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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 [Original Presidency text and new version with proposed changes]

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

Submitted by the Office for Criminal Justice Reform on ^{26th} February 2007

SUBJECT MATTER

1. 16874/06 is a new version of the proposal for a Framework Decision (FD) which aims to set out common minimum standards of procedural rights in criminal proceedings. The stated purpose is to increase Member States' trust in each others' criminal justice systems in order to facilitate the application of the principle of mutual recognition. 5872/07 is a further compromise version of the proposal with amendments to articles 1-3 made by the Presidency. 5119/07 is a non-binding Resolution tabled by the UK and 5 other Member States, which could be pursued in parallel or as an alternative.

SCRUTINY HISTORY

2. A first Explanatory Memorandum was deposited on 20 May 2004 after the introduction of the proposal as document 9318/04. It was considered by the Commons European Scrutiny Committee (ESC) on 29 June and further information was requested. It was sifted to Sub-Committee E of the House of Lords and the EU Committee (EUC) made a Report on this text to the House of Lords on 18 January 2005 (HL Paper 28). This version of the text was cleared by the ESC on 19 October 2005.
3. An Explanatory Memorandum on document 10880/05 was deposited on 5 August 2005. This was considered by the ESC and cleared scrutiny on 8

March 2006 (report 26715). It was sifted to Sub-Committee E of the EUC and cleared by a letter from Lord Grenfell on 18 May 2006. A further Explanatory Memorandum on 15432/05 was submitted to the Committees on 8 February 2006. The Dossier was considered by the ESC on 8 March and further information was requested. It cleared from Commons scrutiny on 5 July 2006, after the original Commission text was withdrawn and replaced by a new text drafted by the Austrian Presidency. The document was retained under scrutiny by the House of Lords Committee.

4. An Explanatory Memorandum on document 13116/06 was submitted to the Committees on 19 October 2006, commenting on the Austrian text. The Austrian text also annexed the proposed Resolution, which has now become detached as 5119/07. The ESC requested a further account of progress in due course on 1 November in report 27919. The EUC made a Report on the Austrian text to the House of Lords on 16 January 2007 (HL Paper 20).

CURRENT STATE OF NEGOTIATIONS

5. The previous texts of the FD failed because of difficulties in agreeing a common standard at EU level which added value to the ECHR but respected national constitutional and other differences. In addition there is an issue about the adequacy of the proposed legal base. These are difficult and sensitive areas and divergences of view remain. Six Member States, including the UK, proposed that progress might best be made via a non-binding Resolution, based on practical measures, and it was agreed at the JHA Council in June 2006 that the Working Group should consider binding and non-binding approaches in parallel. With that remit in mind the UK and the five other Member States put forward a revised proposal for practical action which could be taken forward immediately. The latest version of this Resolution is in 5119/07, tabled on 17 January.

MINISTERIAL RESPONSIBILITY

6. Ministerial responsibility for the criminal justice system in England and Wales is shared between the Home Secretary, Lord Chancellor and Attorney General. They are supported by the Office for Criminal Justice Reform (OCJR), the cross-departmental team that supports all criminal justice agencies in working together to provide an improved service to the public. Reform of criminal procedural safeguards falls within OCJR's responsibilities, and they assumed the co-ordinating policy role for this dossier in December 2005. The Attorney General leads for the three CJS ministers in relation to such work. In Northern Ireland the Secretary of State for Northern Ireland leads. In Scotland, criminal law is a devolved matter and therefore Scottish Executive Ministers have responsibility.

LEGAL AND PROCEDURAL ISSUES

Legal Base

7. The Framework Decision is proposed under Article 31 of the Treaty on European Union, as amended by the Treaty of Nice, which covers common action in judicial co-operation in criminal matters. Article 31(1)(c) 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 reserved its position with regard to the adequacy of the proposed legal base and will review the matter afresh when a final text is presented and its necessity and value can be better judged. Clearly, our assessment of the overall value of the instrument in improving judicial cooperation in criminal matters will be highly significant.

European Parliament Procedure

8. Article 39(1) of the Treaty on European Union 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 the current version of the FD but did comment on the 2004 version in a report dated 21 March 2005. The Council has not responded to that report.

