



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 5 June 2007

10287/07

LIMITE

DROIPEN 56

NOTE

from : Presidency
to : COREPER/Council

No. prev. doc. : 8545/07 DROIPEN 35, 9760/07 DROIPEN 43, 9937/07 DROIPEN 47
No. Cion prop. : 9318/04 COPEN 61+ADD 1

Subject : Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union

I. INTRODUCTION

On 28 April 2004 the European Commission tabled a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (9318/04 COPEN 61 + ADD 1). Since then, this draft has been discussed in the Working Party of Substantive Criminal Law, including three times by the Council during the Austrian, Finnish and German Presidencies.

The Hague Programme, approved by the European Council in November 2004 (see under 3.3.1) provides 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, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.

On 1/2 June 2006 the JHA Council had agreed on the principles for further work on the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, on the basis of the work by an *Ad hoc* informal Working Party set up during the Austrian Presidency. It was concluded that the scope of the proposed Council Framework Decision would be limited to the right to information, the right to legal assistance, the right to legal assistance free of charge, the right to interpretation and the right to translation of documents of the procedure. The Council also instructed its preparatory bodies to examine practical measures.

At its meeting on 15/16 June 2006, the European Council urged the finalisation of negotiations on the procedural rights in criminal proceedings.

Discussions continued in the Working Party on Substantive Criminal Law under the Finnish Presidency. The Council concluded at its meeting on 4/5 December 2006 that work should be pursued in order to conclude the discussions. A majority of delegations supported the future adoption of a binding instrument (see doc 16201/06 PV/CONS 71 JAI 670).

The Working Party has had four meetings during the German Presidency. The basis of the discussions on the Framework Decision was a Presidency compromise proposal, including practical measures in the Annex to the Framework Decision (see doc 16874/06 DROIPEN 76). This text was, in a written opinion by the Council of Europe, considered to "meet basic requirements for coherence and consistency with the European Convention on Human Rights ("ECHR")" and a "sound basis for ensuring that the final text will avoid incompatibilities with the ECHR" ("Strasbourg proof", see doc 5431/07 DROIPEN 3). The final version of the text, as a result of discussions in the Working Party, the Article 36 Committee, COREPER and the Council and amended by the Presidency with regard to Articles 3 (1) b, 5 and 5a, along the lines of suggestions of the Commission, in order to match even better the standards of the ECHR, is attached in Annex I. This text corresponds to DROIPEN 35 with the amendments just mentioned in bold.

At its meeting on 19 April 2007, where this file was lastly examined by the JH A Council, the Council concluded that work should be pursued in order to reach a consensus on the scope of the instrument at the meeting of the JHA Council in June. A number of options were discussed during that Council meeting and thereafter at meetings of COREPER on 23 and 30 May.

II. RESERVATIONS

General scrutiny reservations were been laid down by the UK, IE, MT, CY, CZ and SK delegations. UK, MT and CY have a specific reservation on whether the Council can adopt a binding text covering domestic criminal proceedings. IE has a reservation on the legal basis.

PL, DK, SE, UK, IE and NL have parliamentary scrutiny reservations.

III. OPTIONS EXAMINED BY COREPER

The dividing line between at least 21 delegations that can accept the text in the Annex and the remaining delegations that cannot, has been the question whether there is competence for the Union to legislate on purely domestic proceedings or whether the legislation should be devoted solely to cross-border cases. The Presidency has therefore oriented its research for a compromise on proposals covering at least the proceedings of the European Arrest Warrant and in addition giving an optional choice to cover all criminal proceedings. The following models were examined by COREPER.

Option 1 - temporary opt-out

The essence of this option is in Annex II (see also DROIPEN 43). This clause would imply that the Framework Decision would at the beginning become binding on all Member States only in respect of the provisions concerning the European Arrest Warrant. Member States which cannot accept that the Framework Decision would be binding for all criminal proceedings, would be given a temporary opt-out. Such a temporary opt-out needs to be motivated on objective grounds. The Presidency has suggested that the motivation could be connected to an evaluation of the effectiveness of the Framework Decision.

