rights (Article 14). Is it sufficiently clear when and in what circumstances the letter of rights should be handed over?*

No. The Committee believes that further clarification as to when the letter should be delivered should be contained within the text of the Framework Decision.

Service of the letter of rights will, in the Committee’s view, become an integral element of the operation of the procedural safeguards in the EU. It will therefore be important to evidence that the suspect has been given a copy of the document and the circumstances in which such service took place. The Committee understands that there are video recording facilities available at the charge bars in a number of police stations in Scotland. To avoid any dispute about delivery of the letter, the Committee would recommend that service of the document is recorded by video camera and available for inspection subsequently.

Are you content with what is proposed to be included in the letter of rights?

Information about access to legal advice and representation and legal aid should also be available.

The letter of rights will be translated in all official Community languages. Is this sufficient? Might there be cases where the suspected person does not understand an official Community language?

The Committee would envisage that if the letter of rights is to be meaningful, it should be available in all of the languages of the EU, as well as other languages likely to be spoken by persons arrested or detained in the jurisdiction in question, including, for example, minority languages spoken by nationals of the State in question and by non-national residents of that State.

14. *Evaluation (Article 15). What value do you believe the evaluation and monitoring procedure would have? Who should carry out the evaluation? Should publication be optional or mandatory?*

The Committee agrees that it is important to monitor and evaluate the changes introduced as a result of this initiative. In conducting such an evaluation, consideration requires to be given to the information which is sought as a result. This will then give an indication of the data required to be collected. In the Committee's view, the input of advice in this regard from an independent and professional researcher is often invaluable.

October 2004

Examination of Witnesses

Witnesses: MR GERRY BROWN, Convener of the Society's Criminal Law Committee, MR MICHAEL MEEHAN, Member of the Criminal Law Committee, and MRS ANNE KEENAN, Deputy Director, The Law Society of Scotland; DR KAI HART-HOENIG, Vice-Chairman, Ms LOUISE HODGES, Secretary, and MR JONATHAN MITCHELL, Treasurer, European Criminal Bar Association, examined.

Q328 Chairman: Ladies and gentlemen, thank you all very much indeed for taking the time to come and help us with our inquiry into the proposal for procedural rights in criminal proceedings to be harmonised, to some extent at least, across the European Union. This is a very important topic and I am most grateful to you, and so are all the other Members of the Committee, for coming and helping us with our inquiry. I think the value particularly of what you will have to say in answer to the questions that we have on this subject is that you are all legal practitioners, so have a particular experience and perspective which will be of great assistance to us. Can I perhaps start by asking about your perception of the need for this proposal from the European Commission? The purpose is to try to produce a level of compliance constant across the European Union by Member States with minimum ECHR standards in criminal proceedings. Do you perceive a need for this?

Mr Mitchell: My Lord Chairman, I am Jonathan Mitchell and I speak as Treasurer of the European Criminal Bar Association. There is a great need, not least because Europe is a very varied area of legal tradition with very wide variations in the way in which it is dealt with, and there does need to be, not a homogenous and completely unified system, but attention to detail in the practical realities. The ECHR case law is very good at what happens at the end of a set of proceedings but is woefully inadequate in terms of what happens right at the beginning if there is a problem. In the main our concerns are to do

with what happens at the outset of a criminal case and hope to provide some safer platform on which to begin proceedings. That is the one we are looking at at the moment.

Q329 Chairman: Does it seem to you and your members that there have been systematic failures in other Member States or particular Member States in compliance with ECHR standards at the beginning of legal proceedings?

Ms Hodges: We understand that the figure of 38,000 is the outstanding cases to go to the European Court of Human Rights.

Q330 Chairman: 38,000 in the pipeline?

Ms Hodges: Yes. Taking that figure alone gives an indication. Of course, they will not all be meritorious and they will not all be successful. On the other hand, there will be several cases which have never got that far just because of the procedure that you have to go through and the costs that could be incurred in taking that procedure forward. Also there is the time element. It is very likely that if someone is suffering a custodial sentence they would be freed before any case came to the European Court of Human Rights.

Q331 Chairman: Any addition to that from Scotland?

Mr Brown: Not really, just to say thank you very much for the invitation to give evidence this afternoon, my Lord Chairman. I would support the comments made by Mr Mitchell as far as the

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recognition that perhaps this Framework is focusing on the more practical implications of what should be done by those who are involved in dealing with suspects and what the suspects are entitled to in respect of their rights and safeguards.

Q332 Chairman: One of the last questions on which I will be asking for your help relates to the exercise of monitoring whatever Framework is put in place to try to improve matters. Looking at the Framework proposals as a whole, are they likely to improve the matters to which they are addressed?

Mr Mitchell: Not in their present form, my Lord Chairman. We have set out, or have tried to set out, practical steps which need to be taken to firm up this Framework Decision. It is partly because it has been a political exercise to try to get agreement on some common areas and often the trouble with a political decision is that attention to detail is lacking, the really effective attention to detail has not been looked at with care. We think there is a great deal of work that needs to be done on the detailed application of standards in the legal systems.

Q333 Chairman: Thank you for that. We will come on to the detail in a moment. I am sure that you are right. The action that is being proposed is being proposed at a Union level and it is being proposed to introduce standards which will apply not just in the case of criminal proceedings which have a cross-border element but also in relation to criminal proceedings which are entirely within one or other Member State's boundaries. Do you perceive any *vires* problem about this?

Mr Brown: No. Our view is that with the introduction of the European Evidence Warrant and with the various proposals about a European Prosecutor, we do support action at European Union level and we think that this should apply to all European nationals and not simply to those that have a cross-border dimension.

Q334 Lord Hope of Craighead: I think there is a technical problem here that perhaps I could flush out a little. I think Article 1 has the broad reach that Mr Brown is suggesting, I think that is probably right, but the Treaty for the European Union, Article 31(C), provides that the common action is to ensure compatibility of rules applicable in Member States, as may be necessary to improve such co-operation, that is co-operation in Member States. There is a problem as to whether this is going further than the Treaty powers. Is it possible to get around that? Can you find a solution to the problem?

Dr Hart-Hoenig: My Lord Chairman, if I may comment on this. It is a question of how to construe the provision. If you say, what is the intention of the

Framework Decision, it is to improve or create the premises and conditions for mutual trust and mutual recognition. Let us say in terms of logic, if I am detained in Italy, or if I am initially arrested there—it is then not a cross border case, it is a domestic Italian case. However if I leave Italy and then have been surrendered then it is a cross border case. What is the difference? What is linking these matters is to create such an area of freedom, justice and security and to ensure mutual trust and mutual recognition. The circumstances you will encounter in cases outside a home country and subject to protection by EU minimum standards must be equivalent more or less or, let us say, largely similar.

Q335 Lord Hope of Craighead: Is it possible the solution you are suggesting is the uniform standards applicable to everybody remove the risk of misunderstanding where if somebody finds themselves in a strange country and perhaps their reason for being there is misunderstood is their true status is misunderstood? If there is a uniform practice that applies to everybody, at least as far as co-operation is concerned, that is ensured in every case.

Dr Hart-Hoenig: I am somewhat reluctant to employ the word “uniform” because in the EU countries we have both adversarial and inquisitorial systems and, apart from that, other criteria often distinguishes between different treatments or issues. I am not sure we would find uniform regulations that would be in accord with all the currently existing elements and would provide the same level of protection. Therefore I have some reservations, but regarding let us say, the gist or the intention of your comment, I would say you are right, that should be the guideline for dealing with these issues.

Mr Mitchell: May I endeavour to add something to what my friend from Germany has said. Our interests are in the rights of suspects and defendants—we are defence lawyers in the European Criminal Bar Association—and I think I would be bold enough to say, if by uniformity you mean providing better standards and safeguards for suspects and defendants and those being investigated in all EU countries, then I would be in favour of that. I think Kai is saying, and I agree with him that there are clearly individual states with history of laws and procedures which we would not want to be damaged provided the standards for suspects and defendants were high.

Q336 Chairman: Dr Hoenig's reference to mutual recognition is important. Ever since the European Arrest Warrant Directive or Framework Decision was approved, I think it has now been implemented in nearly all Member States, there is the prospect of individuals from any one Member State, including of

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course this country, being extradited to foreign countries to stand trial there without the merits of the case against them ever having been investigated in the country of origin. That is fine as a matter of mutual recognition on a political level but the worry, speaking for citizens in the United Kingdom as a whole, is they have not necessarily got that confidence in the judicial systems of all other Member States that the political masters must profess to have. Perhaps that underlines the importance of some minimum standards emerging as quickly as possible in order to try to improve public perception of what their fate would be if they do get extradited to these other Member States. Do you think that the Framework proposals might achieve something in that direction or is that just pie in the sky?

Mr Meehan: My Lord Chairman, the Society's position is that it would achieve something. It is recognised as a first step, there is no doubt about that, but it is a significant first step. How much ultimately it achieves will very much depend on compliance and that in itself is closely tied in with monitoring and evaluation. However, it may prove to be illusory if there are rights but evidence which has been obtained when the rights have been disregarded is admissible. This may mean that the EU citizen is not much better off at the end of the day. The foundation is there; whether it stands firm will very much depend on the compliance by the States.

Mr Mitchell: May I deal with and build on to what has just been said. I think nobody would argue that as an attempt to try to codify and set up a simple set of standards to promote mutual recognition, it is a good attempt. The problem is—we have already dealt with this partly in the question—that it is not enough. It is out of time with other procedural frameworks going through: the arrest warrant, the evidence warrant which is hoped to be in place by January 2005, no doubt with the other Framework Decisions coming through, and they are going fast through the system along with the terrorism proposals and so on. The safeguards simply are not keeping up with the amount of European Union Framework Decisions that are coming through. That is a singular dangerous problem, we submit, for defendants and suspects in all the countries of the EU.

Ms Hodges: Particularly because it is mutual recognition without scrutiny in the other countries, so there is no opportunity to question any decisions that have been made.

Q337 Lord Borrie: I am mildly surprised, Mr Mitchell by you being in favour of this Framework Decision at all. When I read your written material, paragraphs 3(a), 6(a) and 6(b), you were so damning

on rather fundamental matters that I wonder whether you are being amazingly optimistic. Negotiation can always achieve something but you are suggesting they are starting from such a low base that I wonder whether you have any hopes for this at all; you must do otherwise you would not be here.

Mr Mitchell: The short answer, if I may, is I would rather there is something happening than nothing. It is only by at least discussing these things and bringing something to the table that this sort of further debate and discussion that is happening in your Lordship's House can take place. I agree with what I said, I stick to it. A lot more needs to be done but at least people are thinking about it. It is action that has got to take place now, not just thought.

Dr Hart-Hoenig: If I make an additional point. The problem is establishing an overview of all of these initiatives. Speaking as a German we are pleased that the House of Lords is the only institution which has clearly stated that it is more or less prosecution driven. And is the first entity dealing with procedural rights, the others are more or less blueprints for the prosecution side. What we now need from the other side is some countervailing measures. Thus while elements of the European Convention on Human Rights may clarify some points the initiatives are not going to create something going further than the ECHR which is not acceptable. Moreover introducing and implementing further instruments is unacceptable if they are splitting up all these other instruments dealing with procedural rights. I would argue that the introduction and implementation of further instruments is only acceptable when the various initiatives have been implemented. Then should further instruments be forthcoming. It is agreeable that opinion within the EU has discerned that this could have some relevance to the protection of human rights but weak from a German perspective, since it constitutes the lowest common denominator.

Q338 Chairman: That brings one very aptly on to asking a question or two about the minimum standards. This proposed instrument will be imposing minimum standards—emphasis on the word “minimum”—and it is hoped that as many Member States as possible will have higher standards. I think Mr Mitchell has in mind particularly, maybe everybody does, that it would be nice to see the minimum standards in the instrument raised somewhat. As against that one has to set the possibility, if one raises it too high, of failing to get political agreement and getting nothing. I do not know what your feelings are about that. As I understand it, particularly in regard to some of the Articles which require legal advice to be available immediately before questioning and then to be

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available throughout the period of investigation leading up to the trial, there are some of our European Union colleagues who would not wear that because it is so contrary to their traditional methods of conducting criminal investigations. Does one push for these things and insist that the standards are raised or does one just take what one can get?

Ms Hodges: Although there are very different systems in Member States, we hope that the fundamental purpose of the criminal justice system is to convict the guilty and acquit the innocent. Therefore, we would hope that any political party would be keen to make sure that safeguards are in place before instruments are put in place that increase investigatory powers and historically, we know, there is a risk that they get abused. Without safeguards in place, do we want to be creating European instruments that could cause injustice? I do not think that we should be shy about saying that these safeguards do need to be in place if mutual recognition is going to work at all in practice.

Chairman: Of course, it is right that all criminal justice systems try to acquit the innocent and convict the guilty, but probably a response to that might be that the minimum standards that are being suggested, or the higher standards that are being promoted, are designed to assist the endeavour to make sure that the innocent are acquitted and they do not have much to offer to ensure that the guilty are convicted.

Q339 Lord Hope of Craighead: I just wondered whether I have picked up the Law Society of Scotland's position correctly. You do see the Framework Decision as in some respects raising standards as compared with what currently exists in Scotland, is that right?

Mr Brown: My Lord, yes. I have a difficulty with the word "standards". I prefer the words "rights, responsibilities, safeguards". The Scottish system, as my Lord knows and many of you will be aware of, is distinct from the system of England and Wales. What we are dealing with there is access to detainees by qualified lawyers at an early stage, but that access is limited, and Anne may make some more comments about this, because of case law in that the access is not automatic, it is not a right. If it did become a right, as it is presently framed, I anticipate there would have to be consultation in Scotland with the appropriate bodies, including the police, as to how that right should be exercised. Anne, do you want to come in on this?

Mrs Keenan: My Lord Chairman, we have had this matter judicially determined in Scotland in the case of *Paton v Richie* in the 2000 *Scots Law Times*, page 239. That was a case in which the person sought access to a solicitor and it was held in that case that there was no such right in Scotland under section 14

of the Criminal Procedures (Scotland) Act 1995. Accused persons have a right to intimation of the detention to the solicitor but the Act does not confer any rights on the person detained to have access to that solicitor before he or she is interviewed. That matter is ultimately a matter which will rest with the police authorities to determine. We appreciate that the admissibility of the evidence obtained will be a matter which will be determined subsequently by questions of fairness and the like during the procedure of the trial, but there is no absolute right as it is framed currently in Article 2.2 of the Framework Decision. To that extent, it would be a clarification of a detainee's right under Scots law. That is one aspect of it. The other aspect relates to interpreting and translating. Whilst we have a system in Scotland whereby in recent years we have had some development because we have had a separation of the role of the Crown in that process, previously the Crown would instruct the interpreter for the accused person to operate at the trial but since devolution and since the Human Rights Act 1998 we have a position now whereby the Crown will only instruct the interpreter for the witnesses and then the court will separately instruct the interpreter for the court for translation purposes. We then have a further separation where there is another interpreter instructed if the defence wishes to communicate with the client in a particular way.

Q340 Lord Hope of Craighead: Really we are looking at interpretation at a very early stage, are we not, when the suspect, as he has become, is still in the police station. In practice, what change would be needed if these procedural rights were taken into account?

Mrs Keenan: Perhaps not at the stage of instruction but in regard to monitoring and ensuring that there is a basic standard of quality in interpreting services. That would be a major change for us. Currently I am working in a group with the Crown Office representing the Society which is very alive to these problems because we have a concern at the moment that in instructing interpreters there is no vetting procedure and no monitoring of standards. I am aware that your Lordships will have heard evidence from other witnesses about the National Register, which I think is organised by the Institute of Linguists, but my information is that it has very few Scottish interpreters on it. From having discussed this matter with the Crown Office, I understand that very few interpreters are actually taken from that register. We do not have a separate Scottish register at the moment but I understand that the Scottish Executive has commissioned some research to look into this matter. The group that I am working with at the moment is proposing vetting procedures. We are

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working with Disclosure Scotland to try to find out something about the people we are instructing and putting in court. We are very keen that there is some monitoring of the quality of the interpreting standards. The change would not be at a practical instruction level but definitely at the monitoring and compliance levels.

Q341 Chairman: To the extent that some of the proposals that look as if they might go into this Framework Decision would require a raising of the standards in Scotland, is that a development that the Scottish legal profession as a whole would support or would you feel nervous about its practicality?

Mr Brown: I think the view we have at this stage is that there would have to be consultation on it. The balance would have to be struck between the proper investigation of crime and access to a lawyer by the detained person, who often is a vulnerable individual. For example, it may be the case that the six hour period of detention would have to be suspended for a period of time to allow a solicitor to make himself available. Linking in with that, the position that we take is that because this is the start of the process and it involves all the safeguards, it is very difficult to envisage anyone other than a solicitor having access to an individual at that stage because one has to give advice looking forward to the whole process of the trial and possible appeals. You have to have someone who is trained to do that.

