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Co-operation in criminal matters in the European Union and the right of defence in criminal proceedings

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1. Introduction

In February 2003 the European Commission published its *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*¹. With this event a public debate was opened on the harmonization of certain aspects of the right of defence in criminal proceedings in the European Union. The harmonization would cover the right to legal aid, to translation and interpretation, to contact with the family and consular authorities, and to be informed of corresponding procedural rights. It would also embrace the special rights of suspects and defendants, who for reasons of certain characteristics applicable to them that impair their ability of defence, require special attention from judicial and law enforcement officers so as to ensure fairness of the trial. The *Green Paper* encountered lively reactions from the Member States, NGO's, academic centers, associations of translators and interpreters, defence lawyers and the judiciary. Those entities generally expressed their support for the idea of raising the standard of protection of the rights of suspected persons in the European Union. They also pointed at the numerous abuses and deficiencies and proposed specific solutions in that respect. As a result of these consultations, on 28 April 2004 the European Commission presented a *proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union*². The time limit for implementation of the framework decision has been scheduled, according to the proposal, for 1 January 2006. At the time of writing this paper, this proposal has not yet been adopted as binding law. It is also worth noting that the issue of the European Union competence to adopt this act is controversial³.

The proposal of adopting such legislative act has been justified by the European Commission with the need to enhance the operation of the principle of mutual recognition of judicial decisions in criminal matters between Member States⁴. One of the currently existing obstacles to the smooth operation of that principle is the lack of sufficient trust between particular Member States with regard to the respect for fairness of the trial⁵. The fact that all the Member States are parties to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) does not amount *per se* to a sufficient guarantee in that respect. To demonstrate this, numerous judgments of the European Court of Human Rights declaring violations of the ECHR by Member States should be noted, and also a number of individual applications, increasing from one year to the next, alleging violations of the Convention by those states. In its explanatory memorandum to the proposal of the framework decision the European Commission also pointed at the decisions of national courts based on

¹ Green Paper of the European Commission of 19 February 2003, COM (2003) 75.

² COM (2004) 328.

³ In particular, the Governments of certain Member States voiced their reservations referring to the lack of sufficient legal basis in the Treaty on European Union to adopt legislative acts in the field of the procedural rights of suspected persons and the infringement of the subsidiarity principle. The scope of this paper does not allow for a detailed analysis of this issue.

⁴ See § 7 of the explanatory memorandum attached to the proposal of the framework decision; see also: *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters* of 15 January 2001 r., (OJ C 12) p. 10; *Commission Communication to the Council and the European Parliament of 26 July 2000 on the mutual recognition of judicial decisions in criminal matters*, COM (2000) 495.

⁵ See §19 and 22 of the explanatory memorandum.

the conviction that the provisions of the ECHR are violated by the authorities of another Member State⁶.

It is not only because of its fundamental importance for the operation of the principle of mutual recognition of judicial decisions in criminal matters that the proposal to harmonize the rights of suspected persons⁷ in the European Union is significant. Non-governmental organizations rightly pointed out in their responses to the *Green Paper* that the legislative actions taken in the recent years at the international and at the European level were primarily aimed at increasing the efficiency of prosecution of certain offences. As the consequence, they frequently resulted in the limitation of the individual's rights. In those circumstances, an initiative aimed at the better application of the guarantees of the fairness of the criminal proceedings would help to restore the imbalance.

2. General principles of the proposed framework decision

The European Commission has decided that five aspects of the right of defence have priority importance for the operation of the mutual recognition principle. These include: the right to legal aid, to free translation and interpretation, to communication with the family and consular authorities, the right to so-called "specific attention" (awarded to those suspected persons who due to their age or mental, physical or emotional conditions are particularly vulnerable to potential infringements of their rights by law enforcement and judicial officers) and to be informed in a comprehensive manner of the pertaining procedural rights. Other aspects of the right of defence were excluded in order to carry out separate consultations and present legislative proposals. This concerns in particular the problems of obtaining, handling, and use of evidence and the application of pre-trial preventive measures. In that field a separate *Green Paper* of the European Commission⁸ and the proposal of a framework decision⁹ have been published.

