COURT OF CASSATION

DOCUMENTATION AND RESEARCH DEPARTMENT

OBSERVATORY OF EUROPEAN LAW

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GENERAL

Question 1: Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

This type of initiative seems particularly appropriate insofar as it is part of the creation of a real European area of justice. It is even more interesting because it is capable of giving people greater confidence in the different European legal systems, by harmonising procedural safeguards.

It is clear that establishing minimum standards for procedural safeguards in the Member States can only provide greater, consistent protection of individual rights, which we should not only approve but also encourage. It is even more important that we approve it given that there is a strong reference to 'the other Europe', that of the Council of Europe, as the European Convention on Human Rights, along with the case law of the European Court of Human Rights, is the starting point for the European Commission Green Paper.

This reference to the system of the European Convention on Human Rights is wise, because it is crucial that we do not create (or run the risk of creating) a two-speed Europe in terms of fundamental rights: the protection system established by the Council of Europe, a system that is common to all European countries, should surely be the point of reference.

It would be disastrous, from a legal, political or even sentimental point of view, to establish competition between the 'two' Europes, with, on the one hand, the Community protection system, which would be more effective, and, on the other hand, the Convention protection system which would involve countries that were not lucky enough to be part of the privileged 'club', who would be left behind. Such an attitude, which would be considered contemptuous and discriminatory, would ultimately be very dangerous and would be a major political error, building another wall between the two Europes, which would be unacceptable.

This is why we need to take effective action to prevent this type of risk. In this respect, the European Commission's current initiative is commendable because the Green Paper refers expressly to the European Convention on Human Rights and the case law of the European Court of Human Rights. However, we need to go further and consider the European Union subscribing to the European Convention on Human Rights. This is not easy but the technical and political difficulties are not insurmountable. It is true that there are difficulties with linking the two legal structures; the Union must acquire international legal personality (although this is already the case for the first pillar) and must be able to be considered as a 'State' in order to be able to subscribe to it (but there is already talk in European circles of an associated State). In addition, obviously it is difficult for judges in Strasbourg elected by countries that are not Member States of the European Union to rule on questions of Community law without in some way displeasing the Community institutions: but again there are solutions for this, because there is nothing to prevent specific training from being established in Community affairs within the European Court of Human Rights, which is made up of judges who have undergone different training, or even the possibility of using interlocutory questions. Therefore, despite the negative opinion that the Court of Justice of the

European Communities issued in 1996, it is still possible for the European Union to subscribe to the European Convention, despite inevitable difficulties. Moreover, the Laeken Declaration (Jan 2002) and also the recent Parliamentary Assemblies of the Council of Europe have clearly been in favour of subscribing to it, along with the President of the European Commission, Mr Prodi (speech before the Parliamentary Assembly of the Council of Europe in January 2000). Moreover, the issue of subscribing has been raised again by the Charter of Fundamental Rights of the European Union, with the famous 'horizontal clauses'.

In other words, the issue of subscribing is both a current issue and a realistic idea, despite the difficulties. However, those difficulties should not be exaggerated because, although the European Court of Human Rights should naturally be pre-eminent, as the protection of human rights is its *raison d'être* and enables us to have a 'great Europe' of human rights, it is certain that the Court cannot have the power to interpret only the provisions of the European Convention on Human Rights, nor can it obviously deal with respect for Community law, which is the sole responsibility of the Court of Justice of the European Communities.

Finally, as the Green Paper aims to establish common procedural safeguards for the Member States and it refers to the European Convention on Human Rights and the Court in Strasbourg, it would certainly be wise to allow the high courts of Member States faced with a difficulty in interpreting one of the provisions of the European Convention, to have the opportunity, in one way or another, to question the European Court on the point under dispute. This could be done in the form of an interlocutory question, or more simply in the form of an opinion.

Currently, the European Court can issue an advisory opinion on legal issues concerning the interpretation of the provisions of the European Convention on Human Rights and the additional protocols, but only the Committee of Ministers can currently request such an opinion (Article 47, ECHR). It would certainly be wise to extend this possibility by allowing the high courts of the contracting states to request such an opinion, which would have the twofold benefit of enabling the national judges to carry out their role fully as the natural judges of the European Convention on Human Rights (since the European system is only subsidiary) and ultimately to prevent the European Court itself from being overloaded, as many difficulties would be resolved in advance.

LEGAL AID AND REPRESENTATION

I – Scope of application [Question No 2]

Question 2: In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should Member States be required to establish a national scheme for providing legal representation in criminal proceedings?

The answer to this question is undoubtedly yes. But it requires first of all that the notion of a *"scheme for providing legal representation in criminal proceedings"* be clarified.
- ***Notion of criminal proceedings.*** As the Green Paper concerns criminal proceedings and refers to the European Convention on Human Rights, specifically Article 6, it is worth removing any doubts regarding the meaning to be given to the adjective 'criminal'.

We know that in the autonomous European sense of the word, 'criminal matters' covers 'infringements' and 'penalties' that go far beyond the strictly speaking criminal law of the European Member States and cover para-criminal disputes that include some administrative, disciplinary and fiscal penalties, etc. ruled by non-criminal courts. The predominant concept of criminal matters is therefore a material one.

Regarding the rights of the 'defendant', in the sense of the Green Paper, it seems clear that this refers only to the defendant at criminal proceedings in the strict sense of the word, i.e. proceedings which, following a phase of police investigation and establishing the crimes, can lead to proceedings that take place before the criminal courts of each of the Member States concerned. We are therefore coming back to an organic criterion for criminal powers.

- ***Notion of the defendant.*** Having clarified this, we can define the 'defendant' in the sense of the Green Paper, according to the various formulae which imply varying degrees of suspicion. It may be:

- a person who is 'charged' in the European sense of the term, i.e. of course not only someone who receives "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" but also someone who, more broadly, and in particular prior to that 'notification', is the subject of "measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect": opening an enquiry, arrest, being placed in custody, being charged, etc. (see e.g. *ECtHR Foti v. Italy, 10 December 1982, Series A No 56, §52*),

- someone for whom the competent authority has "grounds to believe that he or she has committed" a crime (Article 55 of the Rome Statute of the International Criminal Court, 17 July 1998),

- someone for whom there are "one or more plausible reasons to suspect that he or she has committed or attempted to commit a crime" (French condition for placement in custody),

- or someone for whom there are "serious or concurring indications that mean it is probable that he or she could have participated, as the perpetrator or accomplice, in committing" a crime (French condition for indictment).

The notion of "***serious <u>and</u> concurring indications of having participated, as the perpetrator or accomplice, in committing a crime***", could be a satisfactory formula in that its requirement would have the benefit of drawing the attention of the Member States to the seriousness of the consequences resulting from charging a person who is presumed innocent. This is why, whether or not it leads to restraining measures against the person concerned, charging must be based not only on subjective elements but also, above all, on objective elements, allowing the defendant, as soon as he is informed of the suspicions against him, to start to organise his defence, with the aid of a lawyer.