Q342 Chairman: Thank you. Coming back to what I was discussing with Dr Hart-Hoenig earlier, my understanding is that in France in particular there would be substantial opposition to a proposal that there had to be a lawyer representing the suspected person before any police questioning could take place. They have taken the view that all questioning is done under the general authority of the investigating magistrate and that is a sufficient protection for the accused. What is the perception of the European Criminal Bar Association about the prospects of obtaining a provision of the sort that at the moment is being suggested in the face of French opposition? Is it more important to get something in place than to insist on what, from our perspective, we think would be a very necessary protection?

Dr Hart-Hoenig: My Lord Chairman, I would say I guess you are mirroring the French position accurately and all French lawyers would applaud because they are saying, "Okay, we are more or less decoration for the criminal proceedings". From a German perspective, we now have the first cases regarding the European Arrest Warrant and there is not much leeway for the courts and for the administrative authorities but they have some room and they could be reluctant to act if they suspected

that they were extraditing German nationals to other EU countries where laws relative to the protection of Human Rights are significantly weaker than in the home state. Under these circumstances I would insist on a higher level and if this fails would conclude as a defence lawyer that "I have a good argument to say that it is better to try the defendants in Germany than to extradite them to France. Let us identify some reasons for not extraditing them." By the same token a Bill passed in a National Parliament on a lower level could also dilute protection in Germany. That is my position and I would guess the position of the ECBA as a whole.

Q343 Chairman: We should stand up for the proper standards to be specified in the Framework Decision?
Dr Hart-Hoenig: Yes.

Q344 Chairman: That is interesting.

Mr Mitchell: May I add to that, my Lord Chairman, to make the same point but differently put. Our French colleagues in the ECBA in any event are unhappy with their own French system, if I may put it that way, those defence lawyers where they want to have access to their clients at the earliest stage. Although with ordinary cases it is 48 hours that the defendant or suspect is closeted for questioning, and with terrorists it is four days, I think, most of our colleagues, almost 100 per cent of them, would want to see a change in that regard. Change can come about by pressure and by example and there are few obstacles to someone being moved from one country to another with the European Arrest Warrant if the documentation is basically right; possibly human rights issues can get in the way. There are few obstacles to somebody being transmitted to another country. It is only when that other person, the British citizen, ends up in France and is put through that procedure that the outcry would come and the impact of the change will result.

Q345 Chairman: As for the content of the Decision, the particular items that have been chosen to feature in this first stage of harmonisation of criminal procedures, I suppose to some extent the decisions may seem a little bit arbitrary, there is no reference to right to bail, no reference to right to silence. Do you think that the selection of the rights to be included in this first stage is reasonable overall or do you really think this is just an amendment, the addition of some of the other rights that most people would regard as being important?

Ms Hodges: There are some fundamental rights that have not been included. Perhaps legal professional privilege is one of the fundamental rights that are not included.

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Q346 Chairman: Is legal professional privilege, as we understand it in our jurisdiction, accepted as a principle across the European Union? I simply do not know the answer to that.

Dr Hart-Hoenig: To a large extent. I cannot cover all of the relevant jurisdictions, but to a large extent. One of the pivotal elements is that if I cannot rely on confidential communication with my client and legal privilege, the next dawn raid could include the seizure of my defence papers and torpedo the defence. It is one of the pivotal points.

Q347 Chairman: At the moment in Germany that cannot happen, you can insist on absolute confidentiality for your communications with your client, can you?

Dr Hart-Hoenig: The communications are fully protected. The veil can be pierced to a certain extent in practice but in theory we are fully protected.

Q348 Chairman: Is there much point in insisting on the right of the suspected person to have a lawyer advising at the earliest stage when the questioning of him is going to start unless also one has alongside it recognition of the confidentiality of communication between him and the client? They go together, do they not?

Ms Hodges: Yes, and an opportunity to speak to your client in confidential circumstances.

Mr Brown: As I understand the Framework Decision, the definition is a definition of a lawyer; it is not someone who is a police office adviser or a paralegal. I support the comments made by Louise, it is one of the issues that we feel very strongly about, that there should be inclusion about client confidentiality and professional privilege. That is being diminished in UK law in terms of the Proceeds of Crime Act and certain other legislation but that is because of the balances involved and the different circumstances. Michael, I do not know whether you want to say anything else about that?

Mr Meehan: Thank you. My Lord Chairman, the additional matter which we felt was appropriate was to emphasise the question of the right to silence. To pick up on part of the general discussion already about legal systems being interested in the prosecution of the guilty and the protection of the innocent, I think it is fair to say that the right to silence is a right that is valued higher by the guilty probably. To an extent it is the right not to say something of an incriminating nature. To that end, it is important that a person is advised of that right compared with perhaps an inquisitorial system where a person is interviewed at an earlier stage. In the Scottish system the caution is administered to point out that there is the right to silence and also that anything you wish to say may be used in evidence.

Q349 Lord Hope of Craighead: I just wanted to be a little clearer about the point in time at which the right to silence would be brought into this Framework. It can operate at various stages right up until the moment when evidence is given at the trial. Am I right in understanding that you are looking to the right to silence being spelled out at a very early stage when somebody is at the point of being questioned in the police station? Is that what you are getting at?

Mr Meehan: The stage will still be the same in Scotland, in other words when the person is a suspect. We are not suggesting, as has been suggested in some other submissions, perhaps that when a person goes as a witness to be questioned that they are cautioned. We would not be suggesting that. The right is intimated at the same stage as it is at present in Scotland when the person is a suspect or there are reasonable grounds for suspecting that person, but to reinforce that right the person is given legal advice as to the implications of that right. One of the dangers which we have encountered in practice is one sees in the transcript of a police interview that a suspect has been cautioned by the police at the beginning of the interview on the right to silence but 15 or 16 pages into the transcript they are being told: "This is your chance to give your side of the story" and without the benefit of legal advice that may dilute the protection which they think the caution gives. Although it may be their chance to give their story at that time, if the matter goes to court they will have the chance to have their position investigated and, if felt appropriate, presented to the court. That is something which is not said in the course of a police interview but if somebody had the benefit of legal advice at the stage the caution is given, that could be pointed out.

Q350 Chairman: One has to be clear what one means by the right to silence. The right to silence does not mean that you do not have to say anything, but generally it can be taken also to mean that adverse comments on your position to say nothing cannot be made about you when eventually at trial. If one takes right to silence as including the right not to have adverse comments made about your right to silence, one has to accept that in this jurisdiction the right to silence is not absolute any longer and adverse comments can be made in certain circumstances. Is that the same in Scotland?

Mr Brown: Scotland is different. As I understand it, the right to silence at this stage in almost all circumstances is almost absolute and comment cannot be made. I know that right has been diluted for other reasons in England and Wales. The right to silence between these two jurisdictions is different. There is also a procedure in Scotland that once a person is interviewed he can be taken before a sheriff and questioned by the prosecutor in front of the

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sheriff, asked questions, and during the course of what is called judicial examination he is warned that if he does not disclose a defence or fails to comment, that can be commented on by the prosecution or any co-accused in a trial. There is a half-way house there.

Q351 Chairman: My own view about the right to silence is that it may be a step too far at the moment because it is no use including in one of the minimum standards a harmonised right to silence unless you harmonise the content of the right to silence. If you are going to harmonise that across the whole of the European Union you are going to have a big problem and it would be unlikely to reach unanimity.

Dr Hart-Hoenig: My Lord Chairman, if you will allow me to comment on that. I only deal with white collar crime and I am very keen to get this right established, if I can put it that way. Firstly, I would say that this can be derived from the right against self-incrimination. What I come across is the taxman asking a little bit or the individual dealing with environmental issues filing a report and, what a surprise, this report emerges in the criminal file. For me, it is relevant to have it at the very beginning, very broad.

Q352 Chairman: What do you understand by “right to silence”? Do you understand it as including also the right not to have adverse comments made about your failure to explain things that you must be able to explain?

Dr Hart-Hoenig: At worst these comments could put pressure on that the suspect and could lead to self-incrimination and a comment of such quality is not justifiable. It is also not justifiable if being silent could lead to aggravating a sentence. In Germany, if you are a suspect you have the right to keep completely silent. That also applies to other related areas. If there are taxation processes related to tax evasion, for example, you are also granted the right to silence.

Q353 Chairman: With no adverse comments in any circumstances being made about your right to silence?

Dr Hart-Hoenig: I could complain that making comments is putting pressure on the suspect in order to lure him to say something as a result to self-incriminate himself and that could be successfully appealed.

Q354 Lord Hope of Craighead: As a point of information really, how widely across the Member States does one encounter the kind of caution that one expects from a police officer in our jurisdiction?

Mr Mitchell: I do not think very often is the point. May I hopefully deal with this in a slightly different way; I am bursting to. If I have understood my Lord

Chairman correctly, I am in agreement with his stance on this. The reality of right to silence is all about the burden of proof in the end and the wrongness of our present position in the UK is one of the areas where we could benefit. In the UK we are not perfect here, we could benefit from some of the European systems in reintroducing the right to silence in its naked form as a way of propping up the burden of proof because we have a lot of cases—the reverse burden of proof cases and so on, I will not go into a long list of matters—that are deteriorating rapidly even here. If we allow the right to silence to carry on deteriorating—we do not effectively have one here is the reality now—then we are also allowing the deterioration of the burden of proof and all the other areas of criminal law and the proper standards that apply. That was the point I wanted to make. I hope that deals with your Lordship’s point.

Q355 Lord Hope of Craighead: You have answered my point. We cannot expect to meet a police caution in every Member State and, therefore, there is something here that needs attention.

Mr Mitchell: There is something here that needs attention, however there are good aspects of the system that we do have here. On the system of cautioning and the rules about interviews and so on, we do have some excellent procedures here. To answer a different question my Lord was asking about is our system so good that we should be happy that we have a good system and why should others take on our high standards, may I answer that from a different point: because it saves money. We can tell our European colleagues, and frequently do and they listen, that having a proper interviewing system, by audio or videotape, saves a lot of money in terms of trials and investigations that go on. Whether or not they see it as a fair system, there is a pecuniary advantage in having it.

Q356 Chairman: Thank you. Can I ask for your views about electronic recording of police interviews? I have had it said to me, and I have not got any practical experience of this which allows me to have a view independently of the comments I have heard, that the introduction in police stations of electronic recording in this jurisdiction has been a major contributing factor in reducing miscarriages of justice. Is that something which you think should be introduced at an early stage as part of the minimum standards, bearing in mind that there will be expense implications?

Mr Mitchell: I have given you my answer, my Lord.

Dr Hart-Hoenig: In a couple of jurisdictions taping is a completely alien idea. We do not have it but we would welcome it very much in Germany. “We” means the defence, I am not sure what the state would

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say, especially in terms of cost. We only have evidence which is elucidated via questioning at the police station. We have minutes which are filed but these are not verbatim. Thus if a police officer says "Did I get it right? I will give you a sentence, is that what you mean?" "Yes", and one of the statements given by an accused with an IQ of 80 is "I committed this with conditional intent" and it is quite clear that was his wording! That will be transferred to the trial hearing and then we find out what has been done so far. Electronic recording would be excellent for us. Possibly the problem is the cost. Criminal law is always welcome because it shows that the administration is able to act but the last point on these bills is cost and if it is none that is what the politicians like.

Q357 Chairman: The other side of the costs coin is you save the costs of extremely expensive appeals perhaps.

Dr Hart-Hoenig: You are right. It very much shortens the length of hearings.

Mr Mitchell: Firstly, I think that the ECBA thinks this is the right way to go but on a pragmatic point, coming back to the negotiations, and there is at least some discussion going on, we believe that it is possible in the mid to longer term to persuade other countries and jurisdictions to seriously consider this for the reasons that we have given.

Mrs Keenan: My Lord Chairman, from a Scottish perspective we too would welcome this as a measure. It is something we do have north of the border and it is something which has been very effective in enabling us to resolve matters. As a former prosecutor I can say certainly there were trials which were resolved at an early stage when we were able to play the tape to the defence in a particular case. In some ways, perhaps the cost of implementing this and having recording equipment also can be offset by the costs of saving trials at some point.

Mr Brown: Also, it is quite important that these provisions could be delayed slightly, I presume, to allow certain jurisdictions to facilitate the various Framework provisions. I do not know whether they all have to be immediately implemented.

Chairman: There would have to be a lead-in time. I tossed off the remark that it is all going to be very expensive but really I do not know what it will cost in terms of expenditure.

Q358 Lord Brennan: Is it not important in these considerations, without being unduly divisive in your opinion, to take into account the fact that some European countries historically have worked in a criminal system based on arrest, long detention, no bail and the expectation ultimately of a confession or a plea bargain and all of these procedural devices that

we are talking about are rather more particular to certain jurisdictions than others? I would encourage you to keep advancing them because it would avoid the danger we have just spoken of.

Mr Mitchell: The biggest difficulty is in the East European bloc where there are a lot of problems and there is not always a judiciary completely free from corruption, and even in Southern Europe there is the absence of competition, or the restriction of competition. To become a barrister in Croatia you have to come up with €10,000 to join the local bar association and most Croatian lawyers cannot even afford a meal at the end of the day, let alone stump up that sort of money. There is a host of problems. My Lord is quite right to pinpoint one of them and I am not going to give you a long list of a lot of them but there are serious problems and the work has to go on. It seems to me that if you want to have this mutual recognition then more and more effort has to be piled into it.

Q359 Chairman: Can I now come to some more detailed questions about the content of the proposed Framework Decision. First of all, in Article 1 there is a reference to "criminal proceedings", the decisions to apply to criminal proceedings. Criminal proceedings, as you will know, in Luxembourg jurisprudence has an autonomous meaning. Is it an adequate expression without elaboration to go into this proposal? What about a person who is the subject of extradition proceedings, for instance, are they criminal proceedings?

Dr Hart-Hoenig: I guess criminal proceedings, especially in the Framework Decision, are sometimes dealing with extradition proceedings. Clearly it should be expressed that all these rights are applied from the very beginning of investigations, irrespective of the formal character of the proceedings. If it is an extradition proceeding, my understanding is that it is a criminal proceeding. If you express doubts as to whether it could be criminal proceedings, that could be a reason to make an amendment and obtain further clarification. It must be clear. It must cover all issues which are relevant or which could expose individuals to risks under criminal law that is extradition proceedings as well as other proceedings dealing with criminal issues. That is not very clear in the framework decision.

Mrs Keenan: My Lord Chairman, we would support the view that perhaps we should look at the process that is adopted in relation to the European Convention on Human Rights when we are looking at criminal matters and the classification of criminal matters and we should not be relying solely on Member States determining a matter as being criminal because clearly that would be a very neat way of avoiding the implementation of the

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Framework Decision. A case I have come across is the case of *Engel & Others v The Netherlands* in 1976 which dealt with this matter. In that case, four Dutch soldiers invoked Article 6. The court looked at the ultimate sanction that could be imposed in that case. I think that is a very important matter, we have to look at what norm is allegedly being violated and the nature and severity of the penalty that is to be imposed. If we could frame a definition of a criminal procedure around that basis then I think that is what we would favour.

Q360 Chairman: Would you be suggesting that the definition of “criminal proceedings” should exclude, relatively speaking, trivial proceedings as in, for instance, traffic offences of a reasonably moderate sort?

Mr Brown: My Lord Chairman, I think the problem is to define “trivial” “nowadays, with our increasing legislation because what is trivial for one person is not trivial for another. With our experiences in Scotland of the new disclosure regime—and I welcome the disclosure regime—what would seem trivial before to some individual may be no longer if some major matter is disclosed at a later stage. I would be rather subjective about that and to one person the contravention of the Road Traffic Act—going through a red light—may not be that important but to another person it might be their total livelihood. In our response to the Scottish Executive on this particular paper (of which we are happy to give your Lordships copies) we go into more detail as to what we mean by those matters which are not trivial and are important.

Dr Hart-Hoenig: My Lord, if I may add a point: what does “trivial” mean? For example, in Germany we have a distinction between criminal and administrative proceedings but, nevertheless, what can be imposed are fines of up to one million euro and proceeds can be forfeited. It is equivalent, and it is more or less at the legislation’s discretion to say we are dealing with it as an administrative offence, for example anti-trust cases, or they can say, no, we will upgrade it to a criminal offence. In our view, it can make a lot of difference which procedural rights are applied, and I would tend to broaden instead of narrowing the perspective or the scope of the application. The other point which I have previously referred to is cross border actions. What we have come across are examples of how to circumvent relevant safeguards. For example, policemen are good friends—Italian policemen with American policemen and with French policemen—so they organise the shadowing of people and they can tell them, “This individual is now flying to Spain so you can catch him and you can extradite him to the USA,” which would not be possible under German

law. That is the reality. Therefore, we are very cautious, and I would say it is better to be broad than having it narrow and making too many exclusions, which are prone to abuse.

