



HOUSE OF LORDS

European Union Committee

9th Report of Session 2008–09

**Procedural rights in
EU criminal
proceedings—an
update**

Report with Evidence

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The European Union Committee

The European Union Committee of the House of Lords considers EU documents and other matters relating to the EU in advance of decisions being taken on them in Brussels. It does this in order to influence the Government's position in negotiations, and to hold them to account for their actions at EU level.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

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Lord Mance	Lord Wade of Chorlton
Lord Paul	

The Members of the Sub-Committee which conducted this inquiry are listed in Appendix 1.

Information about the Committee

The reports and evidence of the Committee are published by and available from The Stationery Office. For information freely available on the web, our homepage is

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Procedural rights in EU criminal proceedings—an update

1. In April 2004, the European Commission published a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. We published a Report, prepared by Sub-Committee E (Law and Institutions), on the proposed Framework Decision in February 2005,¹ welcoming the initiative.
2. As negotiations developed, increasing opposition to the proposal emerged. A new draft of the Framework Decision was produced under the Austrian Presidency, while some Member States, including the United Kingdom, put forward a non-binding Political Resolution for agreement instead of the Framework Decision. In 2006, Sub-Committee E undertook an inquiry comparing the Political Resolution with the Austrian Presidency draft. A Report was published in January 2007.²
3. The Government’s position evolved along with the renegotiation of the Framework Decision. They had welcomed the initial proposal, which guaranteed minimum standards by proposing rights in some detail, but felt that the Austrian Presidency text was too vague to be worthwhile, and through its vagueness risked duplication of, and conflict with, the European Convention on Human Rights (ECHR).
4. In oral evidence, Lord Goldsmith, the then Attorney General, expressed the Government’s strong commitment to practical measures to enhance compliance with the ECHR but said that they were not satisfied that the proposal was worthwhile. On the other hand, practical measures which could bring tangible benefits ought to be pursued.³ “Having an alternative route [that is, the Political Resolution] does not rule out having a binding Framework Decision, or certainly does not rule it out for all time”.⁴
5. We agreed with the Government that the rights were too vague and set at too low a threshold. For instance, the provision in the original draft for the recording of police interviews had not been retained in the Austrian Presidency text. We also concluded that the draft proposal would have added little value to the existing protections under the ECHR, and recommended that further EU action was required.
6. It was disappointing not to receive a Government response to our Report, in spite of their commitment to respond to all Select Committee reports within two months of publication. The Secretary of State for Justice wrote to us on 5 February 2009 apologising for the lack of a Government response.
7. However, following the publication of the Report, the Government deposited for scrutiny further revised texts of the draft Framework Decision and, in the course of scrutiny of those documents, further correspondence took place

¹ European Union Committee, 1st Report (2004–05): *Procedural Rights in Criminal Proceedings* (HL 28)

² European Union Committee, 2nd Report (2006–07): *Breaking the deadlock: what future for EU procedural rights?* (HL 20)

³ *Ibid.* Q 7

⁴ *Ibid.* Q 28

between the Committee and the Attorney General.⁵ The proposal for the Framework Decision has fallen, due to the lack of support from the UK and other Member States. We have, therefore, cleared the outstanding documents from scrutiny.

8. In his letter of 5 February, the Secretary of State informed us that the Commission has indicated that it is minded to introduce a new proposal on criminal procedural rights, although narrower in scope than its predecessor, in the second half of 2009, under the Swedish Presidency.
9. We take this opportunity to reiterate our support for the principle of minimum standards of criminal procedural rights across the EU, and to urge the Government to take steps to ensure that the proposals that emerge under the Swedish Presidency represent a real enhancement of rights.
10. **We hope, therefore, that it will be possible for the Council to reach agreement on a meaningful and worthwhile measure. This means a measure that will, first of all, be consistent (in the sense of not conflicting) with the ECHR, but which will, secondly, go beyond the ECHR and add value for those involved in criminal investigations or proceedings within Europe. In the latter respect, it should, in order to avoid confusion, make clear where and how far it is intended to add to the ECHR.**
11. **We draw the Government's attention to our previous reports and recommend that any minimum standard should:**
 - **not be confined to those formally charged, but should also relate to "suspected persons" at the pre-charge stage, and provide for an adequate definition of such persons;**
 - **cover a wide range of offences; the original proposal excluded offences attracting a sentence of imprisonment of over one year, and those regarded as "very minor";**
 - **provide for the right to silence;**
 - **provide for a right to information at the pre-charge stage, in particular by the presentation to suspects of a "Letter of Rights", in a language they understand, explaining their rights under the ECHR and the measure itself;**
 - **give suspects a right to immediate legal assistance and advice, including the services of an interpreter, in each respect on a confidential basis and free of charge where necessary; and**
 - **finally (a point stressed in our previous reports), ensure electronic recording of police interviews.**
12. We make this Report for the information of the House. It was prepared by Sub-Committee E, whose members are listed in Appendix 1.