Voting Procedure

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

Impact on UK law

10. The UK's main high-level concern is to avoid unnecessary duplication of the ECHR and the risk of legal confusion and cost for citizens and Member States. The FD would create a jurisdiction on procedural rights for the European Court of Justice (ECJ). Uncertainties about the application of the FD could lead to references to that court by other Member States. The ECJ would adopt a purposive approach to interpretation, and consider whether the national measure had been applied consistently with the purpose of the FD. For example, the ECJ could set out some general principles which relate to the right conferred (as the national measure must be objectively justified under the FD and be proportionate to the aim to be achieved) and then refer the matter back to the national court to apply the principles and allow it to come to its own view. The more detailed the provisions of the FD, and the less closely aligned those provisions are to the ECHR, the higher the risk that an ECJ ruling could determine meaning for Member States. We are not satisfied that the current proposal for binding EU law is worthwhile, in an area already well covered by the ECHR and overseen by the European Court of Human Rights, as well as the domestic courts. We recognise that the ECHR may not be well-implemented right across the EU but believe that the answer is not new laws and jurisdiction for procedural rights, but rather practical, funded measures which can bring tangible benefits to the citizen.

11. The precise implications for the law of England and Wales differ in some respects from those for Scotland, given the differing legal systems. In England and Wales, the Police and Criminal Evidence Act 1984 provides for many of the safeguards contained in both proposed texts, as does the Police and Criminal Evidence (NI) Order 1989 in Northern Ireland. Similar safeguards exist for Scotland, but there may be significant implications with regard to access to a solicitor depending on whether the right commences from the time of detention, charge or arrest. The law throughout the UK, in line with the European Convention on Human Rights (ECHR), differentiates the rights to be accorded at the stage of arrest (for example, under an extradition warrant) from those at the stage when a person faces criminal proceedings which determine criminal charges. Efforts will be made to tie back the terms of the FD to the ECHR, but if the FD continues to conflate Article 5 and 6 rights, implementation of the FD will almost certainly require legislation to extend Article 6 rights to the point of arrest. Perhaps more importantly implementation of the FD as it stands would entail amendment of the Extradition Act, because the FD grants Article 6 ECHR rights in proceedings for the execution of a European Arrest Warrant (EAW) or for the extradition or surrender of an arrested person to an international criminal court. This would inevitably afford new grounds of appeal, with the practical result of adding delays to proceedings. At present, the execution of an EAW takes about 2 months: adding new procedures which would slow the process would be a retrograde step.

Gibraltar

12. The Government has consulted the Government of Gibraltar about participating in this Framework Decision. The Government of Gibraltar has indicated a wish in principle to participate if the FD proceeds and so appropriate language will be sought.

SUBSIDIARITY

13. The Commission considers that in the area of judicial co-operation in criminal matters, only action at Union Level can be effective in ensuring common standards. The issue of subsidiarity is referred to in the Impact Assessment and the consideration process that the Commission has taken in deciding whether this proposal fits with this principle. The Commission stated that any proposals would take into account national specificities. However this does not seem to be adequately dealt with in the current proposal (fifth recital and in Article 1(5)). HMG is not satisfied that the position regarding subsidiarity is acceptable and will review the matter in the light of the final proposal.

POLICY IMPLICATIONS OF THE DRAFT FRAMEWORK DECISION (16874/06)

Recitals

14. The recitals are more concise than in the previous version. However they are still poorly drafted and we have particular concerns about the fourth recital which states that the FD is intended to create and confer new rights, which would apply to proceedings for the execution of a European Arrest Warrant or the extradition or transfer of a person to an international court. As those new rights are in essence Article 6 ECHR rights, this implies an extension of the rights under Article 6, which the Strasbourg court has repeatedly held not to apply to proceedings that do not determine the criminal charge against a fugitive.
15. In other respects the FD is intended to conform with the ECHR, but the text does not clarify precisely which provisions are intended to correspond to the ECHR as regards meaning and scope and it is not possible to deduce the answer, even where the rights are dealt with in terms which correspond with the relevant ECHR provisions.