Q361 Chairman: It would be right to say, would it not, that there should not be allowed to be difference between different Member States so that particular proceedings in one Member State are called criminal and the provisions apply, whereas the same conduct in another Member State would be classified by them as not to be criminal so the provisions would not apply? You could not have that. There would have to be an autonomous meaning given to the phrase. Does that not mean you have to have some sort of internal definition?

Mr Mitchell: My Lord Chairman, can I just come in on this. I agree with what Kai has said, but simplifying it down to two more basic propositions which could find a universality amongst all the countries of the EU, we would I think say two things. Firstly, if there is a risk that the product of any interview or production of documents could be used at a later stage in criminal proceedings, then they are the sorts of proceedings to which these Framework Decisions should apply—ie quasi criminal proceedings. Secondly, if the sanctions that are imposed in any proceedings are equivalent to those that could be applied in criminal proceedings, then the laws apply. So it is quite easy to come up with a definition which though not one of criminal offence fits circumstances in which the defendant or suspect ends up with a serious penalty of some sort imposed against him. We would recommend that way of looking at it rather than a simple distinction between criminal and civil.

Q362 Chairman: Thank you. What about the suggestion that there be express mention of the European Arrest Warrant so that proceedings for the execution of such a warrant would be covered without any argument about how one classified proceedings of that kind?

Mr Mitchell: It has to be done, my Lord, is the short answer.

Mr Brown: Yes, we agree.

Q363 Chairman: Now what about the point at which the requirements kick in? At the moment under Article 1, paragraph 2, the rights apply to any person suspected of having committed a criminal offence when he is informed by the competent authorities that he is suspected, which allows for at least the conceptual possibility that the authorities by postponing the moment that they are giving this critical piece of information postpone the time when the rights apply. Is that satisfactory?

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Mr Brown: I think Michael is going to deal with that.
Mr Meehan: The Society's position is that it is not satisfactory because there is the danger of turning it into a game of "Simon Says" so that if the officer does not say, "You are now a suspect," then the protection is not there.

Q364 Chairman: What would you suggest?

Mr Meehan: We would suggest the approach which was taken by Scottish courts when looking at the fairness question which is whether there are reasonable grounds to regard a person as a suspect or whether objectively that person was a suspect at that stage, so one would look at the stage in proceedings and the evidence available to make an assessment of whether the person is a suspect.

Q365 Chairman: So the right would not necessarily apply at the beginning of the questioning process?

Mr Meehan: No and, if I may say, it ties in with the point which is raised in question eight. There is a question about the courts applying the Criminal Proceedings Act to a suspected person. Certainly from a Scottish perspective criminal proceedings were often traditionally equated with court proceedings as opposed perhaps to the investigative stage of proceedings. Certainly my understanding of the European case law is that under Article 6 protection, when it comes to considering the right to trial within a reasonable time, the proceedings are regarded as commencing when the person is charged, so you would have a situation where criminal proceedings would apply not to a suspected person but to a charged person. There is a danger therefore that the person, who although suspected is not charged, does not have the protection.

Mr Mitchell: My Lord, could Dr Hart-Hoenig quickly express our view.

Dr Hart-Hoenig: With particular reference to questioning by the police we adopted a broader approach which means time runs from the moment that the individual becomes involved in the investigatory process either by being questioned or being required to produce documents because it is a suspect. If it is an accused person under investigation it is also somewhat dependent on which type of process it is formally, and therefore one must look for, let's say, a substantial definition that triggers these rights once an individual is exposed to risk under criminal law. Maybe that is a definition where one can cover it. Admittedly, it is a legislative issue but once this exposure is given these rights should apply. That is our stance.

Q366 Chairman: Whatever the formulation becomes it has got to be practical, it has got to be workable from the point of view of criminal investigations. It

has of course got to be fair but it has also got to be workable because if it seems not to be working it simply will not be accepted. Let's take the case of a car accident where it looks as though somebody has done a bit of dangerous driving and the police are on the scene because there is an accident and they have been called; would you say the rights apply at that point?

Ms Hodges: My Lord Chairman, how we tend to deal with that at the moment is by admissibility of what is said, and therefore once you suspect someone, once they step over that definition of being witness and become a suspect, at that time they are cautioned and their rights are established.

Q367 Chairman: And if they are not cautioned you cannot use what they say?

Ms Hodges: Exactly.

Mr Mitchell: May I add that in our experience—a slightly different point—we have found both in Europe and in Britain there is an increasing tendency by investigators, whether in tax or criminal cases, to go to people who they may already feel are suspect but are not quite sure, take witness statements (sometimes quite a few witness statements) and then build up a body of evidence which then entitles them to regard them as a suspect, and only then do the criteria apply. We feel that is wrong and leads to injustice. We are very concerned that at the earliest possible practical stage the rights should apply. That is why we think this—because of the problems that can ensue.

Q368 Chairman: At the "earliest possible practical stage" sounds difficult.

Mr Mitchell: I agree with what Louise has said, it is difficult, my Lord, and maybe more work is required on this, but at the earliest stage in the investigation if not at the beginning (which would be my personal preference) of the investigation.

Q369 Lord Hope of Craighead: Is there not a danger that you inhibit the whole process of police investigation altogether? People can be involved, if I might take Dr Hart-Hoenig's phrase, in the investigative process or the criminal process as witnesses, and no doubt members of the Law Society of Scotland will help me, but one is aware of cases where in the course of questioning by a policeman with a perfectly open mind as to who might be responsible for the crime it becomes clear that the person sitting in the chair in front of them may well be responsible for the very crime. One has got to draw some kind of line at some point. What is wrong with drawing the line at the point at which the individual becomes a suspect and if you do that you separate out those who are involved in the process quite

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innocently as witnesses, who are there perhaps reluctantly to help the prosecutor, and those who in the end will be prosecuted?

Dr Hart-Hoenig: My Lord Chairman, I would not have a problem with it if it is quite clear that one cannot prove that the evidence (prior to placing the individual in the formal position of a suspect) has been obtained by deception and being aware that the individual could be a suspect but pretending he was merely a witness. If it could be made sure that such evidence was inadmissible, then I would consider that, one of the essential safeguards in place. Another point which is somewhat in between (not that I wish to use Germany as a blueprint for everything but my experience is derived from that country)—is that if a witness is interviewed he must be cautioned that he has the right to silence and is not obliged to incriminate himself since he could then be exposed to criminal risks. There is a further point. In that the German Constitutional Court has decided that witnesses also have the right to have a lawyer present during questioning. And that they can refuse to answer questions in the absence of one or without having spoken to one. Represent several safeguards and I would therefore have no problems with an individual identified as a suspect whom would thus act as the trigger point at which action is taken. I know (—apologise for reiterating this point—) that information is collected from various sources (taxation etc) as a witness followed by formal action all such evidence is admissible. That is my point as to why I have reservations although be it must practicable.

Q370 Chairman: Another timing point arises under Article 2(1). A suspected person has the right to legal advice as soon as possible and then throughout the criminal proceedings if he wishes to receive it. What about the “as soon as possible”; is that a satisfactory phrase? Does that just mean as soon as you can get hold of a lawyer?

Mr Mitchell: My Lord Chairman, you know our position—certainly mine—on this; “as soon as possible” is far too vague and we have indicated throughout that clear definitions are required. I use the French example where you could have a situation where the suspect is taken into the “Garde a vue” and questioned for two days and once a confession is available that is the point at which it is considered “as soon as possible” and that is a very convenient moment for suddenly getting a lawyer in. No, there has got to be a clearer definition than that.

Q371 Lord Clinton-Davis: What are you suggesting as an alternative?

Mr Mitchell: As soon as the investigation begins. Dr Hart-Hoenig has indicated that even persons who are being interviewed to give a witness statement have rights in terms of what they can have available to them. We are concerned generally that there is no slippage in investigations and the pretence is, “We are foraging around to see where the suspect might be,” as part of the investigation, and we are concerned that the protection should go as early back as possible in the investigation. And we can draw comfort from some of these German institutions.

Ms Hodges: My Lord Chairman, if there is a right to have a lawyer present at any interview obviously an interview cannot start until you have obtained that legal advice and that lawyer is present.

Mrs Keenan: I do not know if this assists in any way, but having had regard to some of the evidence you have had previously from the Commission I note what they said about their intention about that, and I wondered whether having regard to the legislation in Scotland where we have the phrase “without delay” could maybe clarify the matter for some people.

Q372 Chairman: There are two other points arising out of Article 2(1) that have already been referred to by some of the witnesses. One is what is implicit in the use of the expression “the right”? Does that mean the right without paying for it? Does that mean the Member State must provide the legal advice if the individual cannot pay for it? Does legal advice mean simply a bit of advice or does it include assistance and representation in the criminal proceedings that follow? Do you have any view about those points?

Mr Brown: If I could deal with the latter point, first of all, my Lord Chairman, and say I think it was conceded by a witness from the Commission that it includes legal representation and I think it includes the whole process. I am just trying to remember the first point now.

Q373 Chairman: The first point was whether you get it free, whether the right is the right to be provided without having to pay for it.

Mr Brown: The brief answer to that is in the paper in response to the Scottish Executive, which we will give to your Lordships, we refer to the test for assistance for representation through the Legal Aid Board and the test applies on the basis of the nature of the offence and various interest of justice tests. That is the short answer and hopefully that will assist.

Mrs Keenan: Our concern when we looked at Article 2 was that it was not linked into Article 5 in the same way Article 3 was. We did feel if it was going to be a real right to legal advice then there should be some provision made in regard to payment, otherwise it would not be uniform.

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Q374 Chairman: Another problem which was discussed arising out of the same provision was that relating to the identity of people who were to give the legal advice and legal assistance, and the proposition was that if one insisted on it being a properly qualified lawyer, as we would all expect a lawyer to be qualified, then the existing arrangements in some newly joined Member States would become unusable because the individuals would be just paralegals or sometimes law students who had not yet qualified. While it is plainly desirable that that should change to a system where properly qualified lawyers are available, that would take time and one did not want to outlaw the existing arrangements as being inadequate and unacceptable, although on a long term basis they might be.

Mr Mitchell: We in the ECBA have given this a lot of debate and I have to say we have not entirely reached a unanimous conclusion on this very knotty problem. If I could say my bit first and I know Kai has a very profound and sensible argument for the opposition. We have found in Eastern Europe and sometimes elsewhere—Georgia and lots of other countries outside the EU—that there is a very real need for representation in courts and there simply are not enough lawyers and a real need is expressed in these countries for people to go along. Often it is done by NGOs or sometimes people who have practised in these courts and tribunals for up to 30 years. It is just that they simply do not have an adequate or proper or recognisable legal qualification. Our hearts go out to these people who do the job whom we meet regularly in these countries and we extend our deepest sympathies to them for taking on these needy cases where no other representation would exist. That is a real problem and there is a temptation, I have to say on the part of some of us, to weaken our resolve in terms of having proper qualifications. However, at the moment Kai's position and that of others is in the ascendancy and it is that we should stick to standards and he will explain why we have come round to that way of thinking. We worry about the problems but over to Kai.

Q375 Chairman: What is your response?

Dr Hart-Hoenig: Thank you very much. We all have the experience that Member States are very reluctant to adhere to Framework Decisions and to implement them and so forth. Therefore I would not encourage them by creating a specific provision for a transitional period. These accession states know the discussion, they know the green papers, they know what is going on and they know which Framework Decision they could face in maybe one or two years' time, or whatever. There will be a certain time given for implementation. We have clear criteria and we have clear benchmarks for monitoring of it and if we

allowed a transitional period of several years I guess they would be in a more laid-back position and say, "Thank you very much, we have ten years more before adhering to these regulations." So much can be taken into account regarding the monitoring process and the time it takes to implement, but there should be no specific provisions contained in this Framework Decision.

Q376 Chairman: There has been some discussion about the European Arrest Warrant already. As you will know, one of the provisions of the European Arrest Warrant (and it has been repeated in the domestic legislation in this country and repeated in the European Arrest Warrant Framework Decision) is that an individual can resist being extradited, notwithstanding the terms of the European Arrest Warrant legislation if he can satisfy the judge, the magistrates, whoever is presiding at the hearing, that if he goes to the requesting country his human rights will not be observed. Well now, that was simply looking at the ECHR to which all Member States are signatories. It was just occurring to me that it might be appropriate for this Framework Decision to say that extradition under the European Arrest Warrant provisions would not be obligatory in relation to an individual sought to be extradited if the individual can show that his rights under this provision would not be recognised, in which case why could they not bother too much about making special arrangements for countries that do not comply because they would not get the characters extradited. Does that seem reasonable?

Ms Hodges: My Lord Chairman, there certainly has to be some form of sanction or penalty if the safeguards are not adhered to. They should be on several levels, not just on a national or Member State level but also at a grass-roots level, so that if the safeguards are not adhered to there are issues about admissibility of the evidence, so that there are reasons why investigators and everyone wants to make sure that those safeguards are adhered to.

Q377 Chairman: I agree with the thrust of that but are you suggesting that the Framework Decision should have amendments to provide for those sorts of consequences of failure to comply with the rights provisions?

Ms Hodges: I think that is a very useful suggestion.

Mr Mitchell: My Lord, may I just add, yes, the right to a fair trial is an obvious one under Article 6 of the European Convention. If there was any demonstration in the court which was thinking of sending somebody over to the issuing state under the European Arrest Warrant that there was no realistic chance of a fair trial, that ought to be clearly stated as

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a means of preventing that person going over to the issuing state.

Q378 Chairman: Fair trial adjudications from Strasbourg are usually after the event adjudications, are they not?

Ms Hodges: We raised this right at the beginning of this session. I agree with your Lordship. I think we are agreeing with the ECBA with that point.

Dr Hart-Hoenig: Maybe that is a point in the overall monitoring system because it is one subset of this topic of what should happen if they are not adhering to it and not providing, for example, the qualified lawyers required under the Framework Decision. In addition should there be a specific amendment dealing with it clearly or more or less tacitly addressing the accession state or taking the broader view? If you take France they would say we are very qualified but unfortunately we have no access to our client and that is a problem. It may also be a question of drafting rather than substance.

Q379 Chairman: Can I move on to Articles 10 and 11 which impose an obligation to give what is called “specific attention” where the suspected person falls into certain disadvantaged categories—age, mental and physical condition and so forth—Article 11 sets out a number of rights which a person defined as having specific attention is to have. Does the proposed provision here seem to you to be satisfactory in terms of the rights that the people who fall into these special attention categories are to have? There is a question whether there is a sufficient connection between Article 10 and Article 11. Perhaps it ought to be brought all into the same Article?

Mrs Keenan: My Lord Chairman, if I can perhaps start with the definition. We have indicated in our submission that we thought the phrase “specific attention” may be worthy of further definition, and perhaps a non-prescriptive set of examples given. We have a situation in Scotland at the moment where we have just brought legislation through the Vulnerable Witness (Scotland) Act 2004 and, very unusually in those circumstances, the accused can come within the definition of vulnerable witness. The test used in that situation looks at whether there is a substantial risk that the quality of evidence which will subsequently be given in proceedings will be diminished due to fear or distress about giving evidence. One might say that may apply to all accused but there it is. It also provides a list of circumstances which can be taken into account when determining vulnerability. We think that is most helpful because it sets out a range of issues such as those involved in political trials and relationships between—

Q380 Chairman: Did you say political trials?

Mrs Keenan: Political trials and the issue of political allegiances. It also refers to relationships between parties who are involved in the trial and so on. It places quite a heavy onus on the person who is citing the witness or leading the accused in evidence to consider vulnerability at an early stage and to ensure that the specific measures are put in place in order to lead evidence from that person. I accept that is at a later stage further down the process, although Articles 10 and 11 will ultimately look at that, and it is also looking at the interview stage, but that idea of looking at the character of the person who is the suspect, determining the issue of vulnerability and then taking specific measures to assist that person, is the approach that we think should be taken, so that you are looking at it on a subjective basis and you are putting that suspect in the same position that a suspect who is not challenged in the same way would be. So we think there would be merit in looking at the definition again. In regard to Article 11, we feel that Article 11(1), which is the audio and video recording, should be available for every accused not just those who are afforded the right to specific attention. Similarly, under Article 11(2), which is the right to medical assistance, if anyone requires medical assistance then they should be entitled to get that. The third right under Article 11(3) is what we would describe in Scotland as a “supporter” or supporting person or appropriate adult. We agree that should be one of the measures which could be given in appropriate circumstances. There are other issues about definition which we would like to be teased out. There is reference for example to age, mental, physical or emotional condition. We are not clear whether something like a learning disability would come within the focus of that. What about the aspect of vulnerability such as refugees or people who just do not understand the process but not as a result of age or mental physical or emotional condition?

Q381 Chairman: You think it should be redrafted to widen the categories of persons who deserve specific attention?

Mrs Keenan: Yes.