- ***When the lawyer should intervene.*** As soon as a public authority (whether police or judicial) makes the accusation to a defendant that he has committed a crime, as perpetrator or accomplice, he should have the assistance of a lawyer with access to the case file, whatever stage the proceedings are at. This requirement, far from establishing an imbalance that is too favourable to the defendant, aims to compel the investigating authorities to establish sound foundations on which to build the prosecution case. Too

many proceedings collapse because the case is essentially based solely on the defendant's initial statements, made without a lawyer present. It is often said, for example, that tiredness resulting from a long hearing can lead a suspect to make inaccurate statements or even confessions just so that it will be brought to an end. The assistance of a lawyer prevents this type of error. Nevertheless, it should be specified that the right to genuine assistance from a lawyer should not be reduced to just an interview as currently established under French custody law, particularly at the start of the measure. This interview, which is limited to thirty minutes, mainly aims to protect individual freedoms and provide psychological support to the person held in custody. It in no way enables them to exercise genuine 'rights to defence'[1], which, in order to be effective, are required by the European Court not only at the beginning when the indictment is notified but also to be part of an organised strategy and to be implemented each time that the person is questioned, confronted with witnesses or when a court decision is made that he could appeal against.

II – Payment and training of lawyers [Questions 3 and 4]

Question 3: If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?

Question 4: If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?

It goes without saying that if a lawyer carries out the task of defence entrusted to him, he should be fairly paid. However, it should be pointed out here that in France payment consists, in principle, of a freely negotiated fee which is therefore largely unregulated.

In addition, aside from the conditions of entry into the legal profession, which should be regulated, there is no doubt that the Member States should take measures necessary to ensure that the right to a lawyer is effective and therefore that lawyers acting in criminal proceedings are properly qualified. These checks should be carried out by professional bodies, taking into account the independence of the bar.

The reality is that Questions 3 and 4 are only meaningful in France insofar as they refer to lawyers appointed ex officio or appointed under legal aid. In that case there is a concern that only the less experienced lawyers will be used regularly, particularly due to the fact that the cases hold less interest and the fees set are low.

In order to reduce these problems, a measure could be established, modelled on French legislation, aimed at significantly increasing (20% in France) payments allocated for legal aid work in respect of bars that have made **commitments to objectives together with an evaluation procedure aimed at ensuring a better coordination of criminal defence** *(D. 19 Dec. 1991, Article 2 and 132-6*).

III – Right to free legal assistance [Questions 5 to 7]

[1] This was how it was understood by the Constitutional Council, which announced that "*an individual's right to see a lawyer during custody is a right to defence which is exercised during the investigation phase of the criminal proceedings*" (Dec. No 93-326 DC 11 August 1993)

Question 5: Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation "if he has not sufficient means to pay for legal assistance". How should Member States make the assessment of whether the defendant is able to pay for legal representation or not?

Question 6: Article 6(3)(c) of the ECHR provides that a person charged with a criminal offence be given free legal representation "when the interests of justice so require". Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?

Question 7: If free legal representation is to be provided for all offences except 'minor' ones, what definition of 'minor offences' would be acceptable in all Member States?

A. Preliminary observation: *commission d'office* (automatic appointment) and legal aid

As it is worded, Question 5 seems to link free legal assistance and automatic appointment, with the former seeming to imply the latter.

It is true that such a link is established by the international instruments *(see Article 6(3)(c), ECHR, 14.3 d, International Covenant on Civil and Political Rights and 55 c, Statute of Rome*), apart from a notable exception *(Article 47, paragraph 3, EU Charter of Fundamental Rights*). It is explained by the fact that legal aid gives the beneficiary the right to have a lawyer appointed, which is similar to automatic appointment.

Nevertheless, it would seem desirable for future common regulations to have a clear distinction between legal aid and automatic appointment.

Automatic appointment is to provide a lawyer for someone indicted who, for reasons of urgency or any other reason, has not been able to make his own choice of lawyer. It goes without saying that automatic appointment does not imply that the lawyer appointed has to be paid in full or in part by the State. If the person concerned has sufficient funds, there is nothing to prevent him from paying the appointed lawyer, albeit on the basis of a fixed fee. The Commission and the European Court of Human Rights have, however, had to clarify this (*European Commission of Human Rights, 4 July 1983, req. No 9419/81 - ECHR, 25 Sept. 1992, Croissant v. RFA, Series A, No 237-B*).

On the other hand, and above all, **payment of legal fees by the State does not imply that the lawyer has to be appointed automatically.** The fact that a defendant is not able to pay a lawyer should not deprive him of the right to choose freely who will defend him. A lawyer can therefore have been chosen by the person concerned and also be paid by the State. In France, the Court of Cassation has had to rule very clearly in declaring the decision made by a member of the *Conseil de l'Ordre* (Supervisory Council) to be illegal when a retrospective denial of legal aid was made, the beneficiary having chosen a lawyer who was not designated or automatically appointed to defend him (*1st Civil Chamber, 4 April 1995, Bull. No 156*).

Would it also be good to distinguish:

- on the one hand, the right of the defendant to receive assistance from a lawyer of his choice or, if he does not choose one, from a lawyer appointed automatically;

- on the other hand, based on Article 47 of the Charter, the right to free legal assistance, automatically appointed if necessary, for people who are indicted without having sufficient funds.

It is conceivable that the **scope of application of these two principles should not be identical.** So in France, before the police court, which has jurisdiction over the least serious offences (*contraventions*), the Code of Criminal Procedure does not provide for the accused to have a lawyer appointed automatically (compare: Articles 417 and 534 to 536 of the Code of Criminal Procedure). However, if he does not have sufficient funds, he may receive legal aid for trials of the most serious offences (see Table in appendix to Decree of 19 Dec 1991, modified by Decree No 93-727 of 29 March 1993). Only as part of this aid may he have a lawyer appointed.

B. Conditions for granting legal aid

1. Condition pertaining to the financial situation of the defendant

- *Resources and cost of the trial.* In order to assess whether or not a defendant is in a position to pay a defence lawyer, we could envisage taking into account both the resources of the person concerned and the lawyer's fees that would be involved in handling the case, particularly with regard to its complexity. According to this system, a person who would receive financial aid in a complex case would not be eligible in a simple one.

In absolute terms, such a mechanism appears to be satisfactory, insofar as it enables financial assistance to be relatively accurately tailored to people's needs. However, in practice it is very complex to implement. It requires that information be taken into account that cannot be accurately established straight away (duration and complexity of the case).

The only practical system therefore involves granting legal aid to all those with means under a certain threshold, whatever the nature of the case.

Having said that, in order to reduce the excessive inflexibility of such a system, it would appear appropriate to establish a 'safety valve' by providing for the possibility of granting legal aid on an exceptional basis to people whose means are above the threshold when **"their situation seems particularly worthy of interest in view of the purpose of the dispute or the foreseeable costs of the trial"**. This is the formula used by the French legislator (*Law of 10 July 1991, Article 6*).

