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## Opinion

**Title**                      **Impact Assessment on: Procedural Rights in Criminal Proceedings**

**(draft version of 13 May 2009)**

**Lead DG**                      **JLS**

### **1) Impact Assessment Board Opinion**

#### **(A) Context**

The right of accused persons and suspects to a fair trial is a fundamental right which the European Union respects as a general principle under Article 6 (2) TEU and is specifically mentioned in the Charter of Fundamental Rights of the European Union. In 2004 the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. After 3 years of discussion and despite widespread support, this proposal was not adopted. Some Member States opposed the measure on various grounds, including that the TEU did not provide a sufficient legal basis, that the EU's mandate was limited to cross border cases and that the European Convention on Human Rights (ECHR) offers already adequate protection of fair trial rights. The impact assessment evaluates the policy options for a new proposal in this area.

#### **(B) Positive aspects**

The report is accessible to the non-specialist reader and provides a good overview of the issues at stake. Given the complex political history of the file, the report provides an in depth discussion of the appropriate legal base and assesses the political feasibility of different options.

#### **(C) Main recommendations for improvements**

*The recommendations below are listed in order of descending importance. Some more technical comments will be transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.*

#### **General recommendation:**

**The report needs further work on several key aspects. It should explain the timing**

of the initiative, provide an overview of the content of the step-by step approach to taking action in this area, and elaborate the analysis of implementation and administrative costs. It should also analyse more thoroughly the problem drivers which have led to the differentiated application of the European Convention on Human Rights (ECHR) provisions on the rights to a fair trial in Member States, discuss the difficulties related to the definition of 'cross border case' and provide a more transparent comparison of options. DG JLS agreed to make changes along these lines.

**(1) Clarify the timing of this initiative and the contents of the proposed step-by step approach for the EU action in the area of procedural rights.** Given that the Lisbon Treaty would bring about a substantial change in the legal base for this initiative, which may facilitate more wide-ranging legislative action, the report should explain better the timing and consequently limited scope (focussing solely on the right to translation/interpretation) of this proposal. As the different rights to a fair trial (such as translation/interpretation, as well as access to legal aid and consular services, provision of the Letter of Rights) are closely linked, the credibility of the proposed step-by step approach should be better established by providing a roadmap of the potential next steps. Moreover, the relationship of this initiative to the measures in the area of the rights of victims and witnesses should be discussed, especially whether and how the rights for translation/interpretation would apply equally to victims.

**(2) Provide better estimates of the implementation costs and economic outcomes.** The report indicates that there is a lack of systematic collection of data and research in this area. It should nevertheless make a further effort to acquire additional data and present existing cost information more systematically in order to provide extrapolated estimates of the overall implementation costs at national and EU level. It should also indicate what steps can be taken to ensure that sufficient data will be available to underpin future actions. The provision of cost estimates, which is currently limited only to the preferred option, should be presented also for the other options, in particular for Option 2 (non-legislative measures) which is part of the preferred option and might have significant cost implications. Moreover, the report should assess the implications of a more rigorous application of the rights on the length of criminal proceedings/number of appeals and the associated risks, and assess, as far as feasible, the corresponding impact on administrative costs.

**(3) Provide a clearer analysis of why Member States apply differently ECHR requirements regarding fair trial rights and why they have been in general slow to implement third pillar legislation.** The report mentions in several places the importance of broader cultural reasons for the problem of lack of mutual trust in legal systems, and indicates that treaty change and legislative measures might not be sufficient to solve the problem. The report should therefore explain what measures should be considered to enhance the level of trust and consider, beyond the content of current Option 2 (non-binding measures very much focused on interpretation and translation issues), additional non-legislative measures in all areas of fair trial rights.

**(4) Discuss the proposed definition of the 'cross border case'.** Given that (a) the preferred option proposes to limit the right to translation/interpretation to cross border cases and (b) in EU legislation there is currently no established definition of a 'cross border case', the report should at the beginning of the report discuss the difficulties of establishing this definition. It should also elaborate on advantages and disadvantages of

the proposed definition, and assess the potential difficulties of implementing it as regards mutual recognition. The report should also be explicit about the extent to which the right to translation/interpretation would apply to non-EU citizens.

**(5) Provide a more elaborate and transparent comparison of options.** All options should be compared against the baseline and graded in terms of their effectiveness, efficiency and coherence with defined policy objectives. The political feasibility of different options should be assessed separately.

**(D) Procedure and presentation**

Given the urgency of the initiative, the report was submitted to the Board only 2 weeks before the examination. As regards the stakeholder consultation, the original 2004 proposal was accompanied by an extensive consultation, and in preparation of this IA, DG JLS has drawn from a number of additional studies. However, the report should clarify whether the general principles and minimum standards for consultation of interested parties have been followed. The different stakeholder views, beyond the political positions of the Member States, should be better expressed in the relevant parts of the report.

**2) IAB scrutiny process**

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