Q382 Chairman: You mentioned political trials. I think this was something which the European Criminal Bar Association mentioned as well. I have to say that I have my reservations about that because I am not sure what was meant by political trials. Trials in all European Member States would be trials under criminal law so what sort of criminal offence would deserve to be categorised as a political trial?

Mr Mitchell: The buck passes squarely to me on this issue, I fear. The sort of situation we had in mind is this: the leaking of government documents of a highly

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charged political nature, that is one example, or the secrecy laws where an employee of a government department decides to reveal some factor at the heart of the Iraq war, for example.

Q383 Chairman: You would say that any prosecution in this country under the Official Secrets Act is a political trial, would you?

Mr Mitchell: No, what I mean, so I make it clear, is this: where there is clearly in the investigator's mind—and most people would understand what I say and what this means—a political dimension to it, there is an increased duty of care, I would submit, on the investigator to be aware of press publicity, the importance to government to get a quick decision and so on, and to be more aware of the way in which the investigation is conducted. It places that person, the defendant or suspect, in a more vulnerable position. I would argue and submit that. Others may not approve of that position but I do. I say that is a category that needs to be considered and often is not.

Q384 Lord Hope of Craighead: I wonder if I could come back to what Article 11 seems to be driving at. If I am right, as I think I am, it is not really looking at the stage of the trial, it is really looking at the position of the suspected person, not the accused, and that brings me to look at the second sentence of Article 11(1) which is the control mechanism that “a transcript or recording shall be provided to any party in the event of a dispute”. I just wondered what the practical thinking is behind this and what kind of disputes either you or Anne Keenan might envisage arising where one has a person who is vulnerable in the extended definition? Is this simply a dispute about what the person said, or a dispute about how the person was treated, or what kind of protection would you like to see here lying behind the use of the audio or video recording?

Mrs Keenan: I think we would like it to be available in all circumstances, not merely in the event of a dispute. Really if it was in an investigatory stage interview then as the defence counsel you would want to be aware of what was said and the circumstances in which it was said and the whole ambit of circumstances, the state of mind perhaps of the suspect at that time, the intonation, particularly if it was video recorded, and the conditions in which the interview took place.

Q385 Lord Hope of Craighead: So are you really saying that it should be made available without qualification to the suspected person or his or her representative?

Mrs Keenan: Yes.

Q386 Lord Hope of Craighead: It would be there for use for whatever purpose might emerge?

Mrs Keenan: Yes.

Mr Brown: Or it might emerge as part of the evidence, my Lord, as are taped interviews available in the Scottish jurisdiction at this stage. Sorry to interrupt what you were saying, but in the event of a dispute the wording, as Lord Hope has indicated, may be supplementary to what the intention of certainly our submission is.

Dr Hart-Hoenig: My Lord Chairman, the problem here is if we are going back to the area of enlightenment, then from a European perspective, it is a concept of autonomous personality. Moreover the question is when is the individual designated as mentally disabled relative to criminal proceedings and thus is not competent to defend themselves. In Germany we have a different concept. We have clearly defined cases of so-called necessary defence. That covers some sorts of disabilities but also if a charge is brought before a lower regional court it is a case of necessary defence. That is one point. On political offences, my point is that so-called political offences receive special treatment which are not to the accused's advantage. Let's take 9/11; The US Government introduced SAMs (special administrative measures) to deal with it. Maybe you can say it is the difference between war and something else but the liberal tradition under the Rule of Law says that if it is a crime and we are dealing with a criminal process then a crime must be taken as a crime. Therefore there are a number of different positions and you can see that it is not an issue where we have a unanimous position in the ECBA. I would argue that we are very much of the opinion that there should be no specific safeguards regarding political offences because that could be taken as being more discriminative than safeguards because if I am really a political offender about to present my case I should not be treated like a disabled grandmother or as having a child's mind and not a political offence mind.

Chairman: My view of this—and the Committee will obviously discuss this in due course—is that the attempted definition of what constitutes a political offence would be such a minefield that it would really not be worth bothering with. Besides which, there are all different sorts of offences which time by time and year by year become the subject of great political attention. It may be racial violence, it may be domestic violence and every now and again all the political parties say, “This is something which must be specially dealt with.” What would constitute a political offence, using a very small “p” for the word

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political, would be variable. I think it would be a can of worms.

Lord Brennan: It is also an entirely inappropriate one. It is dependent on the capacity of the person to be involved in a fair investigative procedure. It is not dependent on the nature of the offence, it is on the capacity of the individual and the existence of a tape recording and so on to test whether or not the person was of sufficient capacity. So as soon as you adorn this special case with considerations about the nature of the offence, the courts are going to be besieged with arguments about “the tone of voice of an officer when he asked me a question”, or “it was a political offence” or “I was terribly nervous.” It is impracticable.

Q387 Chairman: About the only sort of criminal proceeding that could be justified in calling itself a political offence in this country would be impeachment and nobody is sure if that is the way—
Mr Mitchell: Perhaps we will see when one comes up!

Q388 Lord Borrie: I do not know how far either group would agree with me but as this discussion has gone on it occurs to me that the only safeguards, to use the word in Article 10(1), provided for these people needing specific attention are electronic recording on the one hand and medical assistance whenever needed on the other. I have the impression that everybody here today among the witnesses thinks that those safeguards should be available for everybody. If that is so, what is left of Articles 10 and 11? What is the point?

Mr Mitchell: My Lord, to answer it directly, outside those two provisions the investigators should have an awareness of the needs or capacity of the individual who is there. But it then may be that there is a particular problem and there may need to be some preliminary questioning of the person by the investigator to establish whether there is some urgent matter which is on the mind affecting the capacity of the person being interviewed before the interview is started. That is really the point that we are getting at here. The advantage being on the investigator to have that person in custody or closeted in the interview room, there should be an onus on the investigator to make sure that when they embark on that interview, when they are going to use that interview at some later stage, that they have properly ensured that the capacity of that person is correct and he is in the right frame of mind, and that they are going to get good evidence from it. Too often investigators do not bother. They are too concerned about getting the evidence, regardless sometimes, sadly, of whether that person was in the right frame of mind to actually undergo an interview. That is what is at the basis of this. That is what is behind this.

Mr Meehan: My Lord Chairman, if I may make a small point. When one considers the protection of whether a person was from a capacity point of view able to give an interview or to follow what was happening, it would seem more appropriate rather than a transcript be given that a copy of the tape be given (whether it is audio or visual) because very often what the defence seeks to do is have a psychological assessment of all information, and that would include the inflexion, the tone. An expert who has that information, I would suggest, is far better placed than somebody reading a transcript, which can perhaps give a slightly distorted perception. Often transcripts do not pick up pauses between answers. It may be more helpful if the word “transcript” were replaced with the word “copy”.

Q389 Chairman: I take the point, thank you. Can I now move to Article 12, the right to communicate. The text in paragraph 1 says a suspected person remanded in custody—and we have raised the question of what the implications are of the use of the verb “remanded” and the response was that the word is out of place and will have to be changed so I do not think we need to spend too much time on that—but the question that has been raised is whether there ought to be a right to communicate with a doctor as necessary and at what particular point of time the right to communicate with the family and employers would arise. My own impression would be that it ought to arise immediately. I do not know what view the groups before us have about that.

Mr Mitchell: My Lord, I would simply answer it very swiftly. Under English law and the Code of Practice there is a right to communicate straight away unless there are good reasons affecting injury to persons or destruction of property and so on, certain set categories? Without gloating, I think that the UK Codes of Practice tend to provide a useful set of safeguards as to when the right to communicate could be had, which could well be adopted and ought to be adopted elsewhere.

Mr Meehan: My Lord Chairman, the Scottish position is the same, that the intimation is sent without delay unless there is a good reason, and as a fall-back position, where good reason does exist, the Society would be keen in those cases that immediate intimation is sent to the consulate so that a person who is either travelling abroad or working abroad does not seem to disappear off the radar. I do appreciate that the investigating authorities may not want the fact of intimation to be passed on to the family or employers for legitimate reasons connected with verification but at least it does mean that there is some monitoring or some independent organisation is aware of the detention in custody of a person.

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Q390 Chairman: I suppose there might be circumstances in which the investigative authorities would certainly not want other members of the family or, in the case of employers, employers to know. Equally, there might be cases where the suspected person did not want them to know either!
Mr Brown: Certainly not their employers.

Q391 Chairman: What about a doctor? Amnesty International suggested that the right to communicate should include the right to access to a doctor of one's choice. I am not sure about this "of one's choice". A lawyer of one's choice I can understand but doctor of one's choice? A suitably qualified doctor of course but of one's choice?

Mr Meehan: One can envisage the British patient travelling abroad simply to be arrested so they can see their own doctor that week! Certainly we would not support that. We can appreciate the point of concern that has been raised by Amnesty. However, if doctors are police casualty surgeons and they are regulated then that would be appropriate. I think it is worth bearing in mind that looking at the overall Framework Decision that it is driven towards having access to a lawyer at an early stage. Often a solicitor who sees a client and the client is saying, "I am on medication, and that has not been provided," can raise that with the custody officer and that is recorded. Although, a lawyer is clearly not in a position to diagnose they can certainly raise medical concerns. There is therefore, to an extent, an independent aspect if there is concern about the medical involvement in some countries.

Ms Hodges: Yes we agree entirely with what has been said.

Q392 Chairman: On the letter of rights in Article 14, the first question is when the letter of rights should be handed over. Article 14(3) really has the implication that it would only be on arrest but the Commission in the evidence they have given us has indicated that they think that the suspected person should be given the notice at the earliest possible opportunity and certainly before any questioning takes place. I imagine that there would be no resistance to an amendment to the proposals to make that clear?

Ms Hodges: No, we would agree with that amendment.

Mrs Keenan: We agree.

Q393 Chairman: The more difficult question is what the letter of rights should contain. It has got to be reasonably short and punchy. You must refer in summary outline to the important rights that the minimum standards will entitle the individual to. There is also provision in Part B for the rights of the country in which he or she finds himself or herself to

be set out. That is more difficult. Testing it by reference to this country, what rights would go into the Part B part of the Letter of Rights do you think?

Ms Hodges: That falls to me being the only English solicitor here. I scribbled this on the way in the cab so I hope I have covered most aspects: the right to a copy of the PACE codes of practice which we have; the right to free legal advice at interview; the right to confidential consultation with your legal advisor; the right to silence, although of course with the caution of the adverse inferences that can now be drawn; the right against self-incrimination; the right to a copy of the tapes on the charge; and the right to be informed of the allegation against you and the basis of the allegation. One I forgot was the right to a telephone call or communication.

Q394 Chairman: Yes, one would have to bear in mind that at the stage at which the letter of rights was handed over there probably would not have been any allegation against you in any formal sense.

Ms Hodges: No, but it is right that it should be clarified at the beginning of interview what the allegation is against you and the basis of the allegation.

Q395 Chairman: Would the content be much the same in Scotland?

Mrs Keenan: Yes, obviously omitting reference to PACE.

Q396 Chairman: There must be a Scottish equivalent?

Mrs Keenan: Yes.

Chairman: A problem that might arise in relation to the letter of rights is the entirely practicable one of what languages is it to be in. You might be in a police station in Outer Mongolia, I do not know about that, but it might be somewhere quite remote where you might find yourself—

Lord Hope of Craighead: In Stornoway!

Q397 Chairman: To say it should be in every official Community language does sound to me a little impracticable.

Mr Mitchell: My Lord, I think we take the view that if it is going to be taken seriously, and we do take it seriously, then there really does have to be provision for this letter to be available in most of the commonly spoken languages of the world or areas of the world. That is the first point and we have a novel suggestion for tired police officers or other investigators which is to have some emblem or flag on the document so that where someone might not be able to decipher writing on the document, "Is this the form you need, sir?" if they saw the flag or emblem on it they may think, "Ah, that is my area of the world or whatever" and

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get to the right form at somewhere near the right time.

Q398 Chairman: So you think that every police station in the United Kingdom should have a copy of this letter in Chinese?

Mr Mitchell: I think so, my Lord if not at every police station those forms should be available in the locality and be got to the police station at an early opportunity. This is a pretty fundamental exercise of the rights and the rights are not available if they are not in the language or in the material that the person can understand. I think it is fundamental. This nettle has to be grasped, it seems to us.

Mrs Keenan: We would agree with that, my Lord Chairman. With current day information technology as it is there should be provision to store these on computer disk or some format where they could be printed out relatively easily in that particular language.

Q399 Chairman: I suppose if they were stored electronically the problem I mentioned would not be so serious.

Mr Brown: We have an awful lot of Chinese people in Glasgow.

Q400 Chairman: I guess many of them speak English or Scottish?

Mr Brown: Yes, very well.

Q401 Lord Brennan: May I ask a question to whichever of the two groups would like to respond to it. There is a danger when you get to a document like this of a police station filling up with a lawyer, a doctor, a father, a mother and an interpreter and the whole thing loses shape and coherence. What do you think about—and it may not be appropriate to put it into an article—some kind of preambular comment or some comment perhaps from this Committee, Lord Chairman, that the consequences of all these variable requirements can usually be avoided or reduced in cost or difficulty if the principal protectors are provided—a lawyer and I would say a tape recording. If you have those two then nobody is going to tell somebody, “You cannot speak English, no questions.” I would have thought there is more of an impact in terms of human rights protection if you have the most important precautions.

Mr Brown: Can I say, my Lord, that I could not agree more because certainly in my experience of having dealt with visits to police offices, which can on occasions be very intimidating places, having the benefit of the introduction of tape recordings has lessened the allegations of police officers putting words in mouth and lessened certain parts of the trial process. Very seldom now is there a challenge to what

is said and if there are challenges they are fundamental challenges. The second aspect and why we are so strongly supportive of a qualified lawyer getting access is that it is often the case that the police officers are concerned with investigation and a qualified lawyer there who takes it upon himself, with all of the implications of that responsibility in advising a client, can make a big difference, particularly in serious crime, to the future process and can affect the length and complexity of a trial by giving proper advice. So I totally support that comment.

Mr Mitchell: My Lord, I agree totally with what has been said. May I just add these two features. I agree that having a qualified lawyer is brilliant and should be what happens. That is the perfect position. Why—and let’s not lose sight of it—because there is a duty to the court to provide the best evidence. That is what we are all hoping for in the end—a proper trial with the best evidence available. That is the aim. Yes, but in a fall-back position—and I come to my second point—where a qualified lawyer is not always available, the reality, sadly, is that even though there are local solicitor schemes available and so on and the people are very worthy and very careful to make sure they work properly, you can get trainees going out at 3 o’clock in the morning who simply do not have the level of qualification, for example, for a particular type of trial or a particular individual and they are always the weakest links in these matters and that is where you then have to have the appropriate—I am sorry to use the expression—fall-back position. I agree with you in principle but it is the long hours of the night where things fall down where you need to have a fall-back position. In a perfect world I agree with you but it is not always a perfect world.

Q402 Chairman: Thank you. Can I now ask for your views with regard to evaluation. My view with regard to evaluation and monitoring is that the success of this proposal in raising standards appropriately across the European Union will depend upon there being proper machinery for evaluation, and without it it will run into the sand without making any real difference. I think it is very, very important that there should be proper monitoring and evaluation procedures put in place. I do not think it is going to be enough simply to have a gathering of statistical information because you have got to make sure that you get the right information there to be gathered. What is going to be needed is some form of system for getting complaints about inadequacies in the observance of these minimum standards from the practical experiences of those suspects and their lawyers who have been held in Member States and questioned and been dealt with in criminal

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proceedings. Do you have any suggestions about how this might be done?

Ms Hodges: Well, we agree that as well as statistical analysis, which as we all know can tend to say whatever the person who is crunching the numbers wants it to say, that any monitoring should also have interviews with lay persons, which includes suspects, defendants, victims and other witnesses, and practitioners (as in criminal defence practitioners) so that the evaluation will both be on a statistical basis and an anecdotal basis so there is some flesh on what the statistics say. We welcome the idea of an independent group of experts to monitor and evaluate the Framework Decision while not necessarily just being European Commission based monitoring. We think that other parties and individuals and practitioners should also be involved in the monitoring process.

Q403 Chairman: If it is going to be, as I think it is, a requirement that will be imposed by those minimum standards that the individual is given a lawyer to assist him or her in dealing with the allegations that may be made against him or her, is there any reason why it should not be made a matter of professional obligation on the part of that lawyer to report to some central authority whether it is in England the Bar Council or the Law Society in Scotland, the Bar Council or the Law Society, any complaints which the lawyer has about the observance within the country of these requirements, and that would then provide a means for easy collection of the details you would need for evaluating and monitoring.

Mr Mitchell: My Lord Chairman, I think maybe initially, yes, but there does need to be something supra-national to be a driving force to getting that material once received by bar councils and so on in the first place. There is a lot of percolation up to Bar Council level but it may not go any further. You do need a body, a college, representative unit from all the Bars of Europe or some other institution which draws upon and is proactive in finding out and investigating what is going on and receiving complaints. It needs to be more than just the usual drizzle upwards and then you find a level and it never goes any further. I am pessimistic about it unless there is a driving force proactively going out and seeking information.