As well as legal aid, which is all that is envisaged in the Green Paper, one could conceive partial funding by the State, in order to prevent an 'all or nothing' solution.

Having made this observation, what remains is to determine how to evaluate the means threshold determining whether legal aid should be granted.

- ***Determining a means threshold***. In France, all those with a monthly income lower than a threshold reassessed each year, representing the lowest income tax bracket, benefit from legal aid, subject to adjustments for family costs.

As the Green Paper notes, on this point there are considerable disparities between the legislation of the different Member States. Some Member States do not place any means-related conditions on granting legal aid. Also, if there are conditions, the amount and the method of assessing the means threshold varies among the Member States. Therefore, in one Member State, the threshold is "earning less than twice the minimum monthly salary". If this criterion were applied in France, the means threshold would be twice as high as it is now.

When stating these disparities, the Commission seems to think it is "appropriate for Member States to operate the system that appears to them to be the most cost effective." (p. 26), in accordance with the principle of subsidiarity.

However, this position raises some questions.

The objective set by the Green Paper on procedural safeguards is to draw up common minimum standards that comply, in particular, with the requirements of the European Convention on Human Rights and mean that, through the harmonisation of legislation, legal cooperation between the Member States of the European Union can be facilitated.

It is not certain that this objective can be achieved by means of a text that limits itself to stating that a defendant has the right to legal aid *if he has not sufficient means to pay for legal assistance*.

That would only be repeating the principle enshrined in Article 6(3)(c) of the ECHR.

The text should go further than the current international instruments by giving indications as precise as possible as to how to assess whether the defendant has insufficient resources. Ensuring that the right to legal aid takes effect is dependent on that assessment.

It is certainly out of the question to set a standard means threshold at Union level that would apply in all Member States. Given the disparity between the cost of living in those countries, rather than guaranteeing equal treatment, this solution would create unjustified inequalities.

However, it would be more feasible to envisage the Union developing a common calculation method using, for example, a ratio of the average monthly salary in the country concerned.

- ***Defining a legal framework.*** At the very least, the future text should define more or less precise guidelines as to the method of assessment and the objectives to be achieved.

With this in mind, we should first of all determine the **financial resources to be taken into consideration.** In France, in principle, it is the monthly average of any financial resources that the applicant, directly or indirectly, has had in his possession or at his free disposal during the past calendar year, apart from certain social benefits. The texts specify that elements outside his daily living are also taken into account: the existence of certain movable or immovable assets and the resources of the person's spouse or of

persons habitually residing in his home. There does not seem to be any reason why similar provisions could not feature in a text drawn up by the Union.

With regarding to fixing the threshold, there could at least be a principle of equity requiring that the family situation of the person concerned be taken into account. It seems logical that the means threshold should be raised, in proportions that could easily be established as standard, if the applicant is responsible for offspring, older relatives, a spouse or partner.

Finally, the case-law of the Court in Strasbourg could be enshrined, according to which the applicant does not have to prove 'beyond all doubt' that he does not have the means to pay a lawyer (*ECtHR, Pakelli v. Germany, 25 April 1983, Series A, No 64, § 34*). Rather, it would be desirable not to reserve legal aid for those who do not have the means to pay a lawyer, as this approach seems too restrictive. The criterion established in Article 47 of the Charter, according to which legal aid should benefit those whose means do not afford them **effective access to justice**, seems preferable. The right to legal aid should not only be reserved for people who are completely destitute.

- ***To conclude***, in the light of the above observations, it appears that, *mutatis mutandis*, a text very close to Articles **3.1 and 5 of Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common standards relating to legal aid for such disputes**, which applies in civil matters, could be adopted for determining means.

2. Condition pertaining to the 'interests of justice'

- ***Introductory observation***. Article 6 ECHR, and Article 14 of the International Covenant and Article 55 of the Statue of Rome establish that legal aid should be guaranteed, "where the interests of justice so require". It could be deduced from the wording of Question 6 that these international instruments would only deny legal aid for crimes with the least severe penalties. They actually give States more room for manoeuvre.

Let us remember that the European Court of Human Rights indicated that, in order to assess 'the interests of justice' referred to in Article 6(3)(c) ECHR, both the seriousness of the offence and the severity of the penalty should be taken into account (notions which, in practice, are confused), the complexity of the case and the character of the applicant (*ECtHR, Quaranta v. Switzerland, 24 May 1991, Series A, No 205, § 35*).

The Court has admitted that, for use of the channel of extraordinary appeal which in France is cassation, legal aid could be denied if there were no serious grounds for cassation *(ECtHR, 19 Sept. 2000, Gnahore v. France*).

Future common regulations should not close off these possibilities for adjustment, even though they do, of course, give rise to discussion.(2)

2 Thus, in the *Gnahore* ruling, one cannot ignore the partly dissenting opinion of Judges Tulkens and Loucaides, according to which the requirement of serious grounds means that defendants who apply for legal aid will be "*disadvantaged in comparison to appellants who have not applied for legal aid*".

- ***Defining offences which do not involve legal aid.*** Having made this clarification, we should now answer Questions 6 and 7, which aim to define the scope of application of free legal assistance in terms of offence:
- either by defining the offences for which such assistance may be granted (Question 6);
- or by defining the offences for which such assistance is denied (Question 7).

In terms of drawing up common minimum standards, the first approach seems both more practical and more rational. It seems preferable to define positively those offences for which the defendant must be granted, as far as is necessary, the right to legal aid, rather than to seek a European definition of the minor offences that are excluded from that assistance.

This is particularly desirable given that the notion of minor offence can already be found in *Article 2 of Protocol No 7 to the ECHR* on the right to appeal. It is not clear that the offences for which this right may be excluded should be those for which free legal assistance from a lawyer is not obligatory. We should therefore avoid using a notion whose content could vary depending on what law is considered.

With regard to offences for which there is a right, if necessary, to legal aid, it is established, and in the very terms of Question 6, that all offences that carry the risk of a **custodial sentence** should be included.

The question is knowing what solution to adopt for offences with non-custodial sentences (fines or the removal or restriction of rights).

French criminal law could be used as a reference point here. In our law, offences are divided into three categories according to their seriousness: *crimes*, *délits* and *contraventions*.

Contraventions, which are the least serious offences, are divided into five 'classes' (Article 131-13 of the Criminal Code).

Only ***contraventions*** **in the first four classes** are excluded from the scope of application of legal aid. These are offences which carry a fine of no more than €750 euros and, if appropriate, one of the following additional penalties where expressly established by the regulation establishing the offence (Articles 131-13 and 131-16 of the Criminal Code):
- driving ban for a maximum of three years;
- ban from holding or carrying a weapon requiring authorisation for up to three years;
- confiscation of one or more weapons that the convicted person owns or has use of;
- hunting ban for three years;
- confiscation of the item used or intended to be used to commit the crime or the proceeds resulting from it.