In justifying its selection of the abovementioned five aspects of the right of defence covered by the proposal of the framework decision of 28 April 2004, the European Commission emphasized their particular importance to the realization of the principle of mutual recognition. In the opinion of the Commission, those rights are supposed to have – as opposed to other procedural rights of suspected persons - significant importance in cases with transnational element¹⁰. It would be hard to overlook, however, that at least some of the rights covered by the proposal would be mainly applicable in purely internal cases. The examples would include the right to receive legal advice or the right of suspected persons with hearing or speech impairments to assistance of a sign language interpreter.

⁶ See § 29 of the explanatory memorandum, where a reference is made to the judgment of the High Court of 27 July 2000 in the case *R v. Secretary of State ex Parte Ramda* and to the judgment of the Cour d'Appel de Pau of 16 May 2003 in the case *Irastorza Dorronsoro*.

⁷ The notion of the "suspected person" for the purposes of the proposal of the framework decision covers both, a person who was informed that he is being suspected of having committed a criminal offence, and a person against whom an act of indictment or other equivalent pleading instituting judicial proceedings was brought to the court. Thus, conversely to the Polish code of criminal proceedings of 6 June 1997 (JoL No. 89, Item 555, as amended), where the notion of the defendant *sensu largo* covers both the notion of the defendant *sensu stricto* and the person suspected of having committed a criminal offence (art. 71 § 3 of the code of criminal proceedings), in the present paper both notions are covered with the same notion of the "suspected person". This derogation from the terminological convention accepted in the Polish doctrine of criminal proceedings is justified with the terminology adopted in the discussed documents and the autonomy of legal concepts employed in the legislation of the European Union in relation to the terminological framework of the Polish legal system.

⁸ Green Paper of the European Commission of 17 August 2004 *on mutual recognition of non-custodial pre-trial supervision measures*, COM (2004) 562.

⁹ See the proposal of the Council framework decision of 14 November 2003 *on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM (2003) 688.

¹⁰ See § 24 of the explanatory memorandum.

According to the proposal for the framework decision, the rights provided therein should apply to suspected persons in criminal proceedings in the territory of the European Union, conceived as proceedings aimed at establishing the guilt or innocence of a person suspected of having committed a criminal offence, or to deciding the outcome following a guilty plea in respect of a criminal charge. They will apply not only to the nationals of the Member States but also to third countries nationals. The rights covered by the framework decision set only a minimum standard of protection of suspected persons. Thus, the Member States will not be able to invoke the scope of rights covered by this instrument in order to lower the standard of rights of suspected persons that is guaranteed in their own legal system¹¹.

3. The right to legal aid

In accordance with Art. 2(1) of the proposal, a suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings, including the appeals proceedings¹². With respect to such framing of the right in question, two concerns should be expressed. Firstly, the right to receive legal advice is a narrower concept than the right to a defence lawyer. The tasks of the defence lawyer in the course of criminal proceedings consist not only in providing legal advice to a suspect, but also in representing him before the law enforcement and judicial bodies, including presenting motions for evidence and other pleadings. Whereas, the proposal of the framework decision does not provide for any guarantee of performance of such defence activities, which limits the possibilities for a suspected person to receive effective legal assistance¹³.

Secondly, certain doubts concern the determination of the moment when the suspect has the right to legal advice. It seems that the words “as soon as possible” should be interpreted in relation to the Art. 1(2) of the proposal, according to which the rights conferred by the act apply from the moment when the suspect is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence, and in relation to Art. 2(2) of the proposal, which provides that the suspected person has the right to receive legal advice before answering questions in relation to the charge. The context of the abovementioned provisions indicate that a suspected person should be allowed to communicate with the defence lawyer in the time between being informed about the charges and being questioned in relation to the same. This solution may extend the procedural guarantees provided for in the laws of certain Member States¹⁴, but it does not guarantee a fully effective right of defence to a suspected person. A person suspected of having committed a criminal offence can be (and usually is) first examined in his capacity of a witness of the deed and it is only later – after the presentation of the charges against such person – that such person is examined in his capacity of a suspected person. Therefore, attention should be given

¹¹ See § 17 of the proposal of the framework decision.

¹² According to recital 12 of the preamble to the framework decision, the right to legal advice contained therein does not impose on the Member States any further obligations than those that result from Art. 6 ECHR.