Q404 Chairman: The Commission could be asked to appoint officials to conduct the monitoring exercise and to receive the details that the professional bodies to which I have referred would have available to provide them with.

Mr Mitchell: I believe the ECBA are moving towards the position (although it is not yet elucidated) of an independent body and they are not in favour of the

Commission dealing with this internally or by themselves. A great deal of thought is being given to this by all the Bars in Europe at the moment as to what particular form this body should take. The general view is that it should be independent and supra-Bar and independent and public and visible.

Q405 Chairman: You have got to start, have you not, with requiring the lawyers who are acting for these individuals to report problems or inadequacies that they have come across in dealing with the particular case?

Mr Mitchell: I do not see there is a difficulty in them doing it provided there is a proper independent and transparent body to report to. It might be that their own national Bar is not seen as being impartial or a good enough body to report to however much compulsion is applied.

Q406 Lord Hope of Craighead: I want to be quite clear, Mr Mitchell, you are envisaging a supra-national body ultimately; is that right? Is that because if you confine it within each Member State or contracting state or whatever it is you will not get the perspective that you really need in order to understand that things are being done uniformly across the various jurisdictions?

Mr Mitchell: Yes I do. That is partly the reason, my Lord, and partly because Europeans are capable of dealing with supra-national issues; and having to have a rolling presidency of such a body for example—and I am sorry, these are not well-formulated ideas, they are ideas that are being debated at the moment with no great cohesion. However, I think there may well be in the short-term future a more cohesive view held by the Bars. If that helps, that is the position.

Q407 Chairman: Why should it not be some organ of the Commission? I am not quite sure I understand the objection to that?

Mr Mitchell: Because there might be a reason for the Commission wanting to applaud itself for a wonderful job it has done and it has not done a wonderful job.

Q408 Chairman: No, no, I am suggesting that the Commission would not be investigative itself but would simply be collecting the material which the arrangements with the lawyers and the lawyers' associations would have collected.

Mr Mitchell: We do not have great confidence in that being a proper vehicle for this sort of job.

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Q409 Chairman: Which vehicle, the Commission?
Mr Mitchell: Yes.

Q410 Chairman: I was not sure why not.
Mr Mitchell: Because it is cumbersome, there is too much information, and it already has a big enough job to do in other areas. This is a very selective area which needs a proper job done on it by a body which is truly independent of the Commission and is seen by the public and lawyers to be independent.

Q411 Chairman: You want a body which is truly independent of the prosecuting authorities in the respective countries. That is the essential piece of independence, surely?

Mr Mitchell: My Lord, I agree with that but at the moment I do not think any of us can give you an answer specifically to this question. All we can do, my Lord, is to be encouraging that a lot of thought is going into it, albeit I cannot give you a remedy that is instantly available at this moment.

Dr Hart-Hoenig: The problem is that the Commission tends towards fulfilling self-prophecy. In monitoring they would decide to define the criteria and the reporting systems to obtain the outcome that they would like to have. Another point regarding the reporting obligations, I am also somewhat reluctant because it is possible to get anonymous reports that would be prone to abuse by lawyers.

Q412 Chairman: Anonymous in what sense?
Dr Hart-Hoenig: That the reports could not be traced to who reported about what case. If they just collect it—

Q413 Chairman: I was not suggesting that.
Dr Hart-Hoenig: If you are suggesting that it will not be anonymous—

Q414 Chairman: I am.
Dr Hart-Hoenig: And it is clear that lawyer X made a report saying this prosecutor did that, this judge did that—

Q415 Chairman: It would be much more factual than that. For example, on the right to communicate the suspect was not given the facility to communicate for a week or whatever. Or a specific attention matter where a particular individual was a child aged ten and his parents were not informed and there was nobody present when he was being questioned by the police. This sort of thing.

Dr Hart-Hoenig: May I give you the background to my comment. I came across a dawn raid regarding tax evasion and I told the officer who was conducting it, “You know it is completely unlawful” and his reply was that “By other means I could not get the documents.” Why could he say that? He knows firstly that matter relates to taxation and he knows that to a certain extent I must rely on some sort of co-operation. Secondly, he knows that under German law is the documents are admissible. I could of course make a complaint that could sour relations with the tax offices and would not necessarily lead to the most advantageous results regarding taxation and all other relevant matters. What happens is that no complaint will emerge in this case. Coming to a settlement is preferable. It is often a power game between the prosecution and we are reluctant to complain about these individuals because we have to deal with them for the next ten or 20 years.

Q416 Chairman: I understand that but what you are saying is that there may be no complaint made in a case where a complaint ought to be made and if that is so then the system has to put up with that? That is what you are saying, is it not?

Dr Hart-Hoenig: Right.

Q417 Chairman: Thank you all very, very much indeed. We have had you here helping us for more than two hours and I really am very grateful indeed. I expect we have kept you much longer than you thought you would be kept and the fact that we have is an indication of how valuable we have found your answers.

Mr Mitchell: Most kind.

Mrs Keenan: Thank you very much.

Written Evidence

Memorandum by The AA Motoring Trust

1. The AA established The AA Motoring Trust in 2002 to create a single charity through which its historic public interest work developing motoring and road safety could be focused. In January 2003, The AA Motoring Trust became the sole trustee of the AA Foundation for Road Safety Research and the former AA Motoring Policy Committee stood down in favour of the new charity. The AA Motoring Trust sponsors and undertakes research and provide advocacy, advice and information across the field of motoring, roads and transport and the environment. It has special interest in social issues surrounding car use.

2. Cross-border cooperation is being driven ahead, with urgency. But are the procedural safeguards that should be the pre-requisite for it in place across Europe, or are they an afterthought and running well behind? It is the answer to that question that should define future decisions on cross-border cooperation.

3. The AA Motoring Trust, along with all of Europe's motoring organisations represented by the AIT & FIA supports the principle of cross-border cooperation. In response to the Commission's proposals the AIT & FIA said:

“We recognise that if citizens are to have the benefits of the freedom of circulation that they must also accept the responsibility that goes with it.”

4. But the AIT & FIA went on to say that:

“We have serious concerns about the absence of sufficient procedural safeguards for members when involved as suspects or defendants in cross-border criminal proceedings across the EU.”

5. It is as motorists that most EU citizens are likely to fall foul of the criminal laws of the countries they are visiting. Some will contravene traffic laws innocently, and some recklessly; some will be involved in serious or minor traffic accidents; some of the accidents will be because the foreign driver made a mistake; others because of a mistake by another driver, a citizen of that country. But in all of these scenarios the visiting foreign driver will be at a disadvantage immediately.

6. At the scene of the alleged offence or the accident the visiting foreign driver may not speak the language and so be unable to ask for details from witnesses; when the police arrive it is the resident driver who will be able to present his/her version of the events; the visiting driver could be arrested and be charged with a traffic offence, or of causing an accident but having had no opportunity to give his/her side of the events.

7. Being a foreign driver in a foreign country does have serious disadvantages as far as laying blame is concerned. That is why in those circumstances disproportionate care and consideration should always be applied to citizens of other member states. Indeed member states should not sign up to cross-border cooperation based on uncritical assumptions of mutual trust that their citizens would always be treated fairly.

8. This point was highlighted by Amnesty International at the Brussels public hearing of the Commission's Procedural Safeguards Green Paper on 16 June 2003:

“Mutual Trust is the basis for mutual recognition”

9. “Mutual Trust” in this context is the belief that in all countries of the EU police and courts will act impartially and fairly, and all citizens, resident and foreign visitors alike, will be assured of equal treatment and access to high standards of justice. This means a fair and impartial police investigation, access to a defence lawyer who speaks the language of the foreign visitor, translation facilities and a court process that the foreign defendant can understand and take part fully in the proceedings. The problem is that many legal and policy experts appear to doubt it is the norm across the whole of Europe.

10. Take France, for example. At the 16 June 2003 public hearing a French delegate said:

“93% (of criminal files) are ‘fast track’ or immediate court appearance cases where defence preparation is inadequate.”

“Suspects in police stations are being denied access to lawyers in many cases.”

“Inducements are offered to defendants to plead guilty.”

11. Each year three million British drivers take their cars across the channel, and most do not go beyond France. Many others fly/drive and hire cars. If this can happen in France, the AA Trust is concerned that implementing cross-border cooperation such as driving disqualifications and fines for traffic offences may be premature.

12. In respect of driving disqualifications the UK Government has legislated for the Convention on mutual recognition of driving disqualifications in the Crime (International Cooperation) Act 2003. It means that a UK driving licence holder who is disqualified from driving by a court in another member state will have the disqualification applied administratively in the UK so disqualifying the driver from driving anywhere.

13. The Government's consultation on the proposed legislation said:

“The UK would not seek to enforce a disqualification if it considered that a driver had not had adequate opportunity to defend himself.”

14. This has been translated in the Act which states that the disqualification will only be imposed if:

“The offender was duly notified of the proceedings in which the disqualification was imposed and was entitled to take part in them.”

15. This is a very narrow ground for appeal. It is going to be very difficult for a UK motorist tried, convicted and disqualified in another member state to prove later that the conviction was flawed, or that he/she did not have either an impartial investigation of the facts, or a fair trial. But member states have all signed up to the driving disqualification Convention despite the concerns about procedural safeguards, and the Convention on financial penalties is now in the discussion stage.

16. It is the financial penalties Convention that is probably going to have the biggest impact on motorists in terms of numbers than any other cross-border cooperation issue. Any fine over 50 Euros will be covered by the Convention, which means virtually every relatively minor traffic and parking offence in the EU.

17. The scale could be enormous. Take the UK for example. This year three million “Fixed Penalties” will be issued to drivers for speeding offences detected by camera, and several million parking tickets will be issued. Other member states are turning to cameras for enforcement, and have intensive parking enforcement which could lead to an enormous number of visiting motorists facing fines when they return home. There are many questions that need answers, for example, how will the process of issuing notices to motorists operate; will it involve debt collection agencies; will the notice sent be in the language of the driver; how will it be ensured that foreign registered cars are not targeted; will there be a way of challenging the allegation without having to return to the country; what will be the future of deposit schemes, ie “on-the-spot fines” operated by the police in many European countries?

18. The problem facing motorists driving abroad is the variety of different traffic laws, traffic signing and local practices that do confuse, and result in offences being committed in all innocence. A simple mistake by a driver can have the disastrous unintended consequence of a serious accident. While ignorance of the law may not be a legal defence, it is a practical issue that also needs to be addressed. It has been by the European Parliament's Economic and Social Committee who said earlier this year:

“... harmonising road traffic legislation would seem to be an issue of paramount importance, particularly for completing the internal market.”

“A simple journey across Europe subjects drivers to varying rules and regulations exposing them to diverse and sometimes contradictory driving rules.”

“This situation will become even more complicated with the forthcoming EU enlargement, as the new member states also have their own particular driving rules.”

19. These are the real problems that face millions of European drivers when they cross member state borders and become “foreign drivers”. There is a strong case to argue that procedural safeguards should also run in tandem with moves towards greater harmonisation of traffic rules across Europe.

20. The pre-requisite to further cross-border cooperation must be the adoption of acceptable procedural safeguards that ensure a visiting non-resident to another member state is given disproportionate care that ensures transparency and fairness in the police investigation, and in any subsequent judicial hearing. It may be more expensive, but no Government should pass legislation that leaves their citizens exposed to rough justice in another country.

21. Finally, there is the issue of how and who is going to monitor all of this; who is going to check that foreign motorists will not be targeted for enforcement; who is going to check that police and courts all act impartially and fairly, and do give disproportionate care to ensure foreign motorists are treated fairly? This was raised by the representative of the French Ministry of Justice at the 16 June Brussels hearing when he said:

“Safeguards are necessary for Mutual Recognition which works on the basis that member states agree to execute decisions of other member states, but as a quid pro quo, they should have the right to know how those decisions are being decided (or they are being decided fairly). Judicial practices should be evaluated on a regular basis and this should be extended to the new member states on accession.”

22. The AA Motoring Trust re-emphasises that the motoring organisations of Europe do support the principle of cross-border cooperation, but only if adequate procedural safeguards are in place and they are monitored to ensure compliance. It is as motorists that European citizens are most likely to be charged with offences in other member states, and receive demands for the payment of fines enforced by the courts in their own country. If they don't believe they will be treated fairly as visitors, European integration will be damaged.

23. The AA Motoring Trust believes procedural safeguards must be a pre-requisite for cross-border cooperation, and not follow it later as an afterthought.

1 October 2004

Memorandum by Amnesty International EU Office

1. AMNESTY INTERNATIONAL

Amnesty International is a worldwide membership movement. Our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights. We promote all human rights and undertake research and action focused on preventing grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination.

2. THE PROPOSED FRAMEWORK DECISION

2. Amnesty International welcomes the Commission's adoption of a proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union (the proposal) as a first step towards redressing the balance between security- and prosecution-led developments in EU justice and home affairs and measures designed to enhance the protection of individual rights in these fields.

3. NEED FOR ACTION AT UNION LEVEL

3. The question of a legal base for the proposal was raised by some Member States in the consultation process leading up to the publication of the proposal. Amnesty International (AI) has long been calling for such a proposal which it considers crucial to the development of judicial cooperation in criminal matters at EU level in a manner consistent with the protection of human rights and access to justice. It is Amnesty International's view that there is a need for action in this field at EU level.

4. The key to the legal basis is the need for the proposal and, in order to establish the need for EU action in this area, the impediments to effective judicial cooperation must be identified. One of the key issues is the problem of a lack of genuine mutual trust between judicial authorities and the public within the EU. This arises to a large degree out of differing standards and modalities in the application and interpretation of rights contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR) across the EU. While the European Court of Human Rights interprets the ECHR on the basis that it is a living instrument and allows for a certain margin of appreciation in interpretation of the rights it contains in the context of the current situation within a particular country, in the context of mutual trust and cooperation between EU Member States, the notion of a margin of appreciation in the application of rights related to the administration of justice is difficult to sustain. The basis for mutual trust is that rights are protected equally across the EU—if this is not the case, mutual trust becomes an illusion that cannot be sustained in the practice of judicial cooperation.

5. If the legal basis for the proposal is to “ensure compatibility in rules applicable in Member States, as may be necessary to improve such cooperation”¹ and to improve the mutual trust between Member States which is the necessary foundation for mutual recognition in the field of judicial cooperation in criminal matters, it is important to bear in mind where difficulties arise in practice in cooperation and the issues which undermine mutual trust.

6. In a number of extradition proceedings prior to the advent of the European arrest warrant system, judicial decisions prevented or delayed extradition between EU Member States², in particular in terrorism related cases, on the basis of allegations of ill-treatment at the hands of the police. The facts of these cases turned on the admissibility of evidence allegedly extracted from a third party through ill-treatment or torture which would result in a flagrant denial of the right to a fair trial of the extraditee under Article 6 ECHR if he were to be returned and/or would be contrary to a state's obligations under the UN Convention against Torture

¹ Article 31(c) TEU.

² See *R v Secretary of State for the Home Department, ex parte Rachid Ramda* [2002] EWHC 1278 admin (UK) and *Irrastorza Dorransoro* (No 238/2003), judgment of 16 May 2003, Cour d'Appel de Pau (France).

and Other Cruel, Inhuman or Degrading Treatment or Punishment. The principle behind these cases remains unchanged in the European arrest warrant scheme which, without legislation to correct the problem, is likely to face similar difficulties in such cases.

7. These cases demonstrate two barriers to mutual trust:

1. the admissibility of evidence extracted through ill-treatment and/or torture
2. allegations of torture and other ill treatment by law enforcement officers

The first will be dealt with in a separate proposal relating to the admissibility of evidence and AI hopes that the Commission will address this issue as a priority. The second may usefully be addressed through the present proposal although the current drafting does not go far enough to make a significant difference to the current situation in many Member States and is, in many instances, so vague as to add little in material terms to the existing framework provided by the ECHR. There are a number of ways in which the proposal could be improved, both in general terms and in the specifics of terminology used, which could transform it into a piece of legislation which fulfils the triple function of improving the protection of individual rights and consequently facilitating judicial cooperation between Member States and putting an end to the impunity of the perpetrators of crimes such as trafficking in human beings, terrorism and crimes against humanity³.

4. RELATIONSHIP WITH ECHR

8. If legislation in this field is to have added value to the ECHR and the European Union Charter of Fundamental Rights (CFREU) within the EU, it must be binding on Member States, capable of enforcement and sufficiently precise as to ensure homogeneity of application across the EU. It must also be ensured that minimum standards agreed at EU level are not lower than those provided by the ECHR and that such minimum standards must be interpreted in the light of the evolving jurisprudence of the European Court of Human Rights to ensure that EU minimum standards do not quickly become obsolete or undermine the level of rights protection afforded by the ECHR. The standards and precision of the provisions in the proposal should be improved to ensure that the proposal does give genuine added value to the level of rights protection ensured by the ECHR.