All other offences can justify the granting of legal aid. The same applies to ***contraventions*** **in the fifth class** carrying a fine of more than €750 and up to €1500 and, if appropriate, one or more of the aforementioned additional penalties along with (Articles 131-13 and 131-17 of the Criminal Code):
- ban from issuing cheques for up to three years;
- community service for twenty up to one hundred and twenty hours.

It should also be specified that, whatever the *contravention* that is being prosecuted, the judge always has the option to give an alternative sentence in place of the fine, from a list fixed by law (Article 131-14 of the Criminal Code). Among these sentences are:
- the immobilisation of one or more vehicles belonging to the convicted person for six months;
- a ban from issuing cheques for up to a year.
Therefore, free legal assistance from a lawyer could be granted for all offences carrying a fine of more than a certain amount.

The solution of setting the fine based on the means threshold applied in the State concerned would certainly have the advantage of being quite flexible. It could therefore be established that there is a right to assistance when the fine carried by the offence is higher than this threshold. However, this solution obviously has the disadvantage of being impractical in those States that do not make legal aid dependent on insufficient resources.

Even though setting this amount is partly arbitrary, particularly given the economic disparities already mentioned between the Member States, it would perhaps be possible to consider that any offence carrying a **fine of more than €1000** should involve a right to legal aid. However, it goes without saying that there is no obvious choice of threshold.

What remains is to determine whether legal aid should also be provided for offences carrying certain sentences involving the removal or restriction of rights.

In this respect, it seems possible to use not only the nature but also the duration of the sentence as criteria.

Certain sentences would seem to justify, by their very nature, legal aid. For example:
- sentences restricting freedom (restriction from the territory or from leaving the territory, restriction from or obligation to stay in certain places, remote surveillance etc.);
- obligations to undertake an act (community service, demolition order, medical supervision etc.);
- removal of civic, civil and family rights;
- professional bans and similar sentences such as closure of establishments.
- withdrawal of driving license or any other administrative permit or authorisation.

For other sentences involving the removal or restriction of rights, which it is not possible to list exhaustively, the principle could be that legal aid must be granted whenever the sentence **exceeds a certain threshold** (for example, three years).

Confiscation raises particular issues. Insofar as it can affect an object of value, it could significantly affect the convicted person's assets. However, at the same time, this sentence which is similar to a security measure, exists for a very large number of offences, including minor ones. It would thus be preferable not to classify offences carrying this type of sentence with those giving a right to legal aid.

C. Procedure for granting legal aid

Regarding the procedure for granting legal aid, it seems that the general guidelines for European regulations could be drawn from the provisions that apply in France.

Without enumerating the provisions in detail, it would be good to establish whether:
- legal aid can only be granted at the request of the defendant;
- it is the responsibility of the defendant to provide everything necessary to enable his means to be assessed;
- the decision to grant or refuse the aid requested is taken by a body, either administrative or legal, that has the power to investigate and carry out checks with the social and tax authorities, and whose decisions can be the subject of an appeal.

Question 8: Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

See below p. **: Answer to Question 20.

ACCESS TO THE SERVICES OF LEGAL TRANSLATORS AND INTERPRETERS

I - Conditions for access [Questions 9 to 12]

Question 9: Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?

Question 10: Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial, should be interpreted for the suspect/defendant?

Questions 11: What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

Question 12: Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?

French Law

Various provisions of the French Code of Criminal Procedure establish the right of the defendant to the assistance of an interpreter or translator so that he may be informed of the charges against him and understand the proceedings.

Thus Article 63-1 establishes that anyone placed in custody must immediately be informed, in a language that they understand, of the nature of the offence with which the enquiry is concerned, their rights, and particularly the right to remain silent, as well as the provisions regarding the duration of custody.

According to Article 102, the investigating judge may call on an interpreter, who may not be the clerk of the court or a witness.

Before the *tribunal correctionnel* (Police Court), if the accused, the plaintiff or a witness does not speak sufficient French or if it is necessary to translate a document that is part of the discussion, the presiding judge will appoint an interpreter (Article 407 rendered applicable to proceedings in police courts by Article 535 and to the proceedings in the Court of Appeal by Article 512)

Similar provisions apply before the *cour d'assises* (Assize Court) (Articles 272 and 344).

Practice and case-law allow or require the use of an interpreter outside the cases provided for in these texts. Thus, although Article 63-1 of the Code of Criminal Procedure does not apply to detention at the customs, the Court of Cassation rules that persons detained in this way must be informed, in a language that they understand, of the reasons for their arrest, according to the provisions of Article 5, paragraph 2, of the European Convention on Human Rights. Also, in preliminary enquiries, the police services will call on an interpreter as soon as it becomes apparent that the person they are questioning does not sufficiently understand French.

At what point is an interpreter necessary?

Whatever stage the procedure is at, it is difficult to imagine being able to do without an interpreter if the person to whom information is being given or from whom statements are being taken does not sufficiently understand the language which is being spoken. This common sense comment applies both to defendants in criminal proceedings and to those who are simply witnesses. It implies that the services of an interpreter should be used as soon as the need is felt, whether during the enquiry conducted by the police, the investigation opened before the investigating judge or in the trial phase. The use of an interpreter should not be subject to a procedural act such as being placed in custody or indicted, otherwise examinations recorded previously would lose all significance and would be disregarded by the judges.

How can the need for an interpreter be assessed?

The next issue is that of knowing how we can evaluate the need to call on an interpreter. The Green Paper suggests establishing a formal mechanism, which we could suppose would consist, for example, of a systematic evaluation by a translator, of the linguistic knowledge of any foreign suspect.

Such a mechanism does not exist in France, where it is the responsibility of the police officers or judges to assess the need for an interpreter. In order to decide whether a formal mechanism would be useful, we can envisage the following scenarios:

1) The person does not appear to understand the language in which he is being questioned or notified of his rights. An interpreter should then be called upon with or without a formal mechanism.

2) The person concerned appears to understand, but following the procedure says that he did not understand. An expert assessment by a translator could then serve as proof in order to validate the statements that the person had made. This proof could be particularly useful given that, as the Commission points out, according to the case-law of the European Court of Human Rights, the judicial authorities have the burden of proof of linguistic knowledge rather than the person concerned. In this case it is not the

technical skills of the interpreter that give value to his expert assessment but the fact that he is a third party.

3) The person concerned does not sufficiently understand, but the police officers, constrained by wishful thinking, in a hurry to read out the rights or with difficulty finding an interpreter, have overestimated the linguistic knowledge of the person being questioned. The formal mechanism is less necessary here than in the previous example because the judges retain the power to annul the hearing, if it subsequently emerges that the person concerned did not have sufficient linguistic knowledge.

The solution put forward by the Green Paper does, nevertheless, have two advantages. The first is simply the prevention of proceedings being annulled. The second is the prevention of the relatively frequent case where the person concerned has improved his linguistic knowledge during the proceedings, particularly as a result of living in custody. In this case, the judges are no longer in a position to assess the linguistic knowledge that he had the first time he was interviewed by the police.

Are different interpreters needed for each defendant and the public prosecutor?