This option was rejected by several delegations in COREPER on 23 May 2007.

Option 2 - implementation solution

The essence of this option is in Annex III (see also DROIPEN 47). This option would imply that the Framework Decision would be binding to all Member States with respect to “European Arrest Warrant”-situations, thus including

- a) proceedings for the execution of the European Arrest Warrant as well as
- b) criminal proceedings against persons who, in follow-up to the execution of a European Arrest Warrant, have been surrendered.

An addition of a paragraph 3 in Article 12 of the Framework Decision (Implementation) would envisage that those Member States that, for constitutional or other reasons, are not able or willing, in the implementation of the Framework Decision, to distinguish between criminal proceedings against persons who have been surrendered and criminal proceedings against other persons, under their jurisdiction, arrested or charged with a criminal offence, shall inform the Commission and the Council accordingly. Those Member States, by making such a statement, would become bound by the Framework Decision in respect of all (domestic) criminal proceedings, without distinction.

This option was rejected by several delegations at the meeting of COREPER on 30 May 2007.

Option 3 - enhanced cooperation

Although not formally on the table, the Ambassadors discussed in COREPER on 23 May 2007 the issue of enhanced cooperation under Articles 40, 40a and 40b of the Treaty. This option could imply that a Framework Decision containing the provisions on the EAW would be adopted by the Council, whereas another Framework Decision containing the rights in relation to all criminal proceedings would be adopted according to the procedure of enhanced cooperation.

Several delegations noted that, although in principle they were not against using enhanced cooperation, the file procedural rights was not an appropriate file for this legislative procedure. Other delegations noted that they were in principle against such cooperation whereas others suggested that it was an issue of the scope of the competence given to the European Union by the Treaty.

The President of COREPER concluded that this option seemed to be, at least provisionally, rejected by a blocking minority.

Option 4 - cooperation outside the Treaty

In COREPER on 23 May, also the option of Intergovernmental cooperation outside the Treaty was discussed.

This option was supported only by some delegations.

IV. QUESTIONS TO BE ADRESSED BY THE COUNCIL

Bearing in mind this situation, the Council is requested:

to discuss the state of play of the dossier and in particular ask the Member States, which of them could not accept in principle the proposal for a Framework Decision as set out in Annex I.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(c) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) The European Union has set itself the objective of developing an area of freedom, security and justice. This presupposes an understanding of freedom, security and justice on the part of all the Member States which is identical in its essential elements, and is based on the principles of democracy, respect for human rights and fundamental freedoms, as well as the rule of law.
- (2) Police and judicial cooperation in the European Union helps provide a high degree of security for all citizens. The cornerstone of the area of freedom, security and justice is the principle of mutual recognition of judicial decisions, as established in the conclusions of the Tampere European Council and reaffirmed in The Hague Programme of 2004.
- (3) Mutual recognition is contingent on trust. Recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. Adherence to the minimum standards set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, in respect of arrests as well as in criminal proceedings, forms the basis for such trust. This Framework Decision, to the concrete form of which the Council of Europe has also contributed with its advice, is intended to reaffirm and carefully to expand the minimum standards described in the said Convention – as interpreted and refined in the case-law of the European Court of Human Rights – which are recognised by all Member States. No Member State of the European Union may however fail to meet the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

- (4) Over and above the provisions of the said Convention, this Framework Decision additionally confers
- the right to information concerning fundamental procedural rights, including rules defining certain rights of persons arrested in connection with or charged with a criminal offence in order to safeguard the fairness of criminal proceedings throughout the European Union,
 - the extension of rules defining the rights it establishes to proceedings for the execution of a European Arrest Warrant (EAW).
- (5) Without prejudice to Article 7, the provisions of the Framework Decision are not intended to affect special measures based on national legal provisions to combat crime which is aimed at destroying the foundations of the rule of law. Prosecution of these serious and complex forms of crime, in particular terrorism, may justify restrictions on procedural standards, provided that such restrictions are strictly necessary and proportionate and that the procedural rights are not drained of their substance.
- (6) Notwithstanding that the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes more extensive protective rights, this Framework Decision includes only certain areas in which specific joint minimum guarantees and practical action for that purpose are to be agreed on:
- the provision, to the individuals concerned, of information on their fundamental procedural rights,
 - the right to legal assistance,
 - the guarantee of legal assistance free of charge for persons who are unable to meet the costs,
 - the right to obtain the attendance and examination of witnesses,
 - the right to free interpretation and translation of documents,

