



**COUNCIL OF
THE EUROPEAN UNION**

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9600/06

LIMITE

DROIPEN 36

NOTE

from :	Presidency
to :	COREPER/Council
No. prev. doc.:	9222/06 DROIPEN
Subject :	Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union

I. INTRODUCTION

On 3 May 2004 the Commission submitted a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union ¹. Discussions began under the Netherlands Presidency in the Working Party on Substantive Criminal Law and continued under the Luxembourg and United Kingdom Presidencies. A progress report was made to the JHA Council on 2 December 2005 ² that showed that concerns relating to, inter alia, the legal basis and the relationship with the European Convention on Human Rights were persisting. Delegations' main concerns are set out in point II of doc. 8466/06 DROIPEN 28 JAI 181.

¹ 9318/04 DROIPEN 17.

² 14642/05 DROIPEN 59; 14248/1/05 DROIPEN 54 CATS 73 REV 1 + ADD 1.

On the basis of these results, the Presidency suggested at the informal meeting of JHA Ministers (on 13 January 2006) and at the Article 36 Committee on 2 February 2006 as an interim step to adopt a Council declaration and to continue discussions on the text of the Framework Decision at the same time.¹

Along the same lines, six delegations [REDACTED] suggested at the informal meeting of the Article 36 Committee on 10 April 2006 to consider adopting a Resolution by Member States on ensuring fairness in criminal proceedings with particular reference to access to free legal aid and to an interpreter. Most of these delegations saw such a non-binding instrument as an interim measure to speed up work on the draft Framework Decision. The draft Resolution suggested for consideration refers to standards on free legal aid and assistance of interpreters and translations that are not attached, but to be based on principles in the draft Framework Decision. It is set out in Annex II. However, the majority of delegations strongly favoured continuation of discussions on a binding instrument with a view to its adoption as soon as possible.

At its meeting on 27 and 28 April 2006, the JHA Council took note of the state of play and that an informal working group had been convened in an attempt to overcome the deadlock. This informal working group should examine whether common ground could be reached between the proposal for a Framework Decision on the one hand and for a non-binding instrument on the other hand, and whether a compromise could be reached by way of limiting the scope of the draft Framework Decision to specific rights. Furthermore, the informal working group was invited to establish which rights should be covered by the instrument, focussing on minimum standards rather than elaborating detailed provisions as to how these rights should be exercised in specific criminal proceedings. The informal working group was also asked to examine how possible conflicts between the draft instrument and the ECHR and the case law of the ECtHR could be avoided, and to prepare a new text that might serve as a basis for a compromise solution to accelerate negotiations on the proposal for a Framework Decision. A report was submitted to the Article 36 Committee on 16 May.

¹ 5542/06 DROIPEN 8 CATS 10 COR 1.

II. WORK OF THE INFORMAL WORKING GROUP AND PRESIDENCY PROPOSAL

The informal working group met on 26 April and on 11 May 2006. Discussions took place based on the approach that the working group at this stage should focus on the substance of the draft instrument and that the question of whether the draft should be legally binding or not should be left aside for discussion later. Regarding the examination of the substance, delegations were asked to discuss the draft as if the instrument would be binding in the sense that delegations should only accept provisions they would be prepared to fully respect irrespective of the legal nature of the instrument. This should, however, be without prejudice to a decision to be taken by Council at a later stage on the legal nature (binding or non-binding) of the instrument.

On the basis of the discussions in the informal working group the Presidency has established a proposal which is set out in Annex I. It is based on the following principles: Firstly it establishes only minimum standards and does not provide for an "upper limit" of rights. Consequently it does not prevent any Member State to provide for further reaching rights for suspects in criminal proceedings. Secondly it aims at ensuring full compliance with the rights enshrined in the European Convention of Human Rights and the case law of the European Court of Human Rights and does not allow Member States to go below this level. As compared to the Commission proposal, the Presidency proposal limits the number and scope of the rights covered and focuses on general standards rather than specifying in detail how the rights should be applied in each Member State in view of the different procedural systems.