In France, the interpreter has usually sworn on his honour and conscience to act in the interests of justice and, in any case, never acts in defence of the interests of the persons for whom he is interpreting. In such circumstances, it is difficult to see under what circumstances a conflict of interests could require different interpreters for the defendant and for the representative of the public prosecution. It is true that, in practice, a degree of complicity is sometimes observed between the defendant and his interpreter, who has come out of his role and broken his oath. However, using different interpreters for each party, rather than solving this problem, would have the effect of making it occur more often, by giving the impression that the interpreter was defending the interests of one party or another.

In any case, if it were thought that an interpreter was unable to be neutral, it would be advisable to appoint another interpreter to act for the public prosecution as soon as this comes to light, as it is difficult to see how the interests of the original interpreter would not be contrary to those of the defendant.

What should be translated?

With regard to determining which documents should be translated, it is difficult to make a list in advance. If we accept, as the Commission does, that not all documents necessarily need to be translated, then all documents that could be used by the defence should be translated. This criterion should obviously not only lead to documents offered by the prosecution being translated, since the defendant may wish to produce elements in other documents (for example the written statement of a witness not called by the public prosecution) that are in his favour.

It should also not be left up to the public prosecution or the court to decide whether or not a document may be useful for the defence, since the use which the person concerned will make of it cannot be anticipated. These observations should lead to broad views regarding the type of documents requiring translation.

With regard to oral translation during the trial, this should not only be of questions put directly to the defendant and the answers that he gives, but also everything said in the

hearing: statements from witnesses and other defendants, comments or motions from the public prosecution, speeches made by the lawyers of the other defendants and plaintiffs, etc.

Finally, although the issue is not raised in the Green Paper, it might be added that a defendant in criminal proceedings should have free access to an interpreter during interviews with his lawyer.

II – Provision of services [Questions 13 to 19]

Question 13: Should Member States be required to draw up national registers of legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous professional development be established?

Question 14: If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?

Question 15: Should Member States be required to establish a national scheme for training legal translators and interpreters?

Question 16: Should Member States be required to appoint an accrediting body to govern a system of accreditation, renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior work with the accrediting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?

Question 17: If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?

Question 18: How may and by whom should a Code of Conduct be drawn up and regulated?

Question 19: The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can the Member States do to make this a more attractive profession?

The situation in France

In France, there is a real problem with finding competent interpreters. The problem exists on at least two levels:

1) Each appeal court must establish a list of qualified translators and interpreters for its needs. The people registered on that list generally hold qualifications proving their linguistic knowledge, but not always their experience in oral or written translation. In particular, regarding certain languages for which there are few candidates, it may be easier to use teachers rather than actual translators or interpreters.

2) The people on the lists are not always available when needed. This risk of unavailability, which exists for any expert, particularly due to the fact that legal work is generally an activity additional to a profession, increases in the case of interpreters owing to the request often being more urgent. For this reason, interpreters are often used who are not registered and listed, with varying standards in terms of registration; a central bureau in large cities, and word of mouth elsewhere. There are obviously not the same guarantees regarding the skills of such people as there are for appropriately registered experts.

It is in the light of this experience that we should consider the suggestions made in the Green Paper.

Although it is desirable for translators and interpreters to be subject to prior authorisation by a legal body that is entirely independent and made up of people who know the particular needs of the legal system, this condition is not sufficient because other things need to be taken into account.

The difficulties of recruitment

Several solutions can be considered to improve the situation.

Pooling resources (by creating a European register of translators and interpreters or access to the registers of the other Member States) is one, but this is more suited to written than to oral translation. The latter is often urgent and requires the interpreter to travel.

Prior to this, a training policy could certainly also increase the number of candidates. However, this must be accompanied by discussion as to whether legal translators and interpreters do this work in addition to another profession or whether it needs to be a full time job. In the former case, care should be taken not to train translators and interpreters who cannot be then absorbed by the labour market. The problem of payment exists in both cases, but it is more acute in the second case than in the first.

In any case, better payment for translators and interpreters would probably bring in more applicants. By way of example, the rate fixed by Article R. 122 of the French Code of Criminal Procedure is €11.13 per page for written translation and €13.26 to €14.79 per hour for oral translation, all of which are increased by 25% for languages other than English, German, Spanish and Italian. This level of payment, which is also often made late, does not guarantee the availability of competent translators.

However, improving payment is not the only factor that could make legal translation and interpreting more attractive. Better integration into the legal system and a continuous training system could also play a positive role.

Continuous training and a code of practice

Regardless of means, the authorisation given to a legal translator should not be permanent, but should be renewed dependent on their respect for the code of practice and proof that the skills justifying the initial authorisation have been maintained.

With regard to the code of practice, a few simple rules could be drawn up, knowledge of which should be required by the person concerned, for authorisation, and they should be struck off if they do not comply with them. These rules could be drawn up by a

panel of judges, police officers, interpreters and representatives of the ministries concerned. Knowledge of the rules could be developed through meetings between interpreters or translators and judges.

Technical training should be obligatory, and should cover, on the one hand, the meaning of certain uncommon legal terms, and on the other, the general structure of the legal system.

III - Sanctions [Question 20]

Question 20: Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide interpretation and translation where a person is entitled to it?

It is mainly up to the national courts to punish violations of rules on translation or interpreting, whether that violation takes place during the police enquiry, during the investigation conducted by the investigating judge or at the hearing before the court or appeal court. In France, there have been many such decisions, some of which are by the Court of Cassation. These controls are exerted not only in the light of internal texts, but also in the light of the provisions of the European Convention on Human Rights, which bind French judges as well as the courts of all the Member States of the European Union. They generally lead to the proceedings being partly or completely annulled. Clearly, this is complemented by the controls exerted by the European Court of Human Rights.

If, as envisaged by the Green Paper, a framework decision was adopted in this field, it would bind the Member States, who would be responsible for transposing it, but it could not have a direct effect, in accordance with Article 34, paragraph 2 of the EU Treaty. The problem of sanctioning violations of the provisions of the framework decision therefore needs to be considered on two levels:

1) The framework decision has been correctly transposed: the violation is therefore a violation of internal texts, which should be punished by national courts. It is difficult to see how another control body could be added or what its use would be;

2) The framework decision has not been correctly transposed: if the national judges cannot base their rulings directly on the framework decision, they can nevertheless, as far as possible, interpret national law according to the provisions of the framework decision, having possibly put an interlocutory question to the Court of Justice regarding interpretation, if that procedure is possible in the Member State to which the court belongs. Independently of this limited form of control exerted by the national courts, the Court of Justice could deal with a dispute between Member States regarding the interpretation of application of the framework decision, in accordance with Article 35, paragraph 7 of the EU Treaty.

It could also be envisaged that the framework decision itself could contain a principle establishing that violation of the translation and interpreting rules should be punished effectively by the national courts. However, it would be difficult for such a text to go beyond stating a general principle, which should be applied in combination with the internal procedural rules of each of the Member States.

