



Submission on the legal basis for a framework decision on procedural rights in criminal proceedings for the experts meeting 26th and 27th March 2009

1. Our organisations have advocated the need for a framework decision on defence rights since the proposal for a European arrest warrant. We have steadfastly proposed such a mechanism, supported the Green Paper and subsequent Proposal for a Framework Decision on Certain Procedural Rights in Criminal Proceedings, and argued for the retention of the initially proposed five rights together with the review mechanism. We consider it imperative that if the European Union is to continue to promote mutual recognition in the area of criminal matters, a set of standard defence rights must be enacted.
2. The indication from the forthcoming Swedish Presidency that it intends to bring the Proposal forward once again is welcomed. In order to be pragmatic in approaching the Justice and Home Affairs Council with this Proposal, the difficulties previously encountered must be identified and expunged. The reason given for the rejection of the Proposal at the JHA meeting in June 2007 was that six Member States (UK, IE, MT, CY, CZ and SK) considered there to be no or limited legal basis for the Framework Decision. Prior to considering the content to be included in the revised Proposal, this argument must be addressed. To this end, we set out what we hope is an exhaustive dismissal of the argument.

Legislative Provision

3. The jurisdiction through which the EU is competent in this area is provided in Article 29 TEU,

*“Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by **developing common action among the Member States** in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.”*

Article 31 provides mechanisms by which to achieve this aim,

*“1. Common action on judicial cooperation in criminal matters **shall include**:*

...(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation.”

4. Article 31(1)(c) has been identified as the provision through which it is possible for defence rights to be adopted. But an argument that strictly adheres to the narrow limitations of that provision ignores the intention of the explanatory preamble in 31(1). The words ‘shall include’ declare that the examples given subsequently are non-exhaustive.
5. This is clear from considering the surrounding provisions. Article 29 sets out that the objective shall be achieved by preventing and combating crime, organised or otherwise, *in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud*. Article 31(1)(e) however identifies that common action **shall include** progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of *organised crime, terrorism and illicit drug trafficking* only. To suggest that Article 29 is limited to the fields stated in Article 31(1)(e) would render the identification of additional criminal activity in Article 29 meaningless. This cannot have been the intention when the Article was framed. Each series is therefore but an example of where action should be focussed. Such is the case with the other mechanisms identified in Article 31.
6. This interpretation is further developed in the Opinion of Advocate General Kokott in Case C-105/03 *Pupino* [2005] ECR I-5285, para. 50 in which it is observed that in the French version of the text, instead of ‘*shall include*’, the latter uses the phrase ‘*visé entre autres*’. The individual policy fields provided describe only potential legislative spheres, without strictly delimiting the competence of the Union.
7. The Reform Treaty, approved by all Member States, but awaiting national consensus, confirms there is clear consensus and intention to legislate in this area. Proposed

Article 82 (ex Article 31 TEU) (2) clarifies that intention by specifically referring to defence standards,

“To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States...

They shall concern:

...(b) the rights of individuals in criminal procedure.”

8. The provision on its face does not preclude the adoption of the Framework Decision.

Precedent

9. Council Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings was adopted under the auspices of Article 31. The Opinion in *Pupino* specifically considered the legal basis for the adoption of this instrument. The Attorney General clarified at paragraph 48 that acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated must be regarded as *non-existent*. In such circumstances the Court is obliged to examine of its own motion the lawfulness of the provisions to be interpreted since providing an interpretation is meaningful only if the provisions to be interpreted are valid. The Attorney General concluded at paragraph 51 that the protection of citizens who have become victims of a crime merits consideration, and common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States. The ECJ in *Pupino* confirmed the legal basis of the Framework decision to be Article 31 and that it had jurisdiction to consider the matter. If there were no legal basis, notwithstanding the unrelated issue brought for preliminary reference, the Court would have declared the framework decision invalid.
10. Despite the apparent lack of EU relevance to victim rights in criminal cases, there was never a question of competence when Member States agreed to adopt the framework decision in this area. Rather, the wider benefits for mutual cooperation that such a framework decision could achieve were recognised. There is far clearer justification for action with respect to suspects of criminal activity, particularly with the advent of the European Arrest Warrant.