- (6a) The provisions laid down in this Framework Decision which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall be interpreted in accordance with the case-law of the European Court of Human Rights, *inter alia*
- the right of a person who has been charged with a criminal offence, to defend himself in person can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice, including where mandatory assistance by counsel at some or all stages of the proceedings is required,
 - the right of a person 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, as covered by Article 3 (2) c) can be restricted if this is necessary in the interests of justice.
- (7) This Framework Decision sets common minimum standards. Nothing in it should be interpreted so as to prevent Member States from adopting measures that further enhance individuals' rights in criminal proceedings.

HAS ADOPTED THIS FRAMEWORK DECISION:

**FRAMEWORK DECISION ON CERTAIN PROCEDURAL RIGHTS IN CRIMINAL
PROCEEDINGS THROUGHOUT THE EUROPEAN UNION**

Article 1

Subject matter and scope

1. With a view to facilitating judicial co-operation in criminal matters and in particular mutual recognition of judicial decisions between Member States of the European Union by virtue of Article 31 TEU, this Framework Decision establishes rules defining certain rights of persons arrested in connection with or charged with a criminal offence in order to safeguard the fairness of criminal proceedings throughout the European Union.
"Criminal proceedings" shall mean any proceedings which could lead to a criminal penalty ordered by a criminal court. This Framework Decision extends the rules defining the rights it establishes to proceedings for the execution of a European Arrest Warrant (EAW) in accordance with the provisions of this Framework Decision.
2. "Arrested" and "charged with a criminal offence" shall be interpreted in accordance with the case-law of the European Court of Human Rights relating to Articles 5 (1) (c) and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
3. [...]

4. Unless otherwise provided in this Framework Decision, the meaning of the provisions of Articles 2 to 5 of this Framework Decision which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same as those laid down by the said Convention and as developed in the relevant case-law of the European Court of Human Rights.

5. This Framework Decision does not cover
 - proceedings for violation of professional duties (disciplinary proceedings);
 - proceedings for military offences or other offences subject to military jurisdiction insofar as individual Member States have made reservations under section 57 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
 - proceedings for acts punishable by administrative authorities as offences against legislative provisions, other than proceedings before a criminal court to which an appeal is made, against a decision in this area by an administrative authority.

Article 2

Right to information

1. Member States shall ensure that any person arrested in connection with a criminal offence is informed promptly, in a language which he or she understands, of the reasons for his or her arrest, of any charge against him or her and of the relevant procedural rights that he or she may exercise at this stage of the proceedings.

2. Member States shall ensure that any person charged with a criminal offence is informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her and of the relevant procedural rights that he or she may exercise at this stage of the proceedings.

Article 2a

Right to information in EAW proceedings

With regard to proceedings for the execution of an EAW, Member States shall ensure that the executing competent authority shall inform any person subject to such proceedings promptly after his presentation before this authority in a language which he or she understands of the EAW and its contents, and also of the relevant procedural rights he or she may exercise in accordance with Articles 3a, 4a and 5a and of the possibility of consenting to surrender.

Article 3

Right to defence

Member States shall ensure that:

1. every person arrested in connection with a criminal offence
 - (a) is able to have a legal representative contacted after his or her arrest ,
 - (b) has adequate opportunity to consult with his or her legal representative out of hearing of third parties and without the content of this consultation being monitored by any other means; **monitoring may in exceptional circumstances be justified, if and as far as the fight against serious and complex forms of crime, in particular terrorism, so requires and subject to the presence of adequate and sufficient safeguards,**
 - (c) is generally able to obtain legal assistance of his or her own choosing,
 - (d) is given legal assistance free of charge when the interests of justice so require, if he or she has not sufficient means to pay for legal assistance .

