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## EXPLANATORY MEMORANDUM ON JUSTICE AND HOME AFFAIRS MATTERS

Proposal for a Council Framework Decision on certain procedural rights  
in criminal proceedings throughout the European Union [new versions]

Council of Europe Secretariat's Observations on the Framework  
Decision

Proposed Resolution by Member States meeting within the Council of  
the European Union on practical action to promote fairness in criminal  
proceedings [new version]

Submitted by the Office for Criminal Justice Reform on *11 May* 2007

### SUBJECT MATTER

1. This Memorandum deals with the latest versions of the draft Framework Decision on certain procedural rights, culminating in 8545/07, which was considered by the JHA Council on 19 April. My Memorandum of 26 February set out in detail the Government's views on earlier drafts.
2. 8200/07 contains the Council of Europe's latest written observations on the draft Framework Decision.
3. 7349/07 is a new version of the non-binding Resolution on practical measures, which was tabled by the UK and five other Member States, and has been considered in parallel with the Framework Decision, in accordance with the June 2006 JHA Council's decision.

### SCRUTINY HISTORY

4. A full scrutiny history was provided in the Explanatory Memorandum submitted on 26 February. The European Scrutiny Committee subsequently published a report (on 16 March) where it stated that the Framework Decision "appeared to [...] achieve little that was not already provided by Articles 5 and 6 ECHR but did so in a way which was likely to create confusion and conflict with the ECHR". The Committee concluded by expressing "strong support for a resolution, rather than a Framework

Decision, as we believe this will minimise the risk of conflict with the ECHR and do more to promote the adoption of practical measures of benefit to the citizen".

#### CURRENT STATE OF NEGOTIATIONS

5. The JHA Council on 19 April concluded that there was general agreement for a non-binding political Resolution on practical measures and for a Framework Decision limited to European Arrest Warrant cases (i.e. excluding domestic cases). There should be further consideration as to whether the Framework Decision could apply to a wider category of cross-border cases and, subject to legal advice, if some form of option for covering domestic cases could be available for Member States that wished it. There should also be a review clause to enable the issue of scope to be re-examined three years after entry into force of the Framework Decision.

#### MINISTERIAL RESPONSIBILITY

6. Ministerial responsibility remains as set out in the Memorandum of 26 February.

#### LEGAL AND PROCEDURAL ISSUES

##### Legal Base

7. The Framework Decision is proposed under Article 31 (1)(c) of the Treaty on European Union (TEU) which provides for "ensuring compatibility in rules applicable in the Member States as may be necessary to improve [judicial co-operation in criminal matters]". HMG has now entered a formal reservation regarding the necessity and thus the legal base for the text proposed by the Presidency insofar as it covered rules in domestic cases. It will scrutinise the legal basis of any revised Framework Decision but considers that the necessity issue differs if the rules are limited to cases that are strictly cross-border in nature, that is, cases in which a European Arrest Warrant has been issued.

##### European Parliament Procedure

8. Article 39(1) of the TEU provides for the Council to consult the European Parliament before adopting any measure referred to in Article 34(2)(b) within a time limit of not less than 3 months. The European Parliament has not commented on any recent version of the Framework Decision.

##### Voting Procedure

9. The voting procedure is unanimity in accordance with Article 34(2) TEU.

##### Impact on UK law

10. The impact was explained in the Memorandum of 26 February.

## Gibraltar

11. The position remains as in the Memorandum of 26 February.

## **SUBSIDIARITY**

12. As explained in the Memorandum of 26 February, HMG is not satisfied that the current Framework Decision properly complies with the principle of subsidiarity. That position will not necessarily apply to a measure limited to cross-border cases and we will review the issue in the light of the final proposal.

## **POLICY IMPLICATIONS OF THE DRAFT FRAMEWORK DECISION (8545/07)**

### Recitals

13. The recitals are not significantly changed from 16874/06, except that:

- Recital 4 narrows the scope of application of the Framework Decision so that it will not apply to cases of extradition and transfer to international courts.
- A new recital 6a has been added, which allows certain exceptions to the general requirements of the Decision in accordance with ECHR case-law. We doubt it is desirable to make specific provisions for two special circumstances here (and for a third in Article 3(1)(b)). It would be preferable to introduce a general provision on the lines of Article 52(1) of the EU Charter<sup>1</sup>.
- A new recital 7 has been added which allows Member States to take measures that go beyond the terms of the Decision.