⁵ Printed in Appendix 3

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee are:

Lord Blackwell
Lord Bowness
Lord Burnett
Lord Kerr of Kinlochard
Lord Maclennan of Rogart
Lord Mance (Chairman)
Lord Norton of Louth
Baroness O’Cathain
Lord Rosser
Lord Tomlinson
Lord Wright of Richmond

Declarations of Interests

A full list of Members’ interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Members have drawn particular attention to the following interests relevant to this inquiry:

Lord Bowness

Regular remunerated employment:
Streeter Marshall Solicitors
Notary Public (fees)

Lord Burnett

Parliamentary consultancy agreements:
Consultant with the Devon and Cornwall firm of Solicitors Messrs. Stephens and Scown

Lord Rosser

Regular remunerated employment:
Non-executive member of the National Offender Management Service Management Board
Chair, National Offender Management Service Audit Committee (the Audit Committee post is not separately remunerated but is associated with my membership of the National Offender Management Service Management Board)

Membership of public bodies:
Justice of the Peace

APPENDIX 2: MINUTES OF PROCEEDINGS ON THE REPORT

Wednesday 22 April 2009

Present:

Lord Blackwell
 Lord Bowness
 Lord Burnett
 Lord Maclennan of Rogart
 Lord Mance (Chairman)
 Lord Norton of Louth
 Lord Rosser
 Lord Tomlinson
 Lord Wright of Richmond

The Committee considered the draft Report.

Paragraphs 1 to 8 were agreed to.

It was moved by Lord Blackwell to leave out paragraphs 9 and 10, and to insert at the beginning of paragraph 11:

We believe this matter should be dealt with exclusively within the framework of the ECHR rather than the European Union. However, should the matter proceed

The Committee divided:

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Lord Blackwell
 Lord Burnett

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Lord Bowness
 Lord Maclennan of Rogart
 Lord Rosser
 Lord Wright of Richmond
 Lord Mance

The amendment was disagreed to accordingly.

Paragraphs 9 to 12 were agreed to, with amendments.

The Appendices were agreed to.

APPENDIX 3: CORRESPONDENCE

Letter of 24 May 2007 from Lord Grenfell, Chairman of the European Union Committee, to the Rt Hon the Lord Goldsmith QC, Attorney General

This proposal was considered by Sub-Committee E (Law and Institutions) at its meeting of 23 May 2007.

We note that agreement has now been reached to limit the application of the Framework Decision to EAW and, possibly, cross-border cases. As you know, we highlighted the uncertainty regarding the adequacy of the proposed legal base of the proposal in our report *Procedural Rights in Criminal Proceedings* (1st Report of 2004–05, HL Paper 28). We note that there remain differences of opinion on this matter and we are aware of political sensitivities surrounding the question of competence in the present instance. We would regret the emergence of different standards as regards cross-border and domestic cases and the inequality and disparities which would likely result. We also share the Presidency's concerns regarding the difficulty of agreeing a suitable definition of "cross-border"; we have encountered similar problems in relation to a number of EC civil law instruments. Finally, we question the case for limiting the proposal to EAW cases. There is an argument that some limitation is needed but in our view, the rights afforded by the Framework Decision should, at the very least, extend to all EU instruments which relate to proceedings falling within the scope of the Framework Decision (it should, for example, apply to the ESO proposal). Member States may also wish to consider whether to extend, within the EU framework, Article 6 type guarantees to the post-sentencing stage (e.g. transfer of prisoners Framework Decision and suspended sentences proposal). Such a move could bring genuine added value to the protection of fundamental rights within the EU by ensuring that all EU criminal justice measures are subject to a regime which affords a minimum protection of fundamental rights. We would welcome your views.

You say that the European Parliament has not given a view on any recent draft of the text. Is it the Council's intention to re-consult the European Parliament? We consider it important to respect the European Parliament's role in the legislative process and given the substantial changes to the Framework Decision, we would expect their opinion to be sought. Article 39(1) provides for a minimum three-month deadline for the Parliament to issue its opinion. Could the Council reach political agreement at the June JHA Council in the absence of an up-to-date opinion from the European Parliament?

It is unfortunate that recent changes to the draft have, in the view of the Council of Europe, rendered the proposal less compliant with the ECHR and the Strasbourg jurisprudence. We would hope that once a final scope has been agreed Member States will be better able to focus efforts on ensuring consistency with the ECHR, in cooperation with the Council of Europe.

We have decided to retain the proposal under scrutiny. We are, however, content to clear old versions of the documents held under scrutiny, namely documents 16874/06, 5119/07, 5872/07 & 7602/07, as they have now been superseded.

Letter of 27 June 2007 from the Rt Hon the Lord Goldsmith QC, Attorney General, to Lord Grenfell, Chairman of the European Union Committee

I was grateful for your letter of 24 May.

This dossier was considered by the JHA Council on 13 June. The Presidency sought agreement on a Framework Decision reverting to a text that included within its scope cases wholly within the domestic jurisdiction. The proposal tabled remained unacceptable to several Member States, including the UK, and we regret that the compromise package discussed at the April JHA Council, comprising EU law covering defined cross-border cases, along with a Resolution on wide-ranging practical measures which might bring real benefits, was not pursued. The Council concluded that consensus could not be reached on the Framework Decision.