¹³ Similar concerns have been voiced by CCBE and European Criminal Bar Association who stated that the right to legal advice provided in the proposal of the framework decision does not include the right to the presence of the defence lawyer during the examination (See. *CCBE Response on the Proposal for the Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union*, Brussels, December 2004, p. 4 – the text is available on the website http://www.ccbe.org/doc/En/procedural_rights_ccbe_response_en.pdf, and the position of ECBA, p. 3-4, – the text is available on the website http://www.ecba.org/gb-data/gb-documents/gb-speeches/specmeasuresmatt_spronken.pdf). The comments of Amnesty International went into the same direction (cf. *Amnesty International's Response to the Green Paper from the European Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, May 2003, p. 3 – the text is available on the website http://www.europa.eu.int/comm/justice_home/fsj/criminal/procedural/fsj_criminal_responses_en.htm).

¹⁴ See § 32 of the explanatory memorandum.

to the proposal that the right to legal advice should apply to all persons questioned by the law enforcement officers in relation to the offence¹⁵.

The proposal provides that law enforcement and/or judicial officers shall be obliged to offer legal advice to a suspected person who: (a) is remanded in custody prior to the trial, or (b) 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 (c) is the subject of a European Arrest Warrant or extradition request or other surrender procedure, (d) is a minor, or (e) appears not to be able to understand or follow the content or the meaning of the proceedings owing to his age, mental, physical or emotional condition¹⁶. The obligation to offer legal advice to a suspected person does not restrict the right of the latter to refuse it or to defend himself in the criminal proceedings.

The proposal does not prejudge the mechanism of ensuring this right by the Member States. Apparently, it may consist in appointing an *ex officio* defence lawyer to the suspected person, according to the legal aid scheme existing in a Member State, unless the suspected person has a defence lawyer of his choice. It should be emphasized that according to Art. 5(1) of the proposal, when the abovementioned duty to offer legal advice applies, its costs should be borne by the Member State, if they would cause undue financial hardship to the suspected person or his dependents. The suspected person is obliged to demonstrate these facts, but he is not obliged to prove them beyond all doubt¹⁷. Apart from this, the proposal of the framework decision does not address the problem of bearing the costs of the criminal proceedings, *inter alia*, it does not indicate whether the Member State should reimburse the costs borne by the suspected person in the event of his final acquittal from the charges.

According to Art. 4(1) of the proposal, only persons possessing the professional qualifications described in Art. 1(2)(2) of the Directive 98/5/CE¹⁸ should be entitled to provide legal advice to suspected persons. With respect to Poland that provision refers to the professions of *adwokat* (advocate) and *radca prawny* (legal counselor). *Prima facie* this would mean that only those persons entitled to such professional title should be entitled to provide legal advice in criminal proceedings. However, on the grounds of the current legislation and practice of the Polish criminal law, such simple referral raises two concerns. According to the wording of Art. 82 of the code of criminal proceedings, only a person entitled to provide defence pursuant to the provisions on the constitution of the Advocates Bar can act as a defence lawyer. This possibility does not apply to legal counselors, whose role within the criminal proceedings is limited only to the representation of other participants of the proceedings. It should therefore be considered whether, as a consequence of adopting the framework decision in the Polish legal order, legal counselors shall obtain the right to act as defence lawyers on an equal footing with advocates. It seems that the answer to such question should be in the negative, taking into consideration the purposes of the proposed framework decision, which includes ensuring that only persons sufficiently qualified shall be entitled to the act as defence lawyers. The solution proposed for that act aims to tighten the circle of persons entitled to provide legal advice in criminal proceedings. Consequently, provided that legal counselors have not

¹⁵ See *CCBE Response*, *op. cit.*, p. 3.

¹⁶ See Art. 3 of the proposal of the framework decision. The organization participating in the public consultations proposed that the mandatory participation of the defence lawyer in the proceedings was extended also to other cases, e.g. covering proceedings where the court decides to exclude the public from the hearing of the case or where a possibility of expulsion of a foreign citizen is invoked (See *CCBE Response*, *op. cit.*, p. 4.).

¹⁷ See §60-61 of the explanatory memorandum and the judgment of the ECHR of 25 April 1983 in the case *Pakelli v. Germany*.

¹⁸ Directive 98/5/EC of the European Parliament and of the Council of 16 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 (OJ L 77, 14.3.1998, p. 36-43).

had so far the right under Polish law to act as defence lawyers, it would be difficult to accept that they have sufficient qualifications to that end. The exclusion of legal counselors from the lawyers entitled to provide legal advice would also be consistent with Art. 17 of the proposal, which allows the Member States to maintain a level of protection of the rights of suspected persons that is higher from the standard set forth in the framework decision.