### Article 1 – Subject matter and scope

14. The fundamental definition of criminal proceedings - "in the course of criminal proceedings which could lead to a criminal penalty ordered by a criminal court"- remains unsatisfactory. In 8200/07, the Council of Europe point out that it is "unclear on what basis the notions of 'criminal penalty' and 'criminal court' are to be determined"<sup>2</sup>. It is unsatisfactory that the Framework Decision should leave this basic scope issue to the European Court of Justice (ECJ). Article 1(1) also extends the rights contained in the Framework decision to European Arrest Warrant proceedings. Interestingly, the Presidency in its covering note states that "past attempts to find a workable definition for cross-border cases have not been successful". This is precisely because previous drafts did not define cross-

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<sup>1</sup> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

<sup>2</sup> Para 3 of DROIPEN 31

border cases as EAW cases but sought a wider scope. As explained above, the question remains whether the current workable - but narrower - definition will be satisfying for all Member States.

15. Article 1(3), which extended the guarantees of Article 6 ECHR to arrest cases, has been deleted.
16. Article 1(4) remains unsatisfactory. It aims to ensure consistency with the ECHR but does not explain which provisions "correspond" to ECHR rights. The provision offers no real legal security over and above Article 6(2) TEU without a table of intended correspondence (c.f. the Official Explanations put forward with the EU Charter of Rights<sup>3</sup>). The Council of Europe comments on the "absence of clear indication of the rights whose meaning and scope is still intended to be corresponding to ECHR rights" and states that it is "not possible to conclude with certainty that the current draft fully meets the requirement ... that it should be clearly stated where its provisions are intended to set a higher standard than the ECHR, either in meaning or scope of application, or merely set out ways of complying with the existing ECHR standards" (para 6 and last indent of para 4 of 8200/07).
17. Article 1(5) remains problematic for the UK in that it only excludes military proceedings from the scope of the Framework Decision where a reservation has been made under Article 57 of the ECHR. The UK made no such reservation when it ratified the ECHR in 1951, and cannot do so retrospectively. The argument that the current approach calls into doubt the scope of Article 52(3) of the EU Charter of Fundamental Rights also remains: if Article 1(5) of the Framework Decision is insufficient in itself to cover national reservations, then the same argument may apply to this corresponding provision in the Charter.

#### Article 2 – Right to information

18. Article 2 now clearly distinguishes two categories of persons: those arrested in connection with a criminal offence and those charged with a criminal offence. This dissipates the confusion that existed in 16874/06, whereby Article 5 and 6 rights appeared to be conflated to cover persons who were both 'charged' and 'arrested'. Also, article 2(3) has been deleted. However there remains a lack of certainty as to what are the relevant rights applicable at this stage of the procedure. Article 5 ECHR merely requires information on the reasons for the arrest. The UK gives information about continuing procedural rights at the time of arrest, but there remains a danger that the lack of clarity in this article could lead to interpretations by the ECJ and might cause costly changes to our arrangements. This might be avoided if there were a proper tie-back to the ECHR regarding meaning and scope.

#### Article 2(a) – Right to information in EAW proceedings

<sup>3</sup> Official Journal C310/424 of 16/12/04

19. This new provision presents no difficulties as it covers rights that are already given to EAW cases in the UK in accordance with the Extradition Act 2003 and the Codes of Practice made under it.

#### Article 3 – Right to defence

20. Article 3(1) and (2) now separate out the rights conferred to someone arrested and to someone charged. Article 3(2) applies to persons “charged with a criminal offence” and the text follows that of Article 6(3) of the ECHR. However the Council of Europe have expressed concern that Article 3(1)(b) “tend[s] to move these rights away from the standards of the ECHR and/or the Strasbourg Court’s case law”<sup>4</sup>. The article lacks a firm legal tie back to the ECHR.