Article 1 – Subject matter and scope

16. The terms of Article 1 are now better aligned with those in Articles 5 and 6 of the ECHR. A distinction is made here between persons 'charged with a criminal offence' (who are covered by Article 6 of the ECHR) and those 'arrested in connection with a criminal offence' (who are among those covered by Article 5). The new wording appears to make clear that the scope does not include arrests for another reason, not connected with a criminal offence, such as deportation proceedings. The Presidency state that the terms chosen make it unnecessary to refer specifically to proceedings under a European Arrest Warrant or for transfer to an international court since these proceedings are covered by the terms used.
17. The application of the rights in the FD to persons 'charged with a criminal offence' raises concerns that the FD may accord new rights, for example to free legal representation, to cases not necessarily covered by legal aid at present, such as less serious cases – for example most road traffic offences – which do not qualify for legal aid. We would wish to ensure a clear tie-back to the ECHR to ensure that the obligation under the FD to provide free legal assistance is confined to cases where it is required to be ECHR compliant: that is when the interests of justice so require (taking account of the complexity of the proceedings, the capacity of the individual to represent himself and the severity of the potential penalty) to be determined in the first instance by the national authorities.
18. Article 1(1) clarifies that the FD applies "in the course of criminal proceedings which could lead to a criminal penalty ordered by a criminal court". We need to ensure that we exclude from the ambit of the FD those proceedings which we class as civil, such as confiscation orders, Football Banning Orders, ASBOs, drinking banning orders and the proposed serious crime prevention orders.

19. Article 1(2) specifies that the basic terms used in Article 1(1) are to be interpreted in accordance with the caselaw of the ECHR.
20. The drafting of Article 1(3) is unclear, but the Presidency have said it is intended to clarify that the rights apply to EAW cases. It is therefore problematic for the policy expressed in the FD on the EAW. We believe the terms used may also cover cases where a person was arrested in connection with extradition to any third country (not merely EU member states) in respect of a criminal offence.
21. Article 1(5) makes a saving for national reservations made under Article 57 of the ECHR. Typically these reservations relate to military discipline cases. The UK believes that the rights in the FD, particularly as regards legal representation, should not apply to military discipline cases. A straightforward exclusion for military discipline cases would be preferable. Moreover, there may be an argument that the current approach calls into doubt the scope of Article 52(3) of the EU Charter of Fundamental Rights: if Article 1(4) of the FD 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

22. Article 2(1) sets out basic rights to information, including information 'in detail' on the nature and cause of the accusation. Article 2(1) applies to persons charged with an offence, but Article 2(2) applies 2(1), together with its own provisions, to 'any person who is charged with a criminal offence and therefore arrested'. It appears that Article 2 is intended to include those arrested under an European Arrest Warrant (EAW) or in connection with extradition. The implication of Article 2 seems to be that a person arrested under a EAW (or in connection with other extradition or surrender procedures) is a person who is both 'charged' and 'arrested' and therefore accumulates both Article 5 and Article 6 rights, besides the new 'procedural rights' conferred in Article 3(2) of the FD. This goes beyond the requirements of the relevant provisions of the EAW FD of 13 June 2002 (Articles 11 and 14) and also beyond the current Strasbourg law.
23. Article 2(3) says that the information given must also include information on the rights given by this FD to legal assistance, the right to such assistance free of charge, and to free interpretation and translation. The descriptions of the rights are not aligned with the articles below or with the ECHR. The UK believes there should be a proper tie-back to the ECHR.

Article 3 – Right to legal assistance

24. Article 3(1) applies to persons 'charged with a criminal offence' and the text follows that of Article 6(3) of the ECHR. The inclusion of 6(3)c, on the right to examine witnesses, goes beyond the previous versions of this FD. This should not create difficulties provided it is limited to cases covered by

Article 6 of the ECHR, and not to European Arrest Warrant and other extradition and surrender procedures. Unfortunately, it is unclear, in light of Article 1(3), whether Article 3, or any part of it, is intended to apply to such cases.