PROTECTION FOR VULNERABLE CATEGORIES

Question 21: Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:
(1) foreign nationals,
(2) children,
(3) persons suffering from a mental or emotional handicap, in the broadest sense,
(4) the physically handicapped or ill,
(5) mothers/fathers of young children,
(6) persons who cannot read or write,
(7) refugees and asylum seekers,
(8) alcoholics and drug addicts
Should any further categories be added to this list?

Question 22: Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings?

Question 23: If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, should there be a mechanism for following up the assessment with appropriate action?

Question 24: If the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, are sanctions appropriate? If so, what should those sanctions be?

It seems right that the Member States should provide vulnerable groups with an appropriate degree of protection in terms of procedural safeguards, which would compensate as far as possible for their disadvantaged situation.

The principle is excellent, but its implementation definitely needs to ensure that it is not weakened as a result. The road to hell is too often paved with good intentions…

This is why it is crucial to propose a precise definition of the concept of vulnerability, avoiding any approach that is too broad and that could result in achieving the opposite effect to that desired.

This category of vulnerable people should include minors (of course) but also those who are particularly frail due to age, illness, infirmity or a physical or mental deficiency. To this we could add people under psychological or physical constraints as a result of serious or repeated pressures or techniques that could alter their judgment (in particular members of a sect).

However, this category should not include fathers or mothers of young children, foreign nationals, alcoholics and drug addicts, asylum seekers, etc. A too broad approach would undoubtedly be unworkable insofar as anyone up before the judicial system, and in particular anyone arrested or detained, is surely in a position of weakness (as ruled by the European Court of Human Rights) and therefore in a vulnerable situation.

In the same way, in order to prevent any abuse or distortions, the placing of a person in this category of vulnerable persons (perhaps with the exception of minors) cannot 'establish' their vulnerability: the defendant actually needs to be in a weak situation, which is not necessarily the case for the sick or elderly. It should not therefore be sufficient to note the age or the illness; in each case it needs to be established in what way that age or illness could have had particular consequences which placed the victim in a weak and therefore vulnerable situation. In short, vulnerability, except for minors (all minors or only under sixteens?) should not be presumed.

The vulnerability of the person should surely be assessed at the start of the proceedings. The most practical and effective solution is undoubtedly to give the lawyer the job of 'flagging up' the vulnerability of his client to the judicial authorities, who could then order an expert medical and psychological report.

CONSULAR ASSISTANCE

Question 25: Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?

The obligation to ensure that there is an official responsible for looking after the rights of foreign suspects and defendants exists through international, European and national legal instruments. Through these different frameworks, there are two areas: **consular assistance provided by the French authorities to foreign detainees on its territory and assistance provided to French nationals.** The functions of consulates, which are an "agent of the State in a foreign community" [Jean Combacau, Serge Sur, *in: Droit international Public*, Montchrétien, p. 232] were codified in the Vienna Convention of 24 April 1963, and also appear in various bilateral consular conventions (France has concluded approximately thirty).

At international level, the Member States are bound to provide consular assistance to their nationals, through **consulates.** In summary, the functions devolved to the consular officers by the Vienna Convention mainly concern matters affecting "the status, rights and interests of people" [Elisabeth Zoller, *in*: *Droit des relations extérieures*, PUF, p.128]. Fundamentally, the role of consuls is to protect the interests of France and its nationals. Although the same function has been given to embassies [Article 3(b) of the Vienna Convention of 1961], in international practice, the protection of the interests of nationals ("non-contentious diplomatic protection" [Pierre-Marie Dupuy, *in: Droit international public*, Précis Dalloz, p.120]) is mainly the responsibility of consuls. They, rather than ambassadors, are in direct contact with private persons (natural or legal) of French nationality, either residing or passing through the foreign state. In this respect, the consul is charged with respecting and applying the international rules (particularly agreements and conventions) binding France and the country of residence at bilateral and multilateral level. The local authorities should normally inform the French consulate when they arrest and imprison a French national (except where that person refuses such protection).

Other international texts establish this assistance and protection. The need for states to protect the universally recognised fundamental rights with regard to migrants, by providing them with particular assistance and protection in order to guarantee them the rights established in the Vienna Convention, in particular the right to be informed of the consular assistance available from their country of origin, has been evoked by the

United Nations General Assembly [draft resolutions ‘protection of migrants’ prior to the International Convention of 25 April 2000 on the Protection of the Rights of All Migrant Workers and Members of their Families (2000/49)].
Consular assistance can also be granted by France to a foreign national indicted in criminal proceedings on its territory, if the country of origin of the national does not have representation in the territory concerned.

At European level, other instruments establish the obligation of consular assistance.

Article 20 of **The Treaty on European Union** gives the diplomatic and consular missions of the Member States and of the Commission delegations in third countries the responsibility to cooperate and ensure respect for and implementation of the common positions of actions ruled by the Council, particularly by applying the provisions of Article 20 of the EU Treaty.

Article 46 of the Charter of Fundamental Rights of the European Union places the emphasis on diplomatic and consular protection as being an element of ‘European citizenship’.

The Council of Europe has also established legal instruments: the European Convention on Consular Functions of 11 December 1967, which has not come into force, establishes in Article 2 the right of consular officers to “*to protect the nationals of the sending State and to defend their rights and interests, communicate with, interview and advise any such national, to assist any such national in his relations with the administrative authorities, to assist him, provided that there is nothing contrary thereto in the law of the receiving State, in proceedings before the judicial authorities, to arrange legal representation for him if necessary and to suggest an interpreter, or, with the consent of the said authorities, act as interpreter on behalf of any such national.*” (Article 4 of the Convention).

Article 65 of that Convention establishes that the consul should be informed ‘without delay’ by the authorities of the state of residence when a national of the sending State is subject to any measure depriving him of his liberty. Article 2 of the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees of 11 December 1967 recognises the right of a Contracting Party to decline to admit a consular officer as being entitled to act on behalf of or concern himself with a national of his State who is a refugee. However, the consular officer of the State where the refugee has his habitual residence shall be entitled to protect such a refugee and to defend his rights and interests, in consultation, whenever possible, with the Office of the United Nations High Commissioner for Refugees.

Article 10 of the **European Convention on the Service Abroad of Documents relating to Administrative Matters** of 24 November 1977 establishes the possibility of effecting service directly through its consular officers or, if necessary, through its diplomatic agents, of documents on persons within the territory of other Contracting States, subject to their acceptance.

On 19 December 1995, the **European Union** established measures to guarantee the exercise of the right to consular protection. When a national is imprisoned or arrested, he may ask for the consulate to be informed, which, in turn, will inform the local authorities that the national is under the consular protection of France, and that it may enquire about the reason for the arrest.

The consulate may, subject to the agreement of the national, inform his family, and the Ministry for Foreign Affairs, and request the authorisation necessary to obtain a right to visit. It will check detention conditions and the respect of local laws, may provide legal aid by offering the choice of a lawyer, paid for by the national. The consulate may also be used as an intermediary for funds sent by friends or relations to cover payments, fines or bail [Cf.: 'Consular protection for citizens of the European Union', Council of the European Union].