2. every person charged with a criminal offence:
 - (a) has adequate time and facilities to prepare his or her defence,
 - (b) is able to defend himself in person or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, is given such assistance free of charge when the interests of justice so require,
 - (c) is able to examine witnesses against him, or have them examined, and can obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 3a

Right to legal assistance in EAW proceedings

With regard to proceedings for the execution of a European Arrest Warrant, the rights laid down in Article 3 (1) shall apply accordingly.

Article 4

Right to interpretation

Member States shall ensure that any person arrested in connection with, or charged with, a criminal offence, is provided with the free assistance of an interpreter if he or she does not understand or speak the language used in court.

Article 4a

Right to interpretation in EAW proceedings

With regard to proceedings for the execution of a European Arrest Warrant the right laid down in Article 4, shall apply accordingly.

Article 5

Right to translation of documents

Member States shall ensure that any person arrested in connection with, or charged with, a criminal offence is entitled to receive, free of charge, a translation **or an interpretation of the detention order, the indictment and the judgment, where those documents exist, if the person concerned does not understand the language in which those documents are drawn up. In exceptional circumstances an oral summary may suffice, provided that this does not affect the fairness of the criminal proceedings as a whole.**

Article 5a

Right to translation in EAW proceedings

With regard to proceedings for the execution of a European Arrest Warrant, Member States shall ensure that the person who is the subject of the EAW is entitled to receive, free of charge, a translation or interpretation **of the said document if he or she does not understand the language in which it is drawn up. In exceptional circumstances an oral summary may suffice, provided that this does not affect the fairness of the criminal proceedings as a whole.**

Article 6

Evaluating the effectiveness of the Framework Decision

1. The effectiveness of this Framework Decision shall be evaluated in accordance with the mechanisms to be established under the Treaty on European Union.

2. In order to facilitate an evaluation, Member States shall ensure due cooperation and the provision of information.

Article 7

Non-regression clause

Nothing in this Framework Decision shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the European Convention for the Protection of Fundamental Rights and Freedoms or the laws of any Member States and which provide a higher level of protection.

Article 8

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...].
2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.
3. The Commission shall, by [...], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.
4. On the basis of the Commission's report the Council shall assess the extent to which the Member States have complied with this Framework Decision as regards implementation.
5. Regular evaluation and monitoring of the operation of the provisions of this Framework Decision shall be carried out in accordance with Article 6 above.

Article 9
Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, [...]

For the Council
The President
[...]

Article 7a**Time-Limit of the limitation of the scope**

- 1. Any Member State may limit the scope of this instrument to proceedings for the execution of a European Arrest Warrant as provided for in Articles 2a, 3a, 4a and 5a for a maximum period of three years following the expiry of the time-limit provided for in Article 8 (1), by making a declaration upon adoption of this Framework Decision.**
- 2. A Member State, which has availed itself of the clause of Article 7a (1) may, at any time, notify the General Secretariat of the Council, that it intends to apply all Articles of this Framework Decision.**

(under this option, necessary adaptations will have to be made to some of the text and a renumbering of the articles may have to be made, see DROIPEN 47)

Article 12 Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision before [...].
2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.
3. **Member States whose constitutional principles do not allow for making a distinction between rights as referred to in Articles 2, 4, 6 and 8 to be ensured with regard to proceedings conducted in respect of persons having been surrendered by another Member State and those rights to be ensured otherwise, and Member States which consider such a distinction inappropriate for other reasons, shall inform the Commission and the Council accordingly. For those Member States this Framework Decision is binding with respect to all persons under their jurisdiction arrested and charged with a criminal offence within the meaning of Article 1.**
4. The Commission shall, before [...] submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.
5. On the basis of the Commission's report the Council shall assess the extent to which the Member States have complied with this Framework Decision as regards implementation.
6. Regular evaluation and monitoring of the operation of the provisions of this Framework Decision shall be carried out in accordance with Article 10 above.