Another problem that should be discussed at this point is the conformity with the requirement laid down in Art. 4(1) of the proposal of the current provisions of Polish law that allow advocate apprentices to participate in criminal proceedings and to appear before law enforcement and judicial bodies. According to those provisions, the advocate's apprentice can participate in the activities before the court or other body in the criminal proceedings under the supervision of the advocate, for whom he acts as a substitute. However, the apprentice is not permitted to be appointed directly as a defence lawyer, who must always be an advocate. Furthermore, on granting the power of substitution to the apprentice, the advocate has the duty to display special diligence in order to prepare the apprentice for the hearing¹⁹. The powers of the apprentice to take part in the criminal proceedings are limited to the possibility of participation in court hearings with the right to make motions and other declarations, and to submission in writing of an application for the execution of the written justification of the judgment and of motions for evidence. Other pleadings in the course of the proceedings, in particular appeals, can only be submitted by the advocate. It should also be noted that the suspected person, who is being assisted by a particular act of the apprentice, may request that the advocate also be present during performance of that act. Having this in mind it seems that the current provisions of the Polish law that allow for the participation of advocate apprentices in proceedings do not go against the requirements laid down in Art. 4(1) of the proposal of the framework decision.

The proposal supplements the abovementioned procedural guarantees with the requirement that if the legal advice provided to the suspected person is ineffective, there was in place a mechanism allowing for the replacement of the defence lawyer. The obligation to introduce such mechanism was recognized by the European Court of Human Rights with respect to the ECHR in the case of *Artico v. Italy*²⁰.

4. The right to free translation and interpretation

The right of a person who does not understand the language of the criminal proceedings to free translation and interpretation stems directly from Art. 6(3)(e) ECHR. Its scope was defined in the case law of the European Court of Human Rights. In the opinion of the European Commission, the framework decision will not extend that right²¹. The proposal provides that a suspected person who does not understand the language of the proceedings has the right to free interpretation of the oral proceedings²² and free translation of the documents from the case file²³. With regard to oral proceedings, the proposal extends the right to interpretation also to the persons who suffer from hearing or speech impairments²⁴. The

¹⁹ See § 41 of the *Rules of Ethics and Professional Dignity of the Advocate Profession*, adopted by the National Bar on 10 October 1998 r. (Resolution No 2/XVIII/98).

²⁰ Judgment of the European Court of Human Rights of 13 May 1980 in the case *Artico v. Italy*, report of the European Commission of Human Rights of 8 March 1979, application No 6694/74.

²¹ See recital 13 of the preamble to the framework decision.

²² See Art. 6 of the proposal of the framework decision.

²³ See Art. 7 of the proposal of the framework decision.

²⁴ See Art. 7(3) of the proposal of the framework decision. The European Commission has chosen to extend the right to interpretation to such persons with the aim of ensuring the right of the suspected person, stemming from Art. 6(3)(e) ECHR to be informed about what he is accused of so that he understands the nature and cause of the accusation (see § 64 of the explanatory memorandum). This solution was also recommended by Amnesty International.

Member States should also provide to such persons, if necessary, free translation of the legal advice granted to them in the course of the proceedings.

According to the solution adopted in the proposal, the obligation to provide translation of the case file is initially limited to the documents that are relevant from the point of view of the fairness of the proceedings. The decision on the selection of the documents to be translated should be taken by the judicial or law enforcement body that conducts the proceedings. On the grounds of the ECHR the right to translation has been given a similar scope by the European Court of Human Rights, which held that the Convention does not require the entire case file to be translated²⁵. However, according to the proposal of the framework decision, the defence lawyer shall have the right to request that further documents be translated²⁶. It could be feared though that such construction would open the way for abuses of the right to translation by suspected persons and defence lawyers, who would avail themselves of that right in order to prolong the criminal proceedings.

