



## Statewatch analysis Rights for Criminal Suspects and EU law

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### Summary

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The latest text of a proposed EU measure on the rights of criminal suspects, the very principle of which is still contested by a group of Member States led by the UK, has fallen foul of the Council of Europe, which no longer believes that the text is clearly compatible with the right to a fair trial as set out in the European Convention on Human Rights (ECHR):

*“the Council of Europe Secretariat is regrettably not in a position to state that the present draft still contains sufficient safeguards to ensure coherence and consistency with the ECHR (Strasbourg proof).”*

### Introduction

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Back in 2004, the Commission proposed a Framework Decision on rights for criminal suspects. The intention was to ensure a greater balance in EU criminal law, which was (and still is) overwhelmingly focussed on ensuring more effective prosecutions and investigations, but made no significant contribution towards ensuring that the right to a fair trial was protected.

After lengthy discussions, it was decided in the first half of 2006 that the proposal should be redrafted to focus on certain key rights. But a group of Member States, led by the UK (along with Ireland, Malta, Cyprus, the Czech Republic and Slovakia) opposed a binding EU measure on this issue, suggesting instead a draft Resolution of Member States.

The six dissenting Member States also argued that the proposed Framework Decision would potentially conflict with Article 6 of the ECHR, which sets out the right to a fair trial. They insisted that representatives of the Council of Europe be allowed to comment on the proposed Framework Decision in order to ensure compatibility with the ECHR. Following the receipt of written comments and then a meeting with representatives of the Council of Europe, the proposal was redrafted during the Finnish Presidency and then at the onset of the German Presidency in order to meet the Council of Europe’s concerns. The Council of Europe then approved the initial German redraft.

However, the German text was amended during discussions in a Council working party. The latest version of the text has therefore been criticised by the Council of Europe in strong terms. The German Presidency therefore intends to revise this text along the lines of Commission suggestions in light of these concerns, but it remains to be seen whether Member States will agree to this. Also, there is still a group of six Member States, led by the UK, which object to the idea that the EU should regulate domestic criminal proceedings, even if the question of compatibility with the ECHR is settled.

## The Rights of Suspects in the Framework Decision

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It was agreed in 2006 that, leaving aside whether there should be a binding Framework Decision or a Resolution of Member States on this issue, the measure to be adopted would focus on certain key rights: the right to information, the right to defence, the right to interpretation, and the right to translation of documents. Articles 2-5 of the initial German version focus on each of these rights in turn. These provisions remain in the latest version of the text, with certain modifications.

Article 2 of the latest text, concerning the right to information following a criminal charge, provides:

(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.

This provision is nearly identical to Articles 5(2) and 6(3)(a) of the ECHR, which set out respectively the rights of those 'arrested' and those 'charged' with offences, with the addition of the obligation to inform the person concerned of the procedural rights which he or she has. Article 2(3) of the original German text, which specified in more detail what procedural rights the suspect would have to be informed about, has been dropped.

Article 3 of the latest text, concerning the rights of the defence, provides:

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 unless in special circumstances the interests of justice so require,
  - (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.

Paragraph 2 is identical to Article 6(3)(b) to (d) ECHR. Paragraph 1 provides for rights following arrest, which are not explicitly set out in Article 5(2) ECHR.

As compared to the initial German version of the proposal, the most recent text of Article 3(1) is less precise as regards contact with a legal representative and the role of the legal representative, provides for the monitoring of contact with lawyers in ‘special circumstances’, and contains the qualification that an arrested person can ‘generally’ choose his or her legal assistance.

Article 4 of the latest text, which deals with the right to interpretation, provides that:

*“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.”*

As for persons charged with a criminal offence, this is identical to Article 6(3)(e). For persons arrested, this right is not explicitly set out in the ECHR.

Article 5 of the latest text is titled ‘Right to translation of documents’, and provides that:

*“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, interpretation or, where compatible with the interests of justice, an oral summary 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.”*

As the German Presidency’s explanatory note points out, this right is derived from the case law of the European Court of Human Rights, rather than the explicit provisions of the ECHR. Compared to the initial German text, the scope of the right is narrower, as the initial text proposed that there was a right to ‘a translation of the documents necessary to ensure a fair trial’, and, in the case of arrest, ‘at least those documents which are essential in order to review its legality’. The proviso that an oral summary need be provided only ‘where compatible with the interests of justice’ has also been added.