The Article 36 Committee agreed that the Presidency proposal in Annex I should serve as basis for further discussions with a view to achieving agreement on an instrument. The vast majority of delegations was in favour of taking the Presidency proposal as a basis for a Framework Decision. On the other hand, [REDACTED] could agree to further discuss the Presidency proposal, but could not accept to take it as a basis for a Framework Decision. They referred to their earlier made suggestion to consider adopting a Resolution (see Annex II), [REDACTED] on the understanding that the focus of any instrument should be on practical measures. [REDACTED] were in favour of continuing discussions on both proposed instruments at this stage and to take a decision on the legal nature (binding or non-binding) later on. [REDACTED] proposed to work on both draft instruments, with a view to adopting both, a Framework Decision on the basis of the Presidency proposal and a Resolution focusing on practical measures.

III. QUESTIONS SUBMITTED TO COREPER/COUNCIL

On the basis of comments made in the Article 36 Committee, the Presidency invites COREPER/Council:

- 1) To confirm that the Presidency proposal set out in Annex I should serve as a basis for further discussions with a view to achieving agreement on the legal nature of the envisaged instrument;*
 - 2) To decide whether a further instrument focusing on practical measures should be elaborated (see e.g. the draft in Annex II).*
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Presidency proposal for the text of an instrument on procedural rights in criminal proceedings

Article 1

Subject matter and scope

1. With a view to facilitating mutual recognition between the Member States of the European Union and to safeguarding the fairness of proceedings this instrument aims at establishing minimum standards to be respected by Member States throughout the European Union concerning certain rights of persons subject to criminal proceedings.
2. The rights referred to in this instrument shall be interpreted with respect for the different legal systems and traditions of the Member States.
3. The minimum standards referred to in this instrument shall be interpreted in full compliance with the European Convention for the protection of human rights and fundamental freedoms, in particular Articles 5 and 6 thereof, as developed in the case law of the European Court of Human Rights.
4. For the purpose of this instrument, "criminal proceedings" and "charged with a criminal offence" shall be interpreted in accordance with national law while respecting Article 6 of the European Convention on Human Rights as interpreted by the European Court of Human Rights.

Article 2
Right to information

1. Member States shall ensure that any person subject to criminal proceedings is provided with effective information, in a language which he or she understands, on the nature of the suspicion and of the fundamental procedural rights that he or she has.
2. This information shall be delivered as soon as these rights become relevant.
3. The information referred to in paragraph 1 shall include in particular information on the right to legal assistance, the right to such assistance free of charge and the right to free interpretation and translation.

Article 3¹
Right to legal assistance

1. Member States shall take the necessary measures to ensure that every person charged with a criminal offence has the right to legal assistance of his own choosing.
2. The right to legal assistance means at least the possibility for the person concerned to have adequate opportunities, time and facilities to communicate and consult with a legal adviser.
3. Member States shall take the necessary measures to ensure that any person subject to deprivation of liberty prior to trial has the right to legal assistance in order to safeguard the fairness of proceedings, taking into account the peculiarities of each national system, the legal relevance attached to such proceedings within the overall procedure, and, in particular for serious offences, the need to protect investigations.
4. Notwithstanding paragraph 1, the right to legal assistance shall be available where the person concerned is subject to a European Arrest Warrant or extradition request or other surrender procedure.

¹ A recital addressing quality standards of the persons involved in criminal proceedings, in particular lawyers, and a mechanism for the provision of a replacement lawyer, is introduced.

Article 4

Right to legal assistance free of charge

1. If the person subject to criminal proceedings is partly or totally unable to meet the costs of legal assistance as a result of his economic situation, these costs shall be borne in whole or in part by the State according to national law when the interests of justice so require.
2. The interests of justice referred to in paragraph 1, shall in particular cover cases where the person concerned:
 - is subject to deprivation of liberty prior to trial, or
 - is subject to criminal proceedings which involve a complex factual or legal situation or which may result in severe punishment, or
 - is unable to understand properly or to follow the content or the meaning of the proceedings because of his age or mental or physical condition, in particular in the case of minors.
3. The economic situation of that person shall be assessed by the competent authority of the Member State in which the court is located.