Among its other objectives, the framework aims to ensure that the translation and interpretation be accurate and precise. In that respect, Art. 8 of that act provides that the Member States should ensure that only sufficiently qualified translators and interpreters are employed in the criminal proceedings and in the case of the inaccuracies in the translation or interpretation, a replacement mechanism should be provided. The proposal also provides that where proceedings are conducted through an interpreter, an audio or video recording should be made in order to ensure quality control. A transcript of the recording should be available at the request of any party. However, it would only be used for the purpose of verifying the accuracy of the interpretation. Such a solution raises certain concerns, in particular in the context of the principle of confidentiality of communication between the suspected person and the defence lawyer. While the creation of a mechanism that would ensure the verification of the accuracy of the interpretation should in principle be supported, the implementation of this mechanism should in no way infringe the principle of confidentiality of communication between the suspected person and the defence lawyer²⁷.

5. The right to specific attention

This vague concept denotes a set of rights awarded in the criminal proceedings to the persons who, for reason of their age or their mental, physical or emotional condition are not able to understand or follow the content or the meaning of the proceedings²⁸. The content of the rights that integrate the right to specific attention seems also to be of little transparency. The proposal of the framework decision points in that respect at the right of a suspected person to have medical assistance during the proceedings and the right to request the presence of the third party during the questioning (i.e. a parent, when the suspected person is a minor). In the explanatory memorandum it was indicated that it was not possible to enumerate all eventual rights that arise from the right to specific attention in the framework decision and in this respect the basic obligation rests with the Member States²⁹.

The construction of the right to specific attention seems to distinguish it to a certain degree from other rights provided for in the proposal of the framework decision. The specific attention should be given to suspected persons who are particularly vulnerable to the eventual

²⁵ See judgment of the European Court of Human Rights of 19 December 1989 in the case *Kamasinski v. Austria*, Series A 168.

²⁶ See Art. 7(2) of the proposal of the framework decision.

²⁷ In this respect see e.g. the judgment of the European Court of Human Rights of 28 November 1991 in the case *S v. Switzerland*, (applications no. 12629/97 and 13965/88), where in § 48 the Tribunal emphasized that the right of the accused to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society.

²⁸ See Art. 10(1) of the proposal of the framework decision.

²⁹ See § 41 of the explanatory memorandum.

abuses on the part of the law enforcement and judicial bodies, and therefore can less effectively request the observance of their rights. Therefore, the right of specific attention has been construed not so much by reference to the rights awarded to such persons, as by the description of the duties imposed on the law enforcement and judicial bodies. Those bodies are charged with the obligation to ensure the fairness of the trial. Thus, if a law enforcement or judicial body determines that there exist circumstances that require awarding the right to specific attention, it should record it in writing. In addition any other step taken as a consequence of this right should be recorded in writing. According to the proposal of the framework decision, an audio or video recording should be made of any questioning of suspected persons entitled to specific attention. A transcript of the recording should be provided to any party in the event of a dispute.

6. The right to communicate with family and the consular authorities

A suspected person who is remanded in custody may request that his family³⁰ and place of employment be notified about his detention as soon as possible. The Preamble of the framework decision reserves in its 15 recital that the suspected person may request such persons to be informed about his detention only where the proceedings are not jeopardized by such information being disclosed. The legislative part of the act in question does not provide, however, for any such reservation.

Suspected persons who have been detained also have the right to communicate and receive assistance from the consular authorities of their home States³¹. If the suspected person does not want to receive assistance from the consular authorities, he should be offered the assistance of an international humanitarian organization³². The Member States can determine which humanitarian organizations shall be entitled to provide assistance in such cases. The proposal of the framework decision indicates in that respect at the International Committee of the Red Cross, whose statutory functions include visiting detainees, and whose delegates in 2002 visited approx. 500,000 detainees worldwide. 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 reasons for not wanting the assistance of the consular authorities of his nationality.

7. Letter of Rights

The realization of the aims of the framework decision will only then be possible if the rights of the suspected persons described therein and the corresponding obligations of the law enforcement and judicial bodies will be familiar to the parties of the proceedings. The proposal provides to that end that the Member States will be obliged to elaborate a standard form, i.e. the Letter of Rights, which would enumerate pertaining procedural rights of the suspected person. A draft form of the Letter of Rights has been attached to the proposal of the framework decision. The Letter of Rights should be available in each official language of the European Community. Member States should also consider the benefits of translating the form into other languages also, if they are commonly encountered in a specific locality.

³⁰ See Art. 12(1) of the proposal of the framework decision. The suspected person may also require that the information about his detention is communicated to other persons. The English version of the proposal of the framework decision employs in that respect a vague concept of "persons assimilated to his family". The Polish version employs erroneously the concept of "przysposobieni".