5. SCOPE OF THE FRAMEWORK DECISION

9. The proposal covers the following basic rights which the Commission considered to be fundamental to initial access to the right to a fair trial contained in Article 6 ECHR:

- The right to legal advice
- The right to free interpretation and translations
- Specific attention to vulnerable suspects and defendants
- The right to communication
- Written notification of rights (the “Letter of Rights”)
- Evaluation and monitoring

10. The common element of the rights contained in the proposal is that they are key to ensuring that the suspect or defendant has full access to and understanding of their rights and, in particular, insofar as they apply to initial arrest and detention that they tend to discourage possible abuses by law enforcement officers by alerting third parties to the situation of the detained person and providing information to that person regarding their rights. There are two additional elements which AI considers would make the proposal more effective in this regard and which, while included in specific cases in the proposal, have been omitted as general principles:

- (a) *the right of access to a doctor*

11. Amnesty International regrets that the Commission has not included the right of access to a doctor, including a doctor of one’s own choice in this proposal in general. Prompt medical evaluation of detainees can form an effective safeguard against torture and ill-treatment, as underlined in international instruments. The Committee for the Prevention of Torture has identified the right of access to a doctor as one of a “trinity” of fundamental protections from ill treatment along with the right of access to a lawyer and the right not to be held incommunicado. The right to be examined by a doctor is also an integral part of the duty of the authorities to ensure respect for the inherent dignity of the person. AI believes that this right should be included generally in a separate provision and not restricted to the case of suspected persons entitled to specific attention under Article 11 of the proposal.

³ Amnesty International EU Office has made comprehensive comments on the specific provisions of the proposal in two documents:

12. In AI's view, guaranteeing in law and practice the right of people deprived of their liberty to have access to a doctor, including one of their own choice, from the outset of their detention, constitutes a major safeguard against ill-treatment in police custody. This right is not guaranteed in law and practice in all EU Member States and is a problem that has been raised by the Committee for the Prevention of Torture in relation to a number of EU Member States.⁴

(b) *audio and/or video recording and surveillance*

13. In AI's experience, placing exclusive emphasis on administrative and legislative safeguards against ill-treatment can prove inadequate in preventing ill-treatment and it is useful to look at additional practical measures to prevent ill-treatment, including the use of audio-visual tape recording of questioning and closed circuit television monitoring of the questioning of detainees. This is of particular importance in cases where a lawyer is not present during questioning.

14. The Committee for the Prevention of Torture has stated that:

“The electronic recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.”⁵

15. The proposal itself contains a provision on recording of proceedings in Article 9 in order to verify the accuracy of interpretation and Article 11 in relation to those entitled to specific attention, but does not extend the practice more generally.

16. Amnesty International believes that the inclusion of a provision for the electronic recording of proceedings, in particular the electronic recording of questioning of suspects and defendants and video surveillance in areas of police detention would have a positive impact on mutual trust and should serve to reduce instances of and allegations of ill treatment by police officers which may constitute abuses of human rights and/or may undermine effective cooperation between Member States.

6. SCOPE OF APPLICATION OF THE FRAMEWORK DECISION (ARTICLE 1)

17. The definition of “criminal proceedings” included in Article 1.1 is not sufficiently clear. The definition of proceedings or offences as “criminal” as opposed to, for example, “administrative” varies between EU Member States. In international law, the determination of whether a matter is “criminal” is autonomous and depends on both the nature of the act and the nature and severity and consequences of the possible penalties. While the classification of an act under national law is a consideration, it is not decisive⁶. Amnesty International considers that the scope of application should include all proceedings which would be considered “criminal” under international law, rather than relying solely on national law classifications of offences as “criminal”.

18. It is not clear from the current drafting that proceedings for the execution of a European arrest warrant would come within the scope of the proposal. If the proposal is to have value in facilitating judicial cooperation, such proceedings should not be excluded (and indeed they are mentioned in Article 3). In the light of international case law to the effect that “extradition” proceedings do not amount to the determination of a criminal charge⁷ and that, therefore the full range of protections provided in article 6 ECHR are not applicable to such cases, Amnesty International considers that the scope of application of the proposal should explicitly refer to the European arrest warrant.

⁴ eg Belgium CPT/Inf(2002)25 Italy (AI Index: EUR 30/02/99) Malta (CPT/Inf(2002)16).

⁵ 12th General Report—CPT/Inf (2002) 15.

⁶ *Engel and Others v Netherlands*, (No 1), Judgment of the European Court of Human Rights, 15 July 1982; *Öztürk v Turkey*, Judgment of the European Court of Human Rights, 21 February 1984.

⁷ See most recently *Mamatkulov and Abdurasulovic v Turkey*, Judgment of the European Court of Human Rights 6 February 2003 and *H v Spain* (1983) 37 DR 93.

7. CONCLUSION

19. Amnesty International believes that this proposal could form the basis of legislation which would improve the standards of rights protection and access to justice in criminal proceedings across the EU. In order to do this, however, the provisions of the proposal need to include clearer definitions and higher standards. In particular, the right of access to a doctor and the electronic recording of police questioning of suspects and defendants should be applied to all suspects and defendants, not only those entitled to “specific attention”. The definition of criminal proceedings should be broadened to ensure that it covers proceedings such as those under the European arrest warrant.

28 September 2004

Letter from the Crown Prosecution Service

Thank you very much for your letter of 21 July concerning this matter. I am grateful to you for allowing me a little extra time to respond to your call for my views on the draft Framework Decision.

My officials were involved in the original consultation exercise concerning the Green Paper preceding the draft Framework Decision in 2003. By way of background I am enclosing a copy of our submission then at Annex A (*not printed with this Report*). This may be of some assistance to you regarding your call for evidence on all aspects of the Framework Decision.

Generally, we would endorse the comments in the Home Office Explanatory Memorandum of May this year—in particular paragraphs 14 and 16. In England and Wales the bar has already been set quite high by our domestic procedures to ensure satisfactory recognition of defendant’s rights. In many instances we are either at or above the baseline the Framework Decision envisages. Given the recent expansion of the EU and proposals concerning further future expansion, it is perhaps an opportune time to seek to ensure that there is an acceptably high standard of compliance by all 25 EU Member States where defendants’ rights are concerned. It would certainly be unwelcome and unfortunate if cross border cases fail for want of confidence in other EU jurisdiction’s ability to meet basic obligations under the European Convention. Therefore, we agree with the “cautiously supportive” line adopted by the UK thus far.

Taking your questions in order.

1. NEED FOR ACTION AT UNION LEVEL

The Commission prefaced a recent meeting of the Criminal Law Working Group by stating that there had been a 500 per cent rise in the number of applications to the European Court between 2002 and 2003. Given that this pre-dates recent expansion, this seems to suggest that there are legitimate concerns about the trust and confidence EU partners can have in each other. Arguably, action at EU level will produce quicker and more demonstrable results than waiting for individual States to demonstrate compliance.

The Home Office appears to be satisfied that the Framework Decision complies with the principle of subsidiarity and has a proper legal basis within the Treaty.

2. RELATIONSHIP WITH ECHR

The ECHR provides a sufficient common standard. The Framework Decision would promote greater compliance with it. Our original submission, Annex A, alludes to several examples where the Framework Decision does this. It also sets out specific instances from the original consultation where we believe that the ECHR is enough in itself.

3. MINIMUM STANDARDS

The intention is to improve compliance across 25 disparate criminal justice systems. It is our understanding that some EU partners will have to do a great deal to comply with the Framework Decision, as drafted. It is perhaps unrealistic to try and set higher standards. We are not aware that there would be any risk of standards lowering as a result of the proposal.

4. SCOPE OF THE FRAMEWORK DECISION

Given the response at 3. above we do not believe there would be any merit in attempting to include any additional matters.

5. SCOPE AND APPLICATION OF THE FRAMEWORK DECISION (ARTICLE 1)

We do not see any need to alter the scope of Article 1.

6. THE RIGHT TO LEGAL ADVICE (ARTICLES 2–5)

Please refer to the comments, pages 1 to 4, under “Legal Representation” of Annex A (*not printed with this Report*).

My officials have been working closely with colleagues at the Home Office in relation to Article 2. The UK intends to put forward amendments here to preserve existing legislation that permits legal advice being withheld in appropriate circumstances. Briefly, The Police and Criminal Evidence Act (PACE) 1984, Code C Annex B permits access to legal advice to be delayed for persons suspected of serious arrestable offences, drug trafficking or where confiscation may arise if the police believe that the suspects legal representative might inadvertently “or otherwise” pass on information from the detained person that may lead to interference with evidence or people. The delay cannot exceed the time by which the suspect must be brought before a court (36 hours for non-terrorist cases, 48 hours for terrorist allegations). Importantly, delaying access to legal advice in these circumstances has not required any derogation from the ECHR thus far. We are firmly of the view that the UK should not sign up to the Framework Decision if it does not permit legal advice to be withheld in accordance with PACE, Code C, Annex B.

The same consideration applies to Article 12, the right to communicate.

7. RIGHTS TO INTERPRETATION AND TRANSLATION (ARTICLES 6–9)

Please refer to pages 4 to 8 of Annex A (*not printed with this Report*).

There are significant time and resource implications associated with Article 7. Currently documents (exhibits, procedural information, bail notices, charge sheets, legal aid notices and the like) are not routinely translated. Instead reliance is placed on real time interpretation either at the police station or court. Under this Article competent authorities would decide which documents are relevant and need translating but the suspect’s legal representative can ask for further documents to be translated. The implications are considerable, particularly when the current system can only just supply the present demand.

Equally where Article 9 is concerned, proceedings in the Magistrates’ Courts are not recorded in audio or video format and transcriptions are in English, not the language spoken by the witness or the language of the defendant. If signing were used in any part of the process then a video recording would be required.

Experience shows that deficiencies in standards of interpretation often become immediately apparent, particularly in court. Poor standards would be reduced if some of the suggestions contained in Annex A (*not printed with this Report*) were pursued.

8. SPECIFIC ATTENTION (ARTICLES 10–11)

Please refer to pages 8 to 10 of Annex A (*not printed with this Report*).

We do not consider that all suspected persons should have the rights set out in Article 11. Existing arrangements under PACE ensure that 11(2) applies to all suspects in any event. As “questioning” can be distinct from interviewing and can take place at a variety of locations and in vastly differing situations it would not be practical to extend this right. Where an officer suspects that a suspect falls into the “vulnerable” group appropriate steps should be taken to ensure that any “questioning” takes place in a controlled environment.

9. THE LETTER OF RIGHTS (ARTICLE 14)

Please refer to page 12 of Annex A (*not printed with this Report*).

It is entirely conceivable that a suspect may not understand any of the official Community languages. In such circumstances it is perhaps best that authorities record what reasonable attempts have been made to comply with the spirit, if not the letter, of the Framework Decision.

10. EVALUATION (ARTICLE 15)

Please refer to pages 12 and 13 of Annex A (*not printed with this Report*).

2 November 2004

Memorandum by EUROJUST

PRELIMINARY OBSERVATIONS

1. Eurojust welcomes the Commission's proposal which aims to establish minimum standards in procedural safeguards in criminal proceedings. It is as a positive step to develop standards and consistency to protect the rights of individuals in the European judicial area where judicial co-operation between police and prosecuting authorities is becoming increasingly necessary and frequent to deal with serious cross border crime.
2. The rapid advance of the principle of mutual recognition in judicial co-operation in criminal matters needs to be underpinned by measures enhancing mutual trust, *a fortiori* with the prospect of the Union's further enlargement. We are confident that mutual recognition will improve effective co-operation in criminal matters by enabling judicial co-operation measures to be applied as efficiently as possible, especially those measures which envisage surrender of persons or of evidence to another Member State. With instruments like the European Arrest Warrant, judges and prosecutors no longer make detailed checks on whether the procedures preceding the request for extradition comply with the provisions of the European Convention on Human Rights. But practical problems can arise if there is a variable level of human rights observance within the European Union. Such proposals may help to alleviate any reluctance on the part of the authorities of one Member State to surrender a national to the judicial authorities of another.
3. Additionally the increase in cross-border cases makes this initiative even more significant. By enhancing fair trial rights generally, the draft Framework Decision will have the effect of ensuring a reasonable level of protection for foreign suspects and defendants, the number of which will continue to grow as since criminal activity in the European Union has increasingly a transnational character.

1. NEED FOR ACTION AT UNION LEVEL

What evidence is there that procedural rights in criminal proceedings need to be harmonised? Does your experience confirm the Commission's statement (EM para. 22) that "there are many violations of the ECHR"? Are there, to your knowledge, significant failings by Member states? Are they failings which only the Union can address or which the Union could do better than individual Member states? Will the proposal remedy those failings?

4. The proposed instrument does not aim to harmonise procedural rights but rather it seeks to raise the standard of compliance with international treaty obligations in respect of existing rights. It makes specific proposals for obligatory action so to ensure those rights are more meaningful in practice.
5. There is abundant jurisprudence from the European Court on Human Rights, which shows persistent violations in Member states' of fair trial obligations. Despite the fact that the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament has regularly denounced these breaches of the European Convention, there remains no appropriate legal or political remedy at EU level.
6. There is a need to establish, with sufficient clarity, exactly where the line lies in the European Union for respecting those rights by determining a level of minimum standards. Once the level of minimum standards is established, it will be easier to implement them, and to ensure and monitor compliance with those rights.
7. However, Eurojust feels that, in accordance with the principle of subsidiarity, Member states should retain discretion to determine how best to meet their obligations under existing treaties as required by the common agreed minimum standards, while taking into account the fundamental characteristics of their own legal system. The Framework Decision seems therefore to be an appropriate instrument with which to seek to implement minimum standards.

2. RELATIONSHIP WITH ECHR

The Commission states: "The intention here is not to duplicate what is in the ECHR, but to promote compliance at a consistent standard".

Why does not the ECHR (and the EU Charter) provide a sufficient common standard? Would the Framework Decision promote compliance with the ECHR?

Are you satisfied that the standards set out in the draft Framework Decision are ECHR compliant?

8. The main problem at present is not the absence of standards but the deficiencies operating in practice. The problem is essentially one of compliance.

9. The intention was to lay down the principles and leave detailed implementation to the signatory States. Although some would say this is a strength, a feature of the rights provided for by the European Convention and by the Charter of Human Rights is their lack of detail. This has led to a tendency certain areas not being adequately covered and also to the rights themselves not being guaranteed and interpreted in varying ways from jurisdiction to jurisdiction.

10. Furthermore, embarking upon appeals to ECHR is too often beyond people of modest language skills, legal expertise, means and energy. The remedies for violations are shown to be unsatisfactory in most cases. An adverse judgment by the Court on the basis that the right to a fair trial has been violated does not in itself involve the review and re-opening of criminal proceedings that have failed to comply with the provisions of Article 6 of the Convention.

11. By setting out the standards required of Member states to enforce these rights in a more pro-active and prescriptive way, the Framework Decision can help to render their practical operation more effective and visible. In this way everyone involved in the different criminal justice systems of the European Union will be more aware of them. This will include not only defendants but also law enforcement officials, lawyers, members of the judiciary, and all the leading players in the criminal justice systems.

12. Eurojust is confident that with the adoption of the draft Framework Decision, shortcomings in the practice in the Member states should decrease as it will provide a serious incentive for Member states to protect and apply the right to a fair trial and will guarantee the effectiveness of the remedies available for any violation.

3. MINIMUM STANDARDS

The aim of the proposal is to set common minimum standards. Are the standards proposed sufficiently high? Is Article 17 (Non-regression) adequate to avoid any risk that existing standards may be lowered?

13. We feel that the non-regression provision in Article 17 is sufficiently clear as to prevent the risk of weakening existing standards of practice to the lowest common denominator. Member states, bound by Article 6(2) TEU to respect fundamental rights, are not likely to use the Framework Decision as a basis to reduce existing national standards where current provisions exceed the European Union requirements. Nor do we expect states to rely on a definition of minimum safeguards to avoid compliance with rights which are granted at national level and which, by definition, would offer greater protection than the European norms.

4. SCOPE OF THE FRAMEWORK DECISION

The Commission describes its proposal as a "first stage". Are there any matters which should be included in the draft but which have not been? In particular are there any which might have immediate and direct cross border implications (such as bail)?

14. The proposal does not address certain critical rights, namely the right to bail, the right to have evidence handled fairly, consistency or symmetry in sentencing, "ne bis in idem" and trials in absentia. However, the Explanatory Memorandum to the proposal adequately justifies this decision to make proposals in relation to the five rights at this initial stage because these rights are of particular importance in the context of mutual recognition. Furthermore, it draws attention to other ongoing initiatives taken separately in the same fields. These include the Green Paper covering the right to bail (provisional release) issued last August; and the preparatory work on mutual recognition of pre-trial orders to obtain evidence (the European Evidence Warrant) and on the rights stemming from the presumption of innocence.

