



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**DROIPEN 21
CATS 41**

NOTE

from :	Presidency
to :	Article 36 Committee
Subject :	Further discussions on the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union

I. Introduction

On 3 May 2004 the Commission submitted a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union ¹.

Discussions began under the Netherlands Presidency in the Council Working Party on Substantive Criminal Law and continued under the Luxembourg and United Kingdom Presidencies until the third reading was concluded. A progress report was made to the Council (Justice and Home Affairs) on 2 December 2005 ². On the basis of these results, in particular of the misgivings still obtaining on the legal basis, the Presidency carried out an analysis of the problem and, at the informal meeting of Ministers (Justice and Home Affairs)

¹ 9318/04 DROIPEN 17.

² 14642/05 DROIPEN 59; 14248/1/05 DROIPEN 54 CATS 73 REV 1 + ADD 1.

on 13 January 2006 and at the Article 36 Committee on 2 February 2006, suggested, as an interim stage, adopting a declaration by the Council and continuing discussions on the text of the Framework Decision at the same time ¹. On the basis of the outcome of discussions at the meeting of the Article 36 Committee on 2 February 2006, in particular of the sceptical attitude of many Member States to the approach pursued by the Presidency, a joint meeting was held on 6 March 2006 between the Working Party on Substantive Criminal Law and experts on the implementation of the European Arrest Warrant. Here an attempt was made to elucidate, on the basis of specific questions, any problems of judicial cooperation arising as a result of differing procedural systems ². The Working Party on Substantive Criminal Law came to the conclusion that apparently no serious problems existed in connection with cooperation and the application of legal acts in the area of mutual recognition. The overwhelming majority of Member States was in favour of continuing the discussions, although it was acknowledged that focusing on the most important procedural rights could help speed up proceedings. It should be noted that on account of the long negotiations and the complex content of the instrument, it was not possible to adhere to the deadline set in the Hague Action Plan for the conclusion of negotiations.

On the basis of the abovementioned conclusions of the Working Party and taking into account the state of play on the present proposal ³, the Presidency is endeavouring with this document to concentrate subsequent discussions in the Working Party on particular problem areas and to make them as solution-oriented as possible in order to reach rapid agreement on the Framework Decision.

¹ 5542/06 DROIPEN 8 CATS 10 COR 1.

² 6621/06 DROIPEN 15.

³ 15432/05 DROIPEN 61.

II. Outstanding issues

1. **Legal basis:** IE/AT/CZ/SK/DK and MT are not convinced that Article 31(1)(c) TEU constitutes the appropriate legal basis for the proposal for a Framework Decision and have upheld the reservations already tabled at the start of the discussions on the existence of a suitable legal basis. The majority of Member States has no doubts about the legal basis and is in favour – with reference to the opinion of the Council Legal Service¹ – of continuing the discussions.
2. **Relationship with the ECHR:** While some Member States see no added value in relation to the ECHR (IE/UK/MT), other Member States (SK/CZ/F/PL/NL) object to the risks arising from a dual legal protection system (ECHR – Framework Decision). Some of the Member States in favour (D/FI/PT/EE/GR/and BE) already regard the general consolidation as a bonus. In addition to this "symbolic value" IT sees real progress in relation to the ECHR (for example, with the letter of rights provided for in Article 14). On the other hand, ES for its part is in favour of harmonising procedural rights on the basis of specific cases (for example, on the basis of the right of access to legal assistance).
3. **Exceptions for serious and complex forms of crime, in particular terrorism:** the recitals in the proposal for a Framework Decision have not previously been discussed by the Working Party. **Recital 8** stipulates that the proposed provisions of the Framework Decision are not intended to affect specific measures in force in national legislation in the context of the fight against certain serious and complex forms of crime, in particular terrorism. The question of exceptions was discussed in the Working Party on several occasions in connection with the possible exceptions provided for in individual provisions (see under point III).

¹ 12902/04 JUR 399 COPEN 117.

4. **General reservations:** UK/IE/DK/CZ/SE/SI and NL have lodged parliamentary reservations. LV and SI have entered linguistic reservations on the text as set out in 10880/05 DROIPEN 34.

III. Summary of the state of play

1. Scope (Article 1):

- (a) **Inclusion of administrative proceedings:** AT/DE/SI/CY/DK and CZ advocate limiting the scope to judicial criminal proceedings and proceedings before courts whose jurisdiction includes criminal matters where appeals can be brought against decisions by administrative authorities.
- (b) FI advocates making an **exception for proceedings for minor offences**.
- (c) UK aired the matter of whether **military criminal proceedings** should be included in the scope. Also still unresolved are decisions on the question raised by IT and LT as to whether the Framework Decision should also be applicable to proceedings against **legal persons** and the matter raised by AT and CZ of the inclusion of proceedings arising from **extraordinary legal remedies** (constitutional complaints).