³¹ The right of the suspected person to communicate with the consular authorities is intended to supplement the right provided for in the Vienna Convention on Consular Relations of the consular officials to communicate with the detained persons (see § 16 of the explanatory memorandum).

³² See Art. 13(2) of the proposal of the framework decision.

Each Police station should have Letter of Rights forms in all official languages of the European Community, so that it is possible to inform the suspected person of his rights in a language he understands³³. The Letter of Rights should be presented to the suspected person in two identical copies. Each copy should be undersigned by the suspected person and the law enforcement officer, who retains one copy of the Letter of Rights as a proof that it was offered and accepted by the suspected person.

The imposition on Member States of the obligation to introduce Letter of Rights forms translated into various languages may considerably contribute to the increase in the level of protection of the procedural rights of persons who do not understand or speak the language of the proceedings. It should also be emphasized that the realization of that obligation does not require considerable means. It has been rightly pointed out, however, that the delivery of a Letter of Rights in writing does not always ensure the effective notification of the procedural rights to the suspected person (e.g. with respect to persons who are blind, illiterate or mentally-ill, or minors). In some cases, this problem could be solved by offering such persons an audio recording of the Letter of Rights³⁴. Notwithstanding the relatively low costs of implementation, this suggestion has not been, however, adopted in the proposal of the framework decision.

8. Monitoring and reporting duties

The provisions of the framework decision that impose on Member States the statistical and reporting duties or provide for the monitoring procedures may appear of little interest from the point of view of academics or practitioners involved professionally in the criminal proceedings. It should be noted, however, that the necessity to adopt a framework decision results precisely from the diversified application by Member States of the provisions of the ECHR and the lack of efficiency of the mechanism designed to ensure its application in individual cases. The creation of effective mechanisms to monitor the implementation of the provisions of the framework decision and sanction its infringements is therefore of fundamental importance to bringing about change in the legal culture and application of the law – not so much in individual cases – as at the national or even at the Community level.

Member States shall be obliged to maintain statistics of cases to which particular provisions of the framework decisions would be applicable. They will also be obliged to supply the European Commission with information on the methods of implementation of the framework decision into the national legal order. On this basis the Commission will elaborate periodic reports that can subsequently be published.

9. Conclusions

The initiative of harmonization of the minimum procedural rights of suspected persons in criminal proceedings in the European Union merits approval. The lack of efficiency of the human rights protection system provided for in the ECHR, and the emphasis put in recent years on the efficiency of prosecution of certain offences, justify the taking of legislative action aimed at increasing the standard of protection of the rights of individuals in criminal proceedings.

Attention should also be given to the circumstances that hinder legislative action in that field at European Union level. The enactment and application of criminal sanctions is still regarded as one of the main attributes of sovereignty that Member States are unwilling to share with the European Union. There are considerable differences between the institutions of criminal proceedings in particular Member States. For that reason, the solutions adopted in the

³³ See Art. 14(3) of the proposal of the framework decision.

³⁴ See *Amnesty International Response, op. cit.*, p. 14.

proposal of the framework decision are predominantly minimalist in character. In the future they can, however, form the basis of further harmonization. Therefore, the monitoring and evaluation of the application of the framework decision shall be of considerable importance and will show if the solutions adopted in the legal act fully pursue its objectives.

However, even at this stage can certain deficiencies of the proposal be noted. For example, the proposal of the framework decision does not include any provisions regarding the right of the defence lawyer to obtain information regarding the case, to communicate with the client without the presence of third parties, and to participate in the proceedings. Without those rights, the legal assistance of even the best-qualified defence lawyer may prove illusory³⁵. Notwithstanding a wide debate on the necessity to ensure that fair remuneration is paid to defence lawyers, translators and interpreters taking part in criminal proceedings, the proposal of the framework decision does not provide any solutions in this respect. In certain cases there is a clear lack of precise determination of the scope of the notions employed in the proposal of the framework decision (e.g. “the child”, “persons assimilated with the family”) or even entire legal constructions (in particular of the “right to specific attention”). It is to be hoped that these doubts shall be clarified by practice and case law.

³⁵ See *CCBE Response*, op. cit., p. 4-5; *CCBA Response*, op. cit., p. 4-5.