5. SCOPE OF APPLICATION OF FRAMEWORK DECISION (ARTICLE 1)

The rights set out in the proposal apply in “criminal proceedings” to “a suspected person” and within the time limits as specified in Article 1. Is the scope of application sufficiently clear? Is it wide enough?

15. It is particularly important to ensure that the right to a fair trial is catered for at a sufficiently early stage. This right should run from the moment the suspect is apprehended or, at the very latest, by the time he starts to be questioned. On the other hand, some consideration must be given to the argument that the principle of subsidiarity dictates that member states should be entitled to exercise autonomy in this area.

6. THE RIGHT TO LEGAL ADVICE (ARTICLES 2–5)

How would Article 2 add to existing rights? What specific obligations does it impose on Member states?

Should Article 4(1) be limited by reference to the 1998 Directive?

How do you envisage Member states giving effect to Article 4(2)? How, in practice, do you foresee the condition, “if the legal advice is found not to be effective”, being determined?

16. It seems clear that right to legal assistance should at least arise immediately after detention has taken place or has been decided by a judicial authority. The ways in which the right to legal assistance apply to the preliminary pre-trial phases of the criminal proceedings (ie investigation prior to arrest, investigation post-arrest but prior to charge) varies considerably from one Member State to the other.

17. In particular, the point at which the suspect is allowed access to a lawyer and the conditions of that access vary considerably. What is required in legal systems with an inquisitorial tradition often vary greatly from those with an adversarial tradition. In some states, the lawyer is permitted to be present during the police interrogation of their client. Other systems, where the procedure for the investigation of crime is more inquisitorial, impose limited access to legal advice from a qualified lawyer, have an initial period during which the suspect cannot have access to a lawyer, or preclude the presence of a lawyer during police questioning.

18. In this respect, Article 2(2) of the draft Framework Decision can be controversial⁸ as it gives any suspected person the right to receive legal advice before being questioned in relation to the charge, before any decision on arrest or detention has been taken. For member states which do not have this type of provision currently, this will represent a very substantial change and which is likely to have an important impact on the whole procedural system, creating the need for other legislative changes which are not necessarily desirable with a view to pursuing the objectives set out in the draft instrument.

By affecting one isolated part of procedural law without any consideration to other crucial aspects of the procedure, the adoption of this provision in the draft Framework Decision could bring the risk of disrupting the delicate balance achieved within the system between the needs of a efficient prosecution and the need for effective protection of the rights of the suspect or defendant at this stage. These other aspects are: the limited time period in police custody, the existence of a reliable judicial control on the arrest decision, the judicial control on the conditions of arrest and detention, the possible review of it, etc).

19. On the second question raised, Eurojust does not feel that the limitation made in Article 4(1) of the Draft Decision by reference to the Directive 98/5/EC on Legal Assistance, is appropriate in the context of setting up of minimum standards for procedural safeguards.

20. As regards the last question, and in accordance with the principle of subsidiarity, we think that Member states should be allowed to implement this requirement in accordance with their specific rules on criminal procedure. This implementation could consist of an assessment to be given, in writing, either by the police authorities or by the judicial authorities, when questioning the suspect or defendant that the legal counsel seems to be effective (eg that he appears when duly called upon, that he advises the suspect or defendant effectively, that he plays an active role, etc).

⁸ (note : In Ireland, Spain and the United Kingdom, the adoption of this provision at it stands now could show to be problematic as it seems to be in contradiction with some specific rules delaying access to legal advice for suspects charged with terrorism offences.)

7. RIGHTS TO INTERPRETATION AND TRANSLATION (ARTICLE 6–9)

Are these provisions satisfactory? Will translation/interpretation be available in any language, not just official Community languages? (The letter of rights is limited to official Community languages—see question 10.)

Article 6(2) calls for the provision of free interpretation of legal advice “where necessary”. Should this be defined?

How do you envisage Member State giving effect to Article 8(2)? How, in practice do you foresee the condition, “if the interpretation or translation is found not to be effective”, being determined?

21. The provision of adequate translation and interpretation services to suspects and defendants is a fundamental right to be enjoyed by all suspects and defendants. The difficulty is not one of the acceptance of the principle, which must surely strike everyone as particularly important, but one of levels and of means of implementation and how best to ensure implementation within realistic limits. In this respect, we welcome the flexible approach adopted by the draft instrument. If we are indeed aware that financial means is key to developing quality and quantity in translation and interpretation, we also know that there is in many member states ongoing difficulty in this respect due to budgetary concerns.

22. However, we feel that it is a necessity to provide adequate translation and interpretation into any language and not only into the official EU languages. It would, for example, be foolish if these rights permitted member states to be obliged to offer a Catalan Spaniard translation into Castilian Spanish but not into his native Catalan. Many member states have significant ethnic minorities where a wide range of languages are spoken and used widely. These defendants should not be disadvantaged by the proposals.

23. We also agree on the wording of Article 6(2) and Article 8(2).

Setting a uniform standard of what constitutes the necessities of justice in the field of free interpretation of legal advice risks undermining ECHR obligations. There is a danger that any set of rules or criteria could lead to an injustice when a deserving case could fall outside such rules or criteria but would fall within the category of cases where the interests of justice would apply.

The same applies to the assessment to be made by the competent authorities regarding the accuracy level of the translation or interpretation and the replacement mechanism to be provided. The use only of translators or interpreters drawn from a recognised list of confirmed specialists whose qualifications are checked and whose quality is monitored is a common practice in some states and has met with widespread approval.

This approach should facilitate the implementation of a general rule in the very different criminal justice systems and should also facilitate the need for flexibility in the enforcement of the rules by the competent authorities in the diverse range of cases they have to deal with.

8. SPECIFIC ATTENTION (ARTICLES 10–11)

What do you understand the obligation (in Article 10(1)) to give “specific attention” means in practice? Should “specific attention” be limited to the matters set out in Article 11?

Should all suspected persons have the rights set out in Article 11?

24. The terms “specific attention” in our view means that a particularly high degree of protection should be afforded to vulnerable suspects and defendants. The duty of care that such attention entails should not be limited to the rights specified in Article 11, although the wording of both provisions seems to favour a restrictive interpretation.

25. In our opinion, the benefit of the rights set out in Article 11(1) should be clearly applicable to any vulnerable suspect. The granting of the benefit of the rights provided for in Articles 11(2) and (3) should be left to the decision of the relevant police or judicial authorities dealing with the case. Once again we feel that flexibility is important and that each case should be dealt with on its own merits. We therefore support giving responsibility for verifying standards to those who have operational responsibility in the case for the integrity of the investigation and prosecution. They should have an ongoing duty to keep the vulnerability of the suspect or defendant under review throughout the proceedings.

9. THE LETTER OF RIGHTS (ARTICLE 14)

Is it sufficiently clear when and in what circumstances the Letter of Rights should be handed over?

Are you content with what is proposed to be included in the Letter of Rights?

The Letter of Rights will be translated in all official Community languages. Is this sufficient? Might there be cases where the suspected person does not understand an official Community language?

26. In relation to the time and circumstances for delivering the Letter of Rights, we feel that the wording of Article 14 does not seem precise enough, even if read in combination—in parallel) with Article 14(2) defining the scope of application of the procedural rights covered. It certainly seems unquestionable that the Letter should be handed over to the suspect on arrest. There is however a need to clarify whether the Letter is to be given to the suspect before being charged and/or questioned, even when the suspect has not been arrested and, furthermore, whether it is to be given in case of other procedural circumstances which do not necessarily imply the questioning of the suspect (seizure, confiscation, home search, etc).

27. We feel that the text of the content of the proposed Letter of Rights, in order to be effective and useful, should be short, concise and easy to read. It should avoid jargon. It should be available to the suspect/defendant in his mother tongue or in a language which he/she has no difficulty in understanding. Obviously if he/she is unable to read then the Letter should be read to out aloud.

28. As regards translation of the Letter, it is also unclear from Articles 14(2) and 14(3) of the draft that a translation is to be provided to a suspect who does not understand the language of the proceedings, even if he has not been arrested before the questioning. For practical and budgetary reasons, whilst it may seem realistic to restrict the translations to be provided to the official languages of the European Union, and to rely, for the cases where the suspect does not understand one of these languages, on the services of the translator called on to translate the questioning.

10. EVALUATION (ARTICLE 15)

What value do you believe the evaluation and monitoring procedure would have?

Who should carry out the evaluation? Should publication be optional or mandatory?

29. We feel that regular evaluation and continuous monitoring of compliance with the rules are essential components of schemes designed to ensure that rights are neither “theoretical” nor “illusory”.

30. The organisation of such evaluation and monitoring could indeed be coordinated by The Commission which could set the parameters of the assessment and the necessary indicators of independence of the evaluation team. The perceived and actual independence of any members of the monitoring/evaluation team is of crucial importance. Additionally, if the Framework Decision is to achieve its objective of enhancing mutual trust, it is of the utmost importance for this evaluation to be organised on a mutual basis, ie by way of mutual peer reviews carried out by delegations consisting of experts (including expert officials, judges, magistrates, academics and lawyers) from the other Member states. Within this context, the network of experts on fundamental rights commissioned by the DG JHA could play a key role.

31. In order to enhance the credibility of these proposals and the scrutiny of the citizens of the European Union, we believe that the reports on compliance should be widely accessible and available to the public.

2 November 2004

Memorandum by FIT (Fédération International des Traducteurs)

FIT

- wishes to express its gratitude and appreciation for the work done by the DG Justice and Home Affairs in the area of Procedural Safeguards in Criminal Proceedings particularly concerning the issue of quality guarantees in Legal Interpreting and Translation;
- welcomes and supports the quality guarantees as set out in the Green Paper preparing the proposed Council Framework Decision on the Procedural Safeguards in Criminal Proceedings such as selection, training, certification, accreditation, a national register, continuous professional development, codes of professional conduct, and good interdisciplinary working arrangements of court interpreters and legal translators with the legal services;

- calls on all participants and Member State delegates involved in the final deliberations on the proposal for the Framework Decision on Procedural Safeguards in Criminal Proceedings to continue to pay particular attention to the fundamental issue of quality in Legal Interpreting performances and of collecting data on legal interpreting and translation in the Member States as ultimate guarantees of its accuracy and efficiency;
- remains committed to the issue of guaranteeing quality in Legal Interpreting and Translation and promoting professionalisation of interpreters and translators and pledges its support to the EU and Member State efforts to achieve and implement an area of freedom, security and justice for all in the EU.

25–28 November 2004

Memorandum by Dr Jacqueline Hodgson (School of Law, University of Warwick)

1. NEED FOR ACTION AT UNION LEVEL; 2. RELATIONSHIP WITH THE ECHR

1. Questions 1 and 2 are dealt with together, as it is the nature and origins of the ECHR which make action at EU level necessary in the current context.

2. Drawn up as part of a process to ensure future peace in Europe, the ECHR provides broadly defined minimum guarantees; it is not prescriptive in the precise manner in which the rights of suspects and defendants should be met. In particular, the way in which defence rights are understood and played out is not the same in the different member states, which have different legal cultures and legal procedural traditions. In the broadly adversarial procedure of England and Wales, for example, defence and prosecution are the two main players in criminal cases, responsible for gathering, selecting and presenting evidence. The rights of the accused are seen, therefore, as a necessary counterbalance to the role of the police and prosecution. In France, however, a broadly inquisitorial procedure, the main player (within procedural theory at least) is the judicial officer responsible for conducting or supervising the criminal investigation. Her role is not to represent the interests of either prosecution or defence, but to search for the truth. As a neutral judicial officer, she is required to ensure both the effectiveness of the investigation and the protection of the rights of the suspect. In this way, suspects and defendants are not seen to require the same degree of protection and the requirements of Art 6 ECHR are satisfied in a different way. This tension is perhaps unsurprising, given that Art 6 ECHR is largely a product of British drafting and so reflects more strongly the adversarial tradition.

3. These differences in the method of compliance can be illustrated further by comparing provision for custodial legal advice in the two jurisdictions. In England and Wales, suspects may consult with a lawyer and may have her present during any (recorded) interrogation by the police. In France, suspects were not allowed any form of custodial legal advice until 1993, from when they were permitted a 30 minute consultation with a defence lawyer, 20 hours after the start of detention. This was a radical and controversial reform at the time, seen by many as undermining the principle of judicial supervision and likely to paralyse the investigation, as suspects would become aware of their right to silence. Unsurprisingly, this has not happened and the second phase of the original reform was finally put in place in June 2000. The suspect may now consult with a lawyer for 30 minutes at the start of her detention in police custody—but the lawyer may not be present during the (unrecorded) police interrogation of the suspect. The defence lawyer enjoys a relatively diminished role in French criminal procedure, because the suspect is believed to be sufficiently protected through the judicial supervision of the investigation. It should also be noted that the function of the defence lawyer while the suspect is in police detention, is to inform the suspect of her rights (the police in France are not required to tell the suspect of her right to silence) and to provide some moral support—not to engage in defence preparation as such. This limited vision of the defence role has been criticised as being contrary to the spirit of the ECHR by the working party of the Cour de cassation in their response to the 2003 Green Paper. France has been repeatedly criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for its poor treatment of those held in police custody. The French government has rejected calls for tape recorded interviews and clearer guidance for police officers in the conduct of the detention and interrogation of suspects.

4. This framework decision has been drawn up not simply to replicate existing safeguards, but to highlight and promote them, to ensure that the rights of suspects and accused persons are applied in a more consistent and uniform manner. This has become necessary given the activities and initiatives of the EU in the field of Justice and Home Affairs, where a number of measures such as the European Arrest Warrant have been taken. Mutual trust among member states is essential if such initiatives and the wider aims of mutual recognition and judicial co-operation are to be successful. Mutual recognition is designed not only to strengthen co-operation between member states in the repression of crime, but also to strengthen the rights of the individual. The broad

guarantees of Art 6 ECHR were not designed to cover such precise procedural requirements and are insufficient to provide the level of reassurance required. Although the case law of the European Court of Human Rights (ECtHR) has done much to strengthen the scope of these guarantees, by, for example, making it clear that defence rights apply during the pre-trial stage as well as during the trial, and that defence assistance must be effective, there still remains considerable scope for varying forms of interpretation and application at national level. This is further borne out by the numerous violations which come before the ECtHR, which frequently are not simply “one off” breaches, but the result of systematic failures within the procedure of member states.

5. In short, the ECHR provides broadly drafted guarantees that act as benchmark standards for member states. A “margin of appreciation” is permitted. Member states may interpret and satisfy these standards in a variety of ways, according to their own particular legal procedure and culture. The existence of Europol and the increased powers of police, prosecutors and courts, presents a separate challenge and is no longer just a national matter to be resolved within nationally defined procedures. These measures impose a European criminal justice regime and so require clear and precisely defined safeguards for suspects as a necessary counterbalance.

6. I consider the standards set out in the framework decision to be ECHR compliant.

3. MINIMUM STANDARDS

7. I would question whether or not Art 2 sets a sufficiently high standard. Legal representation “throughout the criminal proceedings” does not necessarily include the period of police interrogation and para 2 refers specifically to receiving advice prior to (but not during) questioning.

8. Given the absence of tape recorded interrogations in France and the very distant nature of judicial supervision in most instances, this provides the suspect with insufficient protection. My own empirical research in this area suggests that suspects in France are just as vulnerable to the hostility of the police environment as in England and Wales. Judicial supervision in most instances is conducted by the *procureur* (the prosecutor, who also enjoys a judicial status as a *magistrat*) and exists as a form of bureaucratic and retrospective review: the police are required to inform the *procureur* of a suspect’s detention in custody and the file is later reviewed. The *procureur* remains in her office and is responsible for supervising tens of cases at any one time. Whilst this procedure is able to weed out obviously weak cases early on, and to review the outcome of investigations, it provides no real guarantee as to the reliability of the evidence gathered. The process of investigation and evidence gathering is shielded from scrutiny.

9. Other countries, such as Germany, also rely on this method of prosecutorial supervision (though German prosecutors are not considered part of the judiciary).

10. In Art 3, the definition of an offence involving “a complex factual or legal situation” is unclear. This decision is likely to be taken by the supervising judicial officer in France, but in countries such as the UK, the consequences of requiring police officers to make this judgment should also be considered. This is likely to be the responsibility of the custody officer (relying on the information of arresting and later interviewing officers) and further underlines the officer’s “gatekeeping” role (a role which has presented difficulties in eg identifying “vulnerable” suspects). Furthermore, offences that might appear relatively straightforward to those investigating, may be bewildering to the suspect who finds herself arrested, detained and then interrogated. The stress and inherent coercion of detention, together with the uncertainty of what might follow, make it difficult for many suspects to recall events with the kind of accuracy required (especially in England and Wales, where inferences may be drawn from a suspect’s failure to answer questions).