#### Article 3(a) – Right to legal assistance in EAW proceedings

21. The new Article 3(a) confers similar safeguards to EAW cases as apply to those arrested in connection with a criminal offence. This is not problematic as that is the effect of the Extradition Act 2003 (sections 182-185).

#### Article 4 – Right to interpretation

22. The substance of Article 4 is unchanged. It reflects the wording of Article 6(3)(e) ECHR (applicable to a person charged with a criminal offence) though on the face of it the scope is wider, covering cases of arrest as well as charge. A legal tie back to the ECHR should make this provision acceptable.

#### Article 4(a) – Right to interpretation in EAW proceedings

23. This new article applies the safeguards contained in Article 4 to EAW cases.

#### Article 5 – Right to translation of documents of the procedure

24. This Article is based on Article 6 ECHR jurisprudence requiring free translation to the extent necessary to ensure a fair trial. The main change to this provision since 16874/06 is to increase flexibility in the way the information is provided, i.e. by translation, interpretation or oral summary if this is compatible with the interest of justice. The Council of Europe have also expressed concern that Article 5 “tend[s] to move these rights away from the standards of the ECHR and/or the Strasbourg Court’s case law”<sup>5</sup>.

#### Article 5a – Right to interpretation in EAW proceedings

25. This new article provides a similar right for EAW subjects.

<sup>4</sup> See paragraph 5 of 8200/07.

<sup>5</sup> See paragraph 5 of 8200/07.

Articles 6 (Evaluating the effectiveness of the Framework Decision), 7 (Non-regression clause), 8 (Implementation) and 9 (Entry into force)

26. Articles 6-9 contain standard material and remain unchanged in this draft.

#### **POLICY IMPLICATIONS OF THE COUNCIL OF EUROPE'S OBSERVATIONS (8200/07)**

27. The Council of Europe Secretariat were first consulted by the Presidency in December 2006. They said at the time that the Framework Decision was an acceptable basis for the basic requirements for coherence and consistency with the ECHR. However in their latest observations, the Council of Europe have made critical comments, referred to in paragraphs 14, 16, 20 and 24 above. They also point out that even if the provisions aimed at ensuring consistency with ECHR standards were improved, it would be "at the price of a considerably increased complexity of the overall fundamental rights framework applicable in the area concerned" [para 7 of 8200/07].

#### **POLICY IMPLICATIONS OF THE DRAFT RESOLUTION (7349/07)**

28. 7349/07 is a new version of the draft "Resolution of Member States Meeting within the Council of the European Union" which was described in my Memorandum of 26 February. The most significant change is to make clear that the Commission should consider supporting states who wish to introduce tape-recording of all police interviews. Practical experience shows that routine tape-recording of police interviews provides effective protection to suspects and to the police (from unfounded allegations). The specific reference to interpreters has thus been removed from C1 and the title of the Resolution has been changed to reflect this wider aim. Similarly, recital 10 and paragraph 3 have been amended to clarify that the purpose is to *verify* as well as enhance compliance with minimum standards and other minor drafting changes have been made.

#### **CONSULTATION**

29. The Government consulted with a wide range of stakeholders on an earlier version of the Framework Decision. A consultation document was issued in March 2005 and a summary of responses listing the names of respondents was deposited in the Libraries of both Houses on 25 October 2005.

#### **REGULATORY IMPACT ASSESSMENT**

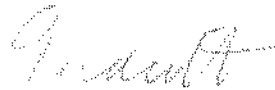
30. The Government conducted a partial Regulatory Impact Assessment on the Framework Decision in 2004. Production of a further Regulatory Impact Assessment will be undertaken once there is agreement among Member States on the content of the new Decision.

#### **FINANCIAL IMPLICATIONS**

31. We had concerns about the implications of the Framework Decision in particular for legal aid. These should be insignificant if the measure is restricted to cases which are clearly cross-border in nature.

**TIMETABLE**

32. We expect the Presidency will continue to work on the revised package with a view to reaching political agreement at the June Council.

A handwritten signature in cursive script, appearing to read 'Goldsmith', written in dark ink.

**The Right Hon the Lord Goldsmith QC**