The Presidency did not allow any formal discussion of the precise scope of a binding measure limited to cross-border cases. For my own part I can see the force of your argument that such a measure might cover the proposed European Supervision Order as well as the European Arrest Warrant. We envisage that it might cover any EU mutual recognition instrument which provides for arrest in another Member State. However such bilateral contacts as we have had suggest that other partners would have had doubts about extending its scope to the post-sentencing stage, which I understand.

The issue of consultation with the European Parliament is really for the Council Secretariat, but given the conclusion of the Council would appear unnecessary. We do not expect any further work on this dossier just now, but we will keep you informed if there is any movement.

I agree with you that the issue of consistency with the ECHR is vital. This issue lies at the root of objections to any binding EU measure which would cover wholly domestic cases. As the Council of Europe said, even if the provisions in the FD 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’. We are committed to ensuring respect for human rights but believe that the EU needs to ask what actually works, and that the answer lies in measures like tape-recording of police interviews and independent investigation of complaints, rather than in adding a layer of EU law on top of national law and ECHR law.

Letter of 12 July 2007 from Lord Grenfell, Chairman of the European Union Committee, to the Rt Hon Baroness Scotland of Asthal QC, Attorney General

We are grateful to Lord Goldsmith for his letter of 27 June 2007 which was considered by Sub-Committee E (Law and Institutions) at its meeting of 11 July 2007.

The Council’s failure to reach a consensus on this proposal at the June JHA Council is somewhat surprising in light of the apparent compromise reached at the April JHA. However, as we indicated in our Report *Breaking the deadlock: what future for EU procedural rights?* (2nd Report of 2006–07, HL Paper 20), while we

strongly support the agreement of a Framework Decision which is truly worthwhile, it is doubtful whether the current draft meets that criterion.

We note that the European Council Conclusions called on Member States to continue working on procedural rights in criminal proceedings. Is it the intention of the Council to work to agree the Resolution on practical measures in light of the apparent stalemate on the Framework Decision? In our Report, we expressed our support for immediate measures to improve defendants' rights across the EU although, as we stressed, we do not consider them to be an adequate long-term alternative to legislation.

Finally, has the Portuguese Presidency indicated any interest in trying to take forward this proposal?

The proposal is retained under scrutiny.

Letter of 30 July 2007 from the Rt Hon Baroness Scotland of Asthal QC, Attorney General, to Lord Grenfell, Chairman of the European Union Committee

Thank you for your letter of 12 July.

The Portuguese Presidency have not mentioned this dossier in their programme so it is difficult to predict what its future will be. As you say, the European Council conclusions called for work on the topic—not necessarily the Framework Decision—to continue as soon as possible, so the JHA Council will no doubt return to the issue of deciding on the best way to enhance procedural rights for defendants in criminal proceedings. However, there are no current plans to continue work on either the Framework Decision or on the Resolution on practical measures. HM Government's view remains that practical action, rather than legislation, would be the best way to meet the European Council's mandate and that binding law would be likely to do more harm than good, except in relation to cross-border issues.

I will keep you informed of any further developments, as and when they arise.

Letter of 5 February 2009 from the Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice, to the Rt Hon Lord Roper, Chairman of the European Union Committee

The purpose of this letter is two-fold: first, to apologise for my Department's failure to reply to the Committee's report of January 2007; second, to provide a brief update on this area of work.

The Committee's report "Breaking the deadlock: what future for EU procedural rights?" looked at the Framework Decision on criminal procedural rights that was then under consideration in Brussels. The protocol on such reports is clear, namely that departments should always provide a formal reply. Therefore, notwithstanding that a great deal of water has passed under the bridge since then—including the creation of the Ministry of Justice—I offer my unreserved apologies for the oversight.

The Framework Decision in question fell, as the Committee is aware, because the UK, with others, could not support it. (It did little more than duplicate—inexactly and therefore potentially confusingly—provisions of the ECHR.) The UK position led to unhappiness in some quarters at the time but I am satisfied that our position was the right one in relation to that text in its final iteration. In any event it is now finished business. No further work is planned on that Framework Decision.

However, the Commission have indicated that they are minded to introduce a new proposal on criminal procedural rights in the second half of this year under the Swedish Presidency. We understand it is likely to be narrower in scope than its predecessor—and look forward to seeing the detail of the proposal. Any such proposal will, of course, be deposited in due course.

APPENDIX 4: OTHER REPORTS

Recent Reports from the Select Committee

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister for Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: Evidence from the Minister for Europe and the Slovenian Ambassador (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62–I: Report, HL Paper 62–II: Evidence)

Previous Reports from Sub-Committee E

Initiation of EU Legislation (22nd Report, Session 2007–08, HL Paper 150)

Green Paper on Succession and Wills (2nd Report, Session 2007–08, HL Paper 12)

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)