11. Art 3 appears to attempt to provide additional protections to suspects considered especially needy or vulnerable. I consider that these protections should be available to ALL suspects—ie that legal advice should be available and suspects should be legally aided where appropriate.

12. In addition, the working of Art 2 is that a suspect has “the right to legal advice”; in Art 3 that it should be “offered”. A weakness of the Framework Decision is that it does not specify that all suspects should be told of their right to legal advice, that they may receive legal aid, and be told these things in a language that they understand. There were problems with the initial implementation of PACE 1984 in that suspects were not provided with information about duty solicitors or that advice was free. This is also an issue in Germany. It is essential that suspects be able to exercise their rights, not simply be told that they exist.

13. Art 10 appears similar to provisions in England and Wales which require “vulnerable” suspects to be attended by an “appropriate adult”. What is meant by “specific attention”? Art 11 states that it “may include the right to have a third person present during any questioning . . .” Again, the identity and role of this third person is unspecified. This should be addressed, as experience shows us that it is just these kinds of suspect who are most susceptible to the pressures of custody and who have made false confessions in the past.

14. Art 12 speaks of “A suspected person remanded in custody”. This is intended to cover those held in police custody without charge, whereas “remand” generally implies on the order of the court and refers to those who are being prosecuted and are held in custody awaiting trial (see eg Art 3). This should be clarified.

15. Art 17 makes clear that national standards should not be lowered as a result of this Framework Decision. It might further be emphasised that these represent minimum threshold standards and should not be considered the norm.

4. SCOPE OF THE FRAMEWORK DECISION

16. It is regrettable that bail is not included in this document, but I understand it is the subject of another Green Paper. A less contested and more straightforward right, is the right to remain silent. As one of the suspect’s most basic rights, I am surprised that this is not also included in this document and the letter of rights. Where interrogations are not recorded, mechanisms ensuring the reliability of the evidence should be clarified. This is essential if member states are to have trust in evidence presented to one another, which may then form the basis of further action. Currently, the Framework Decision requires recording only for those persons falling within Art 10.

5. SCOPE OF APPLICATION OF FRAMEWORK DECISION (ART 1)

17. Criminal proceedings clearly includes police custody. It should be clarified that “competent authority” includes the police.

6. THE RIGHT TO LEGAL ADVICE (ARTS 2–5)

18. Art 2 does not add to the rights existing in England and Wales, but depending on how “throughout the criminal proceedings” is construed, this may allow suspects to have a lawyer present during police interrogation, which is not currently the case in many member states.

19. The type of lawyer envisaged under Art 4 includes only solicitors and barristers. It would not include Law Society accredited police station representatives. This would be more onerous than the current UK position. Given their specialised training, it would seem appropriate and cost effective for these representatives to provide police station advice.

The directive defines lawyers as nationals of a member state who are qualified as solicitors etc. Would it be problematic for a national of a non EU member state, qualified as a solicitor, to advise? (It may be that only EU nationals can qualify as solicitors, I do not know.)

20. Determining the effectiveness of legal advice is very difficult. This decision might be made by a mixed professional/lay body, or it may be determined by the courts.

7. RIGHTS TO INTERPRETATION AND TRANSLATION (ARTS 6–9)

21. Art 6(2) seems unduly restrictive. A person falling within Art 6(1) will surely fall within Art 6(2).

8. SPECIFIC ATTENTION (ARTS 10–11)

22. See above paras 13 and 16.

9. THE LETTER OF RIGHTS (ART 14)

23. Presumably, the letter of rights is a document that should be translated for the suspect under Art 7.

24. It should be made clear that the letter of rights should be available at the same time as the right to legal advice etc—ie immediately upon detention.

10. EVALUATION (ART 15)

25. I welcome the Commission’s recognition of the need for evaluation. The collection of data as outlined in Art 16 will be useful in this respect. Experience of the criminal justice process in France and in England and Wales, also leads me to consider that some form of qualitative assessment must also be made. Statistics reveal nothing of levels of compliance or the ways in which member states implement the safeguards set out in the Framework Decision. Publication of such research should be mandatory—openness being a necessary prerequisite to trust in one another’s legal systems.

4 October 2004

Memorandum by Prof Dr jur M Kaiafa-Gbandi, Aristotle University Thessaloniki

The above mentioned proposal of the Commission for a Framework Decision on procedural rights in criminal matters poses according to my view three basic questions:

- the first refers to the principle of mutual recognition;
- the second refers to the legal basis of the proposal, and
- the third relates (a) to the central position of the Commission for proposing minimum common standards that provide for such rights and (b) to the Non-regression clause of article 17.

SPECIFICALLY:

1. The principle of mutual recognition, which is held by the Council as “cornerstone of judicial co-operation” in criminal matters is not foreseen in the treaties for the field of criminal law. Its transfer from other fields is not at all self-evident, because of the special character of criminal law. Besides, such a transfer does not express the will of the legislator of TEU. Therefore every promotion of this principle, as long as the proposed regulations cannot be based on other provisions of the treaties, constitutes an excess of power from the organs of the Union, as the powers of the latter are given, special and restricted.

The principle of mutual recognition is accepted in the field of criminal matters for the first time in the primary law of the Union in the Treaty for a Constitution for Europe, though it has caused in the frame of this Treaty as well intense dispute from different scholars⁹.

On the other hand it should be stressed, that the Commission considers its proposal as “a necessary complement to the mutual recognition measures that are designed to increase efficiency of prosecution especially with measures that envisage surrender of persons or of evidence to another Member State” (p 12 margin nr 51 of the proposal). In this way it becomes obvious, that the principle of mutual recognition does not serve here the rights of persons in criminal proceedings as such, but it ensures mostly the recognition of prosecution acts against them between the Member States. This constitutes a totally different starting point in finding ways for safeguarding the rights of persons. In other words the real motive, which is luckily visible in the proposal, is not a better safeguard for the rights of suspects or accused, but the facilitation of the penal repression through a more effective judicial co-operation between the Member States. In order to achieve that through mutual recognition of judicial acts an agreed minimum standard of rights for persons in criminal proceedings is required and has to be respected.

The objective of effective penal repression through a more efficient judicial co-operation is, of course, not at all to be underestimated. All the same it has to be clear, that trying to find solutions for a better safeguard of rights for persons involved in criminal proceedings leads to different results than serving the judicial co-operation through common minimum standards, which could allow the mutual recognition of judicial acts. For the latter objective not only the philosophy but also the method and the outcome of the regulations differ.

2. According to the Commission its proposal is based on article 31 par 1c of the TEU. However this article, which regulates common action on judicial co-operation in criminal matters, when it talks about “ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation”, it is obvious that it refers to rules, which concern the judicial co-operation directly, as for example regulations for the transmission of documents, the communication of judicial authorities etc. The Commission regarding the rules about the rights of persons in criminal proceedings as rules which are necessary for the improvement of the judicial co-operation undertakes such a wide interpretation of article 31 par 1c TEU, that could practically include all the rules of the procedural system in a Member State. In other words even rules for the procedural settlements, for example, would be candidates for regulations of common minimum standards, so as to enable thereafter the mutual recognition of the relevant decisions of judicial authorities between the Member States. The same could be said about the possibilities of suspending prosecution etc. Obviously that was not the meaning of article 31 par 1c TEU. Thus under the existing legal frame there is no competence of the EU for setting standards for rights of persons in criminal proceedings. Such a competence is recognized for the first time in the Treaty for a Constitution for Europe, though even there is being intensely criticised, because of its orientation to the principle of mutual recognition.

⁹ H Fuchs, Bemerkungen zur gegenseitigen Anerkennung justizieller Entscheidungen, ZStW 2004, 369–371, S. Gleß, Zum Prinzip der gegenseitigen Anerkennung justizieller Entscheidungen, ZStW 2004, 361–362, M Kaiafa-Gbandi, I Synthiki gia to Europaiko Sntagma kai i proklisis gia ti poiniko dikaio sto xekinima tou 21 eona, (The Treaty for establishing a Constitution for Europe and the challenges for penal law at the beginning of the 21st century), Poiniki Dikkaiosini 2004, 572–573, B Schünemann, Grundzüge eines Alternativ-Entwurfs zur europäischen Strafverfolgung, ZStW 2004, 382. Compare however J Vogel, Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung, ZStW 2004, 411–412, 422.

3. (a) The danger that is related to the very concrete proposal of the Commission on certain procedural rights in criminal proceedings throughout the European Union results from the logic of the minimum standards, which it introduces. The regulations aim at achieving a common agreement of the Member States for the safeguard of certain rights, that is to say a common point that will be reached after concession especially for those countries that ensure a higher level of such rights in their internal legal space. That is the general philosophy of common minimum standards. Such a philosophy serves obviously a more effective judicial co-operation, because as long as the minimum common standards will be respected the recognition of the relevant judicial acts can be also achieved.

However if our objective is an actually effective safeguard for the rights of persons in criminal proceedings, this option is not the only one and definitely is not also the preferable one. In the legal theory, for example, it has been argued that “instead of only establishing common EU minimum standards regarding the rights of the defense and procedural safeguards one should also maximise these rights and safeguards, meaning that suspects and defendants should where possible be given the procedural rights that accrue to him/her under either the law of the issuing or enforcing Member State. This would mean that Member States enforce or execute another Member States’ decision, as if it were taken or delivered in their own state, ie respecting the procedural rights and safeguards of their own criminal justice system plus, as a consequence of recognition of the other Member States’ criminal justice system, also the procedural rights and safeguards of that other Member State that go beyond protection offered to suspects, defendants or accused persons in their own criminal justice system”¹⁰. Of course it is evident, that such an option is not easy to realise, but the question here is, how important the objective is. If the EU takes seriously its recent declaration, which is to be found in the Treaty for a Constitution for Europe, according to which the person is to be put in the core of the EU’s action, it is clear that it has to look for more inventive solutions, at least in the field of safeguards for the rights of persons in criminal proceedings.

(b) The danger that the Commission’s proposal creates, cannot on the other hand be avoided with the Non-regression clause of article 17. According to it “nothing in this framework decision shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the laws of any Member State and which provide a higher level of protection”. Such a provision does not solve the problem. Because a Member State will, of course, implement its own rules, which may ensure a higher level of protection, nevertheless it will recognise at the same time the judicial decision of another Member State taken with lower standards, as long as the latter one respects the common minimum rules set in the proposed Framework-Decision. And here lies the difficulty, because in this way we are driven to a system of procedural rights of two speeds. The one related to the internal rules of a Member State, which may offer a higher level of protection for internal use only and the other, lower one, related to common minimum standards for use on the level of the relations with other Member States in criminal matters. The longterm effects of such a scheme are foreseeable and not at all to underestimate. Because no state that exercises power and tends to be amenable to less possible restrictions will retain for long its own higher level of protection, when from the system of common minimum standards will be clear, that generally something less is sufficient. The proposal of the Framework-Decision follows to that point also the logic of the Treaty for a Constitution for Europe, which has been justifiably criticised for leading to the predominance of the most punitive legislation in the EU¹¹, as the most protective rules for the rights of persons at the level of Member States are set aside in the frame of the law, which is developed in the Union.

This is why according to my opinion the whole undertaking needs a basic re-orientation in order to be acceptable and could be proposed only through a Convention according to art 34 par 2d TEU.

October 2004

Memorandum by the Metropolitan Police Service, Linguistic and Forensic Medical Services

1. RIGHTS TO INTERPRETATION AND TRANSLATION (ARTICLES 6–9)

2. *Are these provisions satisfactory? Will translation/interpretation be available in any language, not just official Community languages? (The Letter of Rights is limited to Official Community languages).*

3. Yes—translation and interpretation will be provided to suspects understanding languages other than official Community languages, in accordance with articles 5 and 6 ECHR.

¹⁰ G Vermeulen, Mutual Recognition of Criminal Decisions, Expert Meeting on Criminal Law in European Dimensions, Maastricht University, 26–27.8.2004, in publication in Maastricht Journal of European and Comparative Law 2005.

¹¹ B Schünemann, Fortschritte und Fehlritte in der Strafrechtspflege der EU, GA 2004, 202.

4. *Article 6(2) calls for the provision of free interpretation of legal advice “where necessary”, should this be defined?*

5. Perhaps. “Where necessary” will mean, where the defendant does not speak the domestic language sufficiently to exercise his right to instruct a lawyer, and where he wishes to exercise this right, and where the lawyer does not speak the defendant’s language sufficiently to interact in that language.

6. *How do you envisage Member States giving effect to Article 8(2)? How, in practice do you foresee the condition “if the interpretation or translation is found not to be effective”, being determined?*

7. If there is a suggestion of inaccurate interpreting or translation from any quarter, quality assurance strategies should be applied, employing suitably qualified and experienced interpreters and translators, in order to safeguard rights under ECHR articles 5 and 6.

8. Such strategies can also be proactively applied at selected points in the process, such as monitoring of taped interpreted police interviews and observation during court hearings. Professional good practice would normally require that translations be both proof read and cross-checked by another translator.

9. The legal practitioner should always check that the interpreter and the other language speaker can achieve full communication before the interaction proceeds. Member States should have agreed codes of conduct, whereby qualified, competent and registered interpreters will be ethically bound to withdraw from any assignment where this is not achieved. This requirement should be recognised and professionally respected, and arrangements made for another interpreter to attend.

10. SPECIFIC ATTENTION (ARTICLES 10–11)

11. *What do you understand the obligation (in Article 10(1)) to give “specific attention” means in practice? Should “specific attention” be limited to the matters set out in article 11?*

12. This will depend upon the capacity of the suspect. It is designed to provide extra safeguards for suspects deemed vulnerable by reasons of age, or mental, physical or emotional condition. It may include the requirement for the suspect to be accompanied by an Appropriate Adult, or it may require interactions to be visually recorded. In the UK such requirements are explored when the suspect first come into police custody. In the Metropolitan Police Service, this is achieved by the completion of a 57M risk assessment form (*not printed with this Report*).

13. *Should all suspected persons have the rights set out in article 11?*

14. Ideally, yes. However, practicalities and limited resources would militate against this being possible (with the absolute exception of 11(2)). In addition, if audio or visual recordings are available, why not simply provide copies of such recordings, on request, rather than involve time and resources in providing transcriptions?

15. THE LETTER OF RIGHTS (ARTICLE 14)

16. *Is it sufficiently clear when and in what circumstances the letter of rights should be handed over? Are you content with what is proposed to be included in the Letter of Rights?*

17. Not altogether clear in the framework decision itself, but this is clarified in paragraph 45 of the explanatory memorandum, ie at the police station, prior to any questioning.

18. *The Letter of Rights will be translated in all official Community languages. Is this sufficient? Might there be cases when a suspected person does not understand an official Community language?*

19. No this is not sufficient and may be considered discriminatory for any signatory to ECHR not to provide the Letter of Rights in other, non-Community languages under Article 14. In our experience, there are hundreds of cases where this would apply.

20. EVALUATION (ARTICLE 15)

21. *What value do you believe the evaluation and monitoring procedure would have?*

22. Ensuring compliance with the decision. Providing valuable management information, essential for demand planning strategies.

23. *Who should carry out the evaluation? Should publication be optional or mandatory?*

24. Ministries of Justice in each member state should co-ordinate responses. These should be made available on request in order to inform the strategies referred to above.

28 September 2004

Letter from the Road Haulage Association Ltd (RHA)

As you may be aware, the RHA was formed in 1945 to look after the interests of haulage contractors in various areas of the country, in effect, amalgamating local organisations that had been established. The Association has subsequently developed to become the primary trade association representing the hire-or-reward sector of the road transport industry. There are now some 10,000 companies in membership varying from major companies with over 5,000 vehicles down to single vehicle owner-drivers.

The RHA offers specialist practical advice to its members on all aspects of national and international road transport. However, since we do not provide legal advice directly, we do not feel qualified to answer the specific questions raised in the call for evidence relating to the adequacy of the proposed Framework Decision.

That said, we would like to make a few general comments based on the experiences of some of our members and their employees (mainly drivers).

Operating or driving a commercial vehicle in a foreign country is becoming an increasingly risky business. Lorries frequently are targeted by criminal gangs intent on smuggling goods (including drugs) or people into another country or back into the UK. Thus drivers often find themselves the victims of crime yet are treated as criminals themselves.

Sadly, we still hear of several cases each year where drivers caught in such circumstances then find themselves in prison without access to acceptable levels of representation and interpretation or what they consider to be fair treatment. These instances are not unique to a single country although they seem to occur more frequently in one or two particular Member States (eg France and Greece). The RHA provides as much help as it can in these circumstances but this usually is limited to help in contacting the Foreign Office (or other official representatives in the area) and putting companies/individuals in touch with Fair Trials Abroad.

In view of the fact that instances of apparent unfair treatment seem still to be occurring, the RHA welcomes any move designed to address the problem and encourage Member States to "come into line".

11 October 2004

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