Article 5¹

Right to interpretation

1. Member States shall take the necessary measures to ensure that any person subject to criminal proceedings or subject to a European Arrest Warrant or extradition request or other surrender procedure is provided with the free assistance of an interpreter when a procedural act requiring the person's participation is taking place if he or she does not understand or speak the language in which the act is being held.

¹ A recital along the following lines is introduced:
"Member States shall guarantee the right to interpretation and to translation of relevant documents, as laid down in Articles 5 and 6, in a way that safeguards the fairness of proceedings, in particular by enabling the defendant [suspect] to have knowledge of the case against him or her and to defend himself or herself."

2. The interpretation referred to in paragraph 1 shall be organised in a way that guarantees the effectiveness of the rights of the defence.

Article 6

Right to translation of documents of the procedure

Member States shall take the necessary measures to ensure that a person subject to criminal proceedings or subject to a European Arrest Warrant or extradition request or other surrender procedure is entitled to get free translation of the documents, which are relevant for the participation of the person concerned in any procedural act, but in a language that he or she does not understand, to the extent necessary to ensure the effectiveness of the rights of defence.

Proposal by [REDACTED]

for a Resolution by Member States

In its paper of 25 January 2006 (5542/06, DROIPEN 8), the Presidency suggested that the current deadlock on the Framework Decision on certain procedural rights in criminal proceedings might be eased by a JHA Council Declaration on criminal procedural rights. The Presidency envisaged that the Declaration would be an interim measure, giving a clear commitment to preserving individuals' fundamental rights and freedoms in criminal proceedings, and offering a way forward for further discussions on the Framework Decision.

Discussions at the Article 36 Committee on 2 – 3 February indicated support among some delegations for that approach. We propose therefore that the idea of a Council Resolution be examined in more detail as a matter of priority, and offer the attached draft Resolution to provide an initial basis for informal discussion.

**RESOLUTION BY MEMBER STATES MEETING WITHIN THE COUNCIL OF THE
EUROPEAN UNION**

OF [] 2006

On ensuring fairness in criminal proceedings with particular reference to access to free legal aid and
to an interpreter

Whereas:

1. It is a key objective of the Union to provide citizens with a high level of safety within an area of freedom, security and justice.
2. The Union's commitment to freedom, security and justice is based on the values of human rights, democratic institutions and the rule of law.
3. The Member States share a determination to counter the threat to freedom and fundamental rights posed by serious crime.
4. Co-operation between the Member States and mutual recognition of judicial decisions in criminal matters is needed to combat criminal organisations effectively throughout the Union.
5. Steps should be taken to ensure that such decisions are respected and enforced throughout the Union, while safeguarding the fundamental rights of people in promoting the fairness of the proceedings.

And Whereas:

6. A high standard of fundamental rights in criminal proceedings should be maintained throughout the Union.
7. The Union's respect for fundamental rights in criminal proceedings is rooted in the ECHR.
8. In the context of cross-border co-operation, it is highly desirable to ensure full compliance with the requirements of Article 6 of the ECHR especially regarding access to free legal aid and to an interpreter for all those who need such services.
9. At this stage of the Union's development it is expedient to take practical steps to enhance observance of certain minimum standards.

HEREBY ENCOURAGES THE MEMBER STATES TO TAKE ACTIVE STEPS TO

- Promote the fullest compliance with Articles 5 and 6 of the ECHR as developed in the case law of the ECtHR.
- Use where appropriate the [attached¹ Annex] on standards for the provision of free legal aid and assistance of interpreters/translators to suspects in criminal proceedings throughout the EU.
- Develop, in cooperation with the European Commission, targeted EU funding for improving the supply and quality of interpreters and translators in criminal proceedings in EU countries with identified priority needs.
- Consider extending available [peer] evaluation mechanisms to safeguard key procedural rights in criminal proceedings.

¹ Not attached, but to be based on principles in the draft Framework Decision.