It should be emphasized that the Framework Decision does not address all rights conferred by the ECHR in criminal cases. First of all, the Framework Decision does not incorporate the remainder of Article 5 ECHR (the Article which governs the liberty of the person), which sets out the circumstances in which a person can be detained (Article 5(1), which also refers to detention in non-criminal cases), the right to be brought promptly before a judicial authority if held on remand and the right to trial within a reasonable time or bail pending trial (Article 5(3)), the right to judicial review of detention (Article 5(4), which also applies to non-criminal cases), and the right to compensation for wrongful detention (Article 5(5), which also applies to non-criminal cases).

Next, the Framework Decision does not incorporate Article 6(1) ECHR, which sets out a general requirement of a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’, which must be held in public (with certain exceptions), or Article 6(2) ECHR, which sets out the right to be presumed innocent until proven guilty. According to the case law of the European Court of Human Rights, Article 6(1) also entails (among other things) a right of access to a court, and Article 6(2) also entails a right against self-incrimination, incorporating a right to silence, and regulates the burden of proof in criminal trials. The Commission issued a Green Paper on the issue of the presumption of innocence in 2006, but so far has not made any legislative proposals.

The Framework Decision also does not incorporate Article 7 ECHR, which deals with the legality and non-retroactivity of criminal proceedings, or the rights to appeal, to compensation for wrongful conviction, and not to be tried twice (the double jeopardy rule), as set out in the Seventh Protocol to the ECHR (which several Member States have not ratified). But it should be pointed out that the Schengen Convention provides for the cross-border application of the double jeopardy rule within the EU.

Finally, the latest text of the Framework Decision applies a variation of the four basic rights to proceedings concerning the European Arrest Warrant (Articles 2a, 3a, 4a and 5a), an issue falling outside the scope of the substantive fair trial guarantee in the ECHR (although according to ECHR case law, in exceptional circumstances, the risk of a unfair trial or the consequences of a prior unfair trial in another state can oblige a State to refrain from carrying out an extradition).

### Relationship with the ECHR

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In addition to the similarity between certain ECHR rights and the text of the Framework Decision, Article 1(2) of the latest text of the Framework Decision provides that:

"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 ECHR].

Article 1(4) and (5) of the latest text provide that:

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.

The effect of Article 1(5), which is more precisely defined than the original German text, would be that notwithstanding the wide scope of 'arrest' and 'criminal charge' as defined by the European Court of Human Rights (cf Article 1(2)), certain types of proceedings falling within the scope of the ECHR would nonetheless not fall within the scope of the Framework Decision.

Article 7 of the latest text of the Framework Decision, the 'non-regression' clause, provides that:

*"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."*

The preamble of the latest text also contains several provisions concerning the link to the ECHR (recitals 3 to 6), some of which indicate that there might be limitations on the rights concerned, for example in terrorism cases (recitals 5 and 6a). Recital 7 refers to the right to have higher standards in national law.

Although the Council of Europe was content with the original German text, pronouncing it 'a sound basis for ensuring that the final text will avoid incompatibilities with the ECHR', it objected on several grounds to a recent text.

First of all, the Council of Europe objected to the extremely short time period (5-7 days) given to it to respond to the latest draft.

Applying the first of three requirements for ECHR compatibility set out by the Council of Europe, the 'compliance with the...requirement' of basing the text as closely as possible to the ECHR and the Strasbourg Court's case law 'has been reduced in the new draft', in the view of the Council of Europe, as '[e]specially the provisions defining the right to defence (in particular Article 3 §1 (b)) and the right to translation of documents (Article 5) now contain qualifications and restrictions which tend to move these rights away from the standards of the ECHR and/or the Strasbourg Court's case-law'.

Next, as regards the requirement that departures from the ECHR texts be clearly explained, either as setting a higher standard or as an elaboration of the ECHR rights, the Council of Europe concludes that 'having regard to the above and the absence of a clear indication of the rights whose meaning and scope is still intended to be corresponding to ECHR rights, it is unfortunately no longer possible to conclude with certainty that the current draft fully meets' this requirement.