Article 4 – Right to interpretation

25. Article 4 applies both to persons charged and those arrested “in connection with a charge”. It mirrors the right contained in Article 6(3) of the ECHR, which is more extensive than that in Article 5(2) of the ECHR (the former is about the information to be given to an accused at the time of the charge or the commencement of the proceedings, the latter at the time of arrest) but appears to contemplate the point of “charge” occurring prior to “arrest”. According to the Presidency, Article 4 does not involve extending ECHR rights as this Article only applies to those arrested ‘in connection with’ a criminal charge. It would appear therefore that this is a matter of clarifying the drafting

Article 5 – Right to translation of documents of the procedure

26. This Article similarly applies both to persons charged and those arrested “in connection with a charge”. It is based on Strasbourg Article 6 jurisprudence requiring free translation to the extent necessary to ensure a fair trial. Whereas Article 6 concerns those charged, everyone who is arrested must, under Art 5, be informed in a “language which he understands” of the reasons for arrest and of any charge brought and at least those documents necessary to review its legality must be translated. In principle there seem no great difficulties with this Article but we need to guard against the long-term risk of being required to translate a greater volume of documentary evidence than is currently necessary in our largely oral criminal proceedings. We also need to clarify what rights this Article intends to confer on those subject to EAW etc proceedings.

Article 6 – Evaluating the effectiveness of the Framework Decision

27. The wording reflects a consensus among Member States to rely on the existing provisions on evaluation contained in the Treaties.

Article 7 – Non-regression clause

28. This provision ensures that Member States can apply a higher standard of protection under their national laws.

POLICY IMPLICATIONS OF THE DRAFT RESOLUTION (5119/07)

29. The draft “Resolution of Member States Meeting Within the Council of the European Union” is designed to encourage Member States to take practical measures based on recognised good practice (often deriving from Strasbourg case-law) to improve compliance with the basic standards of

criminal procedural safeguards which apply throughout the European Union, and are set out in Articles 5 and 6 of the ECHR.

30. Member States would be invited to consult with representatives of civil society in order to prepare, within two years, a concrete action plan drawn from the proposed action points, which are intended as a menu from which items would be selected to meet particular national circumstances. Not all the action points would therefore be relevant or applicable in every Member State.
31. The paper also proposes that funding and related action at Union level might support Member States in enhancing compliance in this way.
32. The action points relate to Access to Information, Access to Legal Assistance, and Access to Interpreters. The Resolution also encourages the Commission to support the introduction of tape-recording of proceedings conducted through an interpreter (section C1).
33. The Resolution, if adopted, would not impose legal obligations on the UK or any other Member States.
34. The Resolution and Framework Decision are not incompatible or mutually exclusive.

POLICY IMPLICATIONS OF THE REVISED DRAFT FRAMEWORK DECISION (5872/07)

35. In this new text, proposed changes to articles 1-3 are marked in bold. Some of these - notably the changes to Articles 2.1 and 2.2 - provide welcome clarification on points of detail. However our main concerns mentioned above remain.

CONSULTATION

36. 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.

ECHR

37. The Council of Europe Secretariat were consulted by the Presidency and have made observations on the FD, in a paper dated 18 December 2006. They say that the FD meets the basic requirements for coherence and consistency with the ECHR. They have also said that full consistency between the Luxembourg and Strasbourg courts requires EU accession to the ECHR.

REGULATORY IMPACT ASSESSMENT

38. The Government conducted a partial Regulatory Impact Assessment on the FD in 2004. Production of a further Regulatory Impact Assessment will be undertaken if there is agreement among Member States that the FD should be pursued to a conclusion.

FINANCIAL IMPLICATIONS

39. There could be costs as a result of the FD in particular for legal aid, depending on the precise wording finally agreed. Even so, the extent of the liability may emerge only in the light of rulings to be made by the European Court of Justice as a result of requests for preliminary rulings in the future. There would also be costs associated with the delays in extradition and EAW proceedings which would be likely if the current text were agreed.

TIMETABLE

40. We expect a new version of the Framework Decision will be prepared in the light of the inconclusive discussions at the Substantive Criminal Law Working Group on 9 February 2007. The next meeting is planned for 1-2 March.

A handwritten signature in cursive script, appearing to read 'Goldsmith', is centered on the page.

The Right Hon the Lord Goldsmith QC