At national level, these rules are applied for the protection of French nationals. The circulars from the Ministry of Justice of 6 June 1952, 30 March 1963, 11 March 1966, 12 December 1974, 17 May 1982, 21 September 1989, 30 June 1984, 17 May 1985 and 18 August 1992 on the arrest and detention of foreign nationals establish the arrangements for implementing the provisions of the Vienna Convention regarding relations between foreign detainees and their consulates.

These circulars specify three legal frameworks for consular assistance to foreign detainees.

A minimum guarantee. A general obligation on the head of the penal establishment to inform the foreign detainee, as soon as he is detained, of the possibility of informing his consul that he has been imprisoned, to ask for a visit from him and to correspond with him. Consular officers must be able to visit any person detained of their nationality who requests a visit, and be able to correspond with him. The head of the penal establishment will report the imprisonment of any foreign national either to the local public prosecution department where the proceedings take place, or where judgment is made. The head of the penal establishment will also inform the public prosecution department whether the person concerned consents to the consulate of his country being informed.

Specific guarantees. These guarantees are stipulated in the consular conventions between France and a number of States, establishing that the consular authorities will be informed of any measure taken to arrest, detain or limit the personal freedom of one of their nationals.

This information is on occasion subject to the authorisation of the accused person according to the Vienna Convention, sometimes subject to the request and authorisation of the person concerned under consular conventions or automatic under bilateral conventions [Cf. table in annex].

There is one exception: foreign nationals with refugee status under the terms of the Geneva Convention of 28 July 1951 enjoying the protection of the French Office for the Protection of Stateless Refugees or those who have claimed political asylum with that body, are considered not to have any link with their country of origin.

The public prosecution department of the place of detention will be informed, even if the accused person does not request it, and even if there is no bilateral convention binding France to the State of which the accused person is a national.
It will notify the appropriate consul according to the specific provisions of the Convention that applies in that case. According to the conventions, this notification must take place without delay, within eight days of the date of deprivation of freedom. Finally, the public prosecution department will inform the consulate of the State, taking

into account the arrangements for issuing visit permits in accordance with the rules of the Code of Criminal Procedure.

The Member States are therefore already bound, through several legal frameworks, to ensure the respect for the Vienna Convention through assistance via a consular officer.

Question 26**: **Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?

According to the texts from the Ministry of Justice, it is the responsibility of the Public Prosecution Department to inform the consulate of the appropriate country as soon as the person is deprived of their freedom, and it is the responsibility of the head of the penal establishment to inform the person arrested or detained of his right to consular assistance.

Question 27**: **Should there be any sanction for failing to comply with the VCCR? If so, what should this be?

Regarding violations of the Vienna Convention on Consular Relations of 24 April 1963, the LaGrand judgment of 27 June 2001 (Germany v. USA) and the Breard judgment of 1998 (Paraguay v. United States) issued by the ICJ, are a reference and are cited by the Commission in its Green Paper. The case brought by Mexico to the ICJ on 9 January 2003 should also be raised, regarding the situation of more than fifty of its nationals currently on Death Row. Mexico claims that the USA has systematically violated the obligations of Article 36 of the Vienna Convention on notifying foreign nationals of their right to consular assistance.

In the LaGrand case, the ICJ considered that the United States had failed in their obligation of consular notification to the detriment of the German nationals, and that prolonged detention or a harsh conviction should give rise to a re-examination and review of the guilty verdict and sentence, taking into account the violation of the rights established in the Vienna Convention. Although the persons concerned had been executed, the Court left the choice of correction of the violation to the United States. In this case, Germany had not claimed damages, as they were not considered to be appropriate in that case, but had demanded guarantees for the future.

The punishment for a 'procedural deficiency' was thus an 'assurance that it would not be repeated' [Philippe Weckel, *in* 'Chronique de jurisprudence internationale', R.G.D.I.P. 2001-3], as the order for an urgent measure issued unanimously by the ICJ was not able to prevent the execution of either of the German nationals.

In an advisory opinion given on 1 October 1999, the Inter-American Court of Human Rights had considered that paragraph 2 of Article 36 of the Vienna Convention not only established a right of the State or a right of the individual, but is a 'human right' in itself, and that a failure to provide legal aid is a violation of the guarantees of a fair trial according to the provisions of Article 14 of the *International Covenant on Civil and Political Rights.*

Article 36 of the Vienna Convention establishes a genuine human right, in that a person, as proven by the ICJ in the LaGrand case, is not simply the subject of consular protection, but takes part in it as a subject of law, in that he can refuse that protection.

The general concern for human rights is not therefore absent from the reasoning of the ICJ.

The National Advisory Commission on Human Rights, in the pending case between Mexico and the United States, asked the French Government, through an opinion issued on 30 January 2003, to intervene under Article 63 of the Statue of the ICJ, in the dispute between Mexico and the USA, and to "*mobilise its partners in the European Union and all of the States party to the Vienna Convention*" to stress the importance attached to "*strict respect for legal safeguards in American proceedings involving foreign nationals, whether or not they carry the death penalty*".

THE LETTER OF RIGHTS

Question 28: Is a common EU wide Letter of Rights feasible? If so, what should it contain?
Question 29: When should the Letter of Rights be given to the suspect?
Question 30: Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?
Question 31: What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

The concept of issuing suspects and defendants in criminal proceedings with a written statement of their fundamental rights is particularly appropriate. This 'declaration of rights' should not be too long and easily understood.

Taking into account the diversity of national legislation, which remains a reality despite considerable efforts to harmonise rights, it would be preferable for the Letter of Rights to give the common European regulations on the one hand, and the specific national regulations on the other. In accordance with a general (French) rule, the letter could be presented in the form of two sections and two sub-sections:

LETTER OF RIGHTS

I. Common European Regulations

A. Convention Regulations (Articles 5 and 6, ECHR)

Article 5:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and the facilities for the preparation of his defence;
   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;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

B. Community Regulations *(Article 6, 47 paragraph 2 and 48, EU Charter)*

Article 6: Everyone has the right to liberty and security of person.

Article 47 paragraph 2: 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.

Article 48: Everyone who has been charged shall be presumed innocent until proved guilty according to law. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

II. Specific national regulations *(French example)*

A. Constitutional Regulations ***(Article 66, Constit.)***

Article 66 1st paragraph: No one may be unreasonably detained.

B. Legal regulations *(Preliminary Article, Code of Criminal Procedure).*

Preliminary Article: I. — Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties.
It should guarantee a separation between those authorities responsible for prosecuting and those responsible for judging.
Persons who find themselves in a similar situation and prosecuted for the same offences should be judged according to the same rules.
II. — The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process.
III. — Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute.
He has the right to be informed of charges brought against him and to be legally defended.
The coercive measures to which such a person may be subjected are taken by or under the effective control of judicial authority. They should be strictly limited to the needs of the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity.
The accusation to which such a person is subjected should be brought to final judgment within a reasonable time.
Every convicted person has the right to have his conviction examined by a second tribunal.