Finally, while there were still provisions ensuring consistency with the ECHR (Articles 1(4) and 7 of the latest text), the Council of Europe lacked sufficient time for a 'more detailed examination' of whether these provisions 'are still sufficient to ensure coherence and consistency with the ECHR'. Moreover, 'even if these clauses were able to do so, it would be at the price of a considerably increased complexity of the overall fundamental rights framework applicable in the area concerned, which may lead to legal uncertainty due to a lack of coherence'.

The Council of Europe therefore concludes:

*"In the light of the rather substantial amendments made to the draft Framework Decision, the lack of further information about their intent and the impossibility to carry out a more detailed examination within the very short deadline given, the Council of Europe Secretariat is regrettably not in a position to state that the present draft still contains sufficient safeguards to ensure coherence and consistency with the ECHR (Strasbourg proof)."*

## Comments

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It would be useful for the EU to adopt a Framework Decision on criminal suspects' rights in order to restore a greater balance to EU criminal law policy and to reinforce and extend some key guarantees set out in the ECHR. But a Framework Decision in this area could be counterproductive if it sets minimum standards lower than those in the ECHR, as Member States' executives, legislatures and national courts might then conclude that regardless of the ECHR, they can 'get away with' the lower EU standards instead. Countries which are negotiating EU membership, or which aspire to membership or close association with the EU, might come to the same conclusion.

In light of this, while the Finnish and German Presidencies made many efforts to comply with the Council of Europe's initial observations, it is alarming to see that following amendments to the original German text at the insistence of Member States, the Council of Europe is no longer able to conclude that the text is 'Strasbourg-proof'.

It is also unfortunate that a group of Member States led by the UK is objecting in principle to this measure, since their original concerns about ECHR-compatibility were (at least in the initial German text) satisfied. Although all four common law Member States are objecting to the proposal, there is nothing in it to suggest any incompatibility with common law principles, given the link between the proposal and the ECHR, a treaty which is binding

on the UK and which was moreover drafted by British lawyers - as was the Commission's initial proposal for a Framework Decision!

The dissenters' concern that the ECHR standards would be misinterpreted by the EU's Court of Justice relies on pre-2000 case law of the Court, not recognising that recent case law of the Court of Justice makes much greater reference to the case law of the European Court of Human Rights (as the Council of Europe submissions recognise) and has moreover effectively overturned some of the earlier Court of Justice case law referred to. Also, the objection to the potential jurisprudence of the Court of Justice is 'a bit rich', considering that five of the six dissenters have opted out of the Court's jurisdiction over preliminary rulings from national courts in criminal matters anyway (the exception is the Czech Republic). In fact, due to constitutional problems, it is understood that the Cypriot courts cannot even refer any *Community* law questions to the Court of Justice!

It can only be hoped that the Council can agree upon and adopt a text in the near future which is compatible with the ECHR - if necessary by using the 'enhanced cooperation' provisions of the Treaties to go ahead without the participation of the dissenting Member States. If the dissenting group persists in blocking this proposal, the UK and its followers will only have themselves to blame if their citizens complain that they have received unfair trials in other Member States.

Documents (click to access)

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COM (2004) 328: initial proposal

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-com-328-2004.pdf>

Council doc 11788/06: Paper from dissenting Member States on ECHR compatibility and Council of Europe contacts

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-11788-06.pdf>

Council doc 13868/1/06: Paper from dissenting Member States on ECHR compatibility

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-13868-rev1-06.pdf>

Council doc 13759/06: Original comments by Council of Europe

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-13759-06.pdf>

Council doc 14794/2/06: Report to Dec. 2006 JHA Council

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-14794-rev2-06.pdf>

Council doc 16874/06: German presidency, initial version

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-16874-06.pdf>

Council doc 17090/06: Explanations of initial German version

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-17090-06.pdf>

Council doc 5431/07: Comments on initial German text by Council of Europe

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-5431-07.pdf>

Council doc 8200/07: Council of Europe comments on recent version of Framework Decision

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-8200-07.pdf>

Council doc 8182/07: Latest version of Framework Decision, submitted to Coreper

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-8182-07.pdf>

COM (2006) 174: Green Paper, presumption of innocence

<http://www.statewatch.org/news/2007/apr/eu-crim-proced-com-174-2006.pdf>

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