2. Right to legal advice (Article 2):

- (a) **Scope of this right** (paragraph 1): UK and ES are in favour of this right not being granted "as soon as possible". While BE/NL/IE/FR/DE and MT would not like to extend application of this right to police questioning as well, LT/HU/SK and SI advocate that the right to legal advice should also include questioning by police authorities. In PL's view, it should be left to Member States to decide how to interpret this right in practice.
- (b) **Admissibility of exceptions** (paragraph 2):
- (i) CZ/SI/SK/SE/DK/LV/IE are against admitting any exceptions to this right. IT/BE/PL and PT are also opposed to any exceptions to this right but are flexible and could contemplate exceptions if the wording were to contain appropriate restrictions.

- (ii) ES/FR/NL and MT are in favour of the unconditional admissibility of such a provision allowing exceptions. LV/LU/DE/AT/EE/PL and FI can accept the provision allowing exceptions currently contained in the text.

3. **Right to free interpretation (Article 6):** CZ and SI are in favour of restricting the exception provided for in the last sentence of paragraph 2 to communication between the suspect and defence counsel in the language of the proceedings. EE is opposed to this and thinks the possibility of communicating in another language is sufficient. IT and FR would like to restrict this right to actual discussion with the legal advisor and have announced drafting proposals.
4. **Right to have third persons informed of detention (Article 12):** FR and CZ consider that the suspect's unrestricted choice of persons to be informed goes too far. FR and MT are opposed to an exception to this right being allowed only "in exceptional cases".
5. **Right to communicate with consular authorities (Article 13):**
 - (a) right to have the consular authorities of the home State informed of the detention without delay and right to communicate with those authorities (paragraph 2): CZ advocates informing the consular authorities even against the suspect's wishes. IT has entered a reservation on the provision.
 - (b) right to communicate with recognised international organisations (paragraph 3): While MT recommends deleting this provision and FR/DE/ES/IE and CZ have voiced misgivings and tabled scrutiny reservations, LT is in favour of providing for advice both through the consular authorities and through international organisations.
 - (c) possibility of suspending this right (paragraph 3): PL is in favour of deleting this provision. CZ/SI/EE and FR also have reservations regarding the compatibility of this provision with international commitments, especially with the 1963 Vienna Convention on Consular Relations.

6. **Notification of rights (Article 14):** While FR/MT and NL advocate either deleting this provision or wording it in such a way that the Member States decide on how to notify a suspect of his rights, and PL supports the draft in 13504/05 DROIPEN 45, DE and DK are flexible. FI is in favour of not applying this provision to minor offences.
7. **Annex (Notification of rights):** FR refers to the link with Article 14 and advocates adapting the information to the particular situation; the form would not be suitable for this purpose. AT points out that the distinction between "rights pursuant to the Framework Decision" (point A.) and "other rights" (point B.) seems to be irrelevant.

IV. Further proceedings

The Presidency considers the statement in the Hague Programme: strengthening freedom, security and justice in the European Union ¹ that the further realisation of mutual recognition as the **cornerstone of judicial cooperation** implies the development of **equivalent standards for procedural rights in criminal proceedings** (point 3.3.1.), the abovementioned opinion of the Council Legal Service and the outcome of the discussions of the Article 36 Committee on 2 February 2006 and of the Working Party on Substantive Criminal Law on 6 March 2006 as an unconditional mandate to continue the discussions with a view to adoption of the proposal as soon as possible. However, at the same time the remaining problems have to be kept in view and steered towards a solution.

V. Questions

The Hague Programme: strengthening freedom, security and justice in the European Union, which is based on a common decision of the Member States, provides for approximation of standards relating to procedural rights. The opinion of the Council Legal Service also confirms that, taking into account necessity and subsidiarity, Article 31(1)(c) provides an adequate legal basis for the proposed approximation of procedural rights.

¹ OJ C 53, 3 March 2005, pp. 1 to 14.

In order to give the Working Party a clear mandate for the further pursuit of its discussions on this matter, delegations are therefore asked for their opinions on the following questions:

- Could restricting the content of the proposal to particular rights help to overcome misgivings on the legal basis and to speed up discussions?
- Should the Framework Decision accordingly focus on the right to defence, the right to information on essential procedural rights and the right to free interpretation and to free translation of relevant documents?
- Should the abovementioned rights and any exceptions thereto be clearly formulated or could it be helpful, for the sake of rapid agreement, to refer to the principles developed in the case law of the ECHR and/or to national law in order to further clarify some aspects (in this case discussion of individual exceptions to certain rights might be unnecessary and general standards would be developed instead)?