Cross Border application

11. The argument that any such framework decision can only apply to cross border cases is misconceived. That the mechanisms codified in Article 31 are non-exhaustive obviates the requirement to restrict the instrument in this way. Notwithstanding, a narrow interpretation of Article 31(1)(c) does not support a restriction to cross border cases in any event.
12. It is not possible to construct a definition that will satisfactorily encompass all such cases. Firstly, if the definition is based on the crime, in the initial stages of an investigation a cross border element may not be apparent. Equally, what may at first seem to be a cross border case may lead to a solely domestic charge on the evidence. The definition would not encompass a non-national accused of a purely domestic offence, thereby excluding a European arrest warrant case.
13. Secondly, a definition based on the nationality of the suspect would necessitate unequal treatment between nationals and non-nationals, extending mistrust between Member States. Circumstances involving multiple charges and multiple suspects will further complicate this approach since suspects would be treated differently in the same proceedings on the grounds of their nationality. This in itself could give rise to applications to the ECtHR, which might otherwise have afforded a wide margin of appreciation, and, potentially, the ECJ raising Article 12 EC. Ultimately this approach can only complicate rather than simplify the process.
14. However a definition may be constructed, if national criminal procedures that do not recognise European Union defence standards are to remain, the obstacles to trust and cooperation will continue. Practitioners are unlikely to be convinced by an assertion that overstretched police officers embroiled in a crucial stage of investigation will undertake additional enquiry to discover which procedure ought to be followed. Accordingly, the justification to act in furtherance of cooperation is achieved only if standards apply in all proceedings.

Need

15. There is a real need for a framework decision in this area. There is now an abundance of legislative activity developing mutual recognition in the prosecution of crime in

operation, with no counterbalancing set of safeguards for the defence. Adoption of a common set of victim rights in 2001 implicitly recognised an equal need for defence rights. This need was indeed explicitly set out in the Tampere Conclusions and reiterated in the Hague Programme. There is now a body of detailed, credible and current empirical evidence to confirm the concerns held by the Commission when the Proposal was made.¹ The ECtHR continues to find breaches of Convention Rights in the area of criminal practice across the Member States, notwithstanding the assertions that the EU accedes to the Convention. The European Committee for the Prevention of Torture consistently finds that the EU Member States fail to provide access to legal assistance and other defence rights from the first moments of detention.

16. In order to give effect to mutual recognition through mutual trust it is clear that there is currently an incompatibility between Member States' rules. The Council Legal Service in its 2004 Opinion agreed that so long as focus remains upon judicial cooperation in criminal matters, Article 31 should be interpreted broadly. Given the adoption of other framework decisions, there is nothing to prevent the Union laying down standards insofar as the essential aim is to facilitate mutual recognition. It believed that greater compatibility between the rules applying to procedural rights in criminal proceedings would increase trust between the legal systems of various Member States.
17. Until there is a Union wide set of standards that apply in all circumstances and upon which practitioners can rely, judicial cooperation will not be realised. A binding piece of legislation that encompasses all key defence rights, with detailed provisions as to when these rights can be accessed, and how compliance with the rights should be measured, is essential for the development of common action amongst the Member States in criminal matters.



Jodie Blackstock
Senior Legal Officer (EU: JHA)
JUSTICE



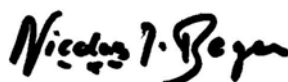
Natacha Kazatchkine
Executive Officer Legal Affairs/
Human Rights in the EU
AI EU Office



Anna Ogorodova
Associate Legal Officer
Open Society Justice Initiative



Roger Smith
Director of JUSTICE



Dr. Nicolas J. Beger
Director
AI EU Office



Zaza Namoradze
Director, Budapest Office
Open Society Justice Initiative

-
- ⁱ (i) T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, University of Maastricht, EC, DG JLS, 12th December 2005,
- (2) Working Group for Cooperation in Criminal Matters, *Fourth round of Mutual Evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" - Report on the first seven evaluation visits (Ireland, Denmark, Belgium, Estonia, Spain, Portugal and the United Kingdom)*, Council of the European Union, 8409/08, Brussels, 15th April 2008,
- (3) G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union*, 20th November 2008, EC DG JLS,
- (4) European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level*, January 2009, PE 410.67,
- (5) Tilburg, Griefswald, *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Draft Introductory Summary*, EC DG JLS/D3/2007/01, January 2009,
- (6) JUSTICE, OSJI, University of the West of England and the University of Maastricht, *Effective Criminal Defence Rights*, <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=2FU733SN1NG53C6JS7D5&taal=en>, ongoing.