In accordance with the current rules of the European Convention on Human Rights, which require that any person 'charged with a criminal offence', in the European sense, be informed immediately, and the Letter of Rights must be issued to the defendant as soon as possible.

This Letter of Rights must be signed by the defendant (or at least a receipt must be signed to prove that the Letter has been issued).

Failure to respect this obligation could result in proceedings being annulled.

NB: The Community regulations, currently the EU Charter of Fundamental Rights, could possibly be replaced by the relevant provisions of the future European Constitution ...

Also, for the purposes of simplification, a summary of the European and national provisions could be proposed in the following format:

LETTER OF RIGHTS

1. Common European Regulations

1.1. Convention Regulations

Article 5, European Convention on Human Rights:

Everyone has the right to liberty and security of person. You may not be deprived of your liberty unless it is to bring you before the legal authorities with a view to lawful detention, to prevent your entry into the country or to make a deportation ruling.

You have the right to be informed promptly of the reasons for your arrest and of any charges against you.

You have the right to be promptly brought before a judge or other officer authorised by law to exercise judicial power, and to be tried within a reasonable time or released pending trial.

You have the right to appeal to a court to decide speedily on the lawfulness of your detention.

Article 6, European Convention on Human Rights:

You have the right to a fair trial. In particular, you have the right to be informed of the nature of the charge against you, to have the time and facilities necessary for your defence, to defend yourself in person or to have the assistance of a lawyer of your choice, even if you do not have the means to pay for it. You have the right to be assisted by an interpreter.

You are presumed to be innocent.

1.2. Community Regulations

Article 6, EU Charter of Fundamental Rights:

Everyone has the right to liberty and security of person

Article 47 paragraph 2, EU Charter of Fundamental Rights:

You have the right to a fair trial. You have the right to be defended by a lawyer.

Article 48, EU Charter of Fundamental Rights:

You are presumed innocent until proved guilty according to law.

2. Specific National Regulations (France)

2.1. Constitutional Regulations

Article 66, Constitution:

No one may be unreasonably detained.

2.2. Legal Regulations

Preliminary Article, Code of Criminal Procedure:

You have the right to fair and full procedure.

You are presumed innocent until proved guilty. You have the right to be informed of the charges against you. You have the right to be legally defended.

... the Letter of Rights could also be considered in a more abbreviated form, for example:

LETTER OF RIGHTS

The right to liberty:

Everyone has the right to liberty and security of person. You may not be unreasonably deprived of your liberty and only in specific cases: either to be brought before the appropriate judicial authority, or to prevent your entry into the country or to make a deportation ruling.

You have the right to be informed promptly of the reasons for your arrest and of any charges against you.

You have the right to be promptly brought before a judge and to be tried within a reasonable time.

You have the right to appeal to a court to decide speedily on the lawfulness of your detention.

The requirement of fairness:

You have the right to a fair trial.

You have the right to be informed of the nature of and reason for the charge against you.

You have the right to be defended. You have the right to defend yourself in person or to have the assistance of a lawyer, even if you do not have the means to pay for it.

You have the right to the assistance of an interpreter.

You are presumed innocent until you have been proved guilty in law.

You have the right to be tried within a reasonable period.

In any case, it would certainly be enough for the defendant to be informed of the **specific and effective rights that he has in the legal system concerned,** in his language, **by means of a booklet.**

RESPECT FOR COMMON STANDARDS

I – Evaluation and monitoring

Question 32: Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?

Question 33: What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?

Question 34: Is recording of police interviews a desirable tool for efficient monitoring?

As the Council indicates in its programme of measures adopted on 15 January 2001, the implementation of the principle of mutual recognition of criminal decisions assumes mutual trust between the Member States in their respective judicial systems. The adoption of a number of rules establishing a common standard for criminal proceedings would obviously help to increase that trust but could prove to be insufficient if each Member State has doubts as to the specific application of those rules by the other Member States. An evaluation of the practices in force in each Member State, conducted by an independent body, would certainly contribute to removing those doubts in full or in part.

The question of knowing on the basis of which information that evaluation should be made seems a little premature, insofar as it involves comparing practices with standards that do not yet exist. The comments that follow are necessarily therefore of a general nature.

Monitoring the way in which Member States have transposed into their national law the principles to be established in a framework decision is important because, since the provisions of the framework decision do not have a direct effect, the national courts will be unable to administer them. However, such monitoring also poses the fewest problems. It is enough for the framework decision to oblige the Member States to notify the measures that they have taken. The Commission could also meet regularly with the representatives of the Member States in order to examine the difficulties posed by implementing the framework decision.

It is more difficult for the Commission to monitor the effective application of the national texts transposing the framework decision but it is also more subsidiary, since monitoring of 'ordinary law' is done by the national courts. The usefulness of statistical information cannot be excluded from the outset, but such information only has meaning if treated very carefully. By way of a simple example, the data on the number of legal aid cases must obviously be interpreted taking into account the wealth of the population, its tendency to go to court, etc. With regard to quantitative information on use of interpreters, this must be analysed in the light of the number of foreign nationals involved in proceedings. This figure must also be considered taking into account the origin of the foreign nationals, in order to find out whether, overall, they constitute a stable, established community or whether they are transient, etc.

Another source of information concerns complaints received by the Commission and articles in the press. These complaints and articles can lead the Commission to request explanations from the authorities concerned, or to make enquiries itself. This power of enquiry can obviously only exist if a text provides for it.

The recording of police interviews in itself only represents a means of drawing the attention of the Commission to operational problems if it conducts surveys, aside from any complaints, i.e. if it listens to recordings of interviews chosen at random. Systematic recording can also be useful to check the relevance of information brought to the knowledge of the Commission. Finally, aside from informing the Commission, such recording of interviews can have a preventive effect, encouraging investigators to respect the rules to which they are subject. These various advantages must be offset against the cost of such a practice and the constraints that it places on investigators.

II - Sanctions

Question 35: Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

Because a framework decision must, by definition, be transposed into national law, it is mainly the job of national judges to sanction violations of common standards, according to the rules of procedure of the Member State concerned.

However, in order to increase mutual trust, the importance of which was stressed above, sanctions adopted by European Union institutions could be useful when it appears that the national system of sanctions does not prevent serious or repeated violations of common standards. The simple possibility of such sanctions could also have a preventive effect. In addition, as the framework decisions do not have a direct effect, the national judges have almost no monitoring powers if ignorance of common standards results from lack of transposition of the framework decision.

Nevertheless, the EU Treaty currently does not seem to give the Council or the Commission the power to adopt restrictive measures in this field, apart from those set out in Article 7 of that Treaty, whose gravity and seriousness is such that they should be reserved for only exceptional cases.

However, it is possible that if reference was made to the Court of Justice under Article 35, paragraph 7 or if the Commission published reports showing serious or repeated violations of common standards in a particular Member State, this would have a desirable effect.