



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 30 September 2004 (06.10)  
(OR. fr)**

**12902/04**

**LIMITE**

**JUR 399  
COPEN 117**

#### **OPINION OF THE LEGAL SERVICE**

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Subject :            Proposal for a Council Framework Decision on certain procedural rights in  
                             criminal proceedings throughout the European Union  
                             9318/04 COPEN 61 COM(2004) 328 final

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#### **I.    INTRODUCTION**

1.    The Commission has submitted to the Council the above proposal, which is based on Article 31(1)(c) of the Treaty on European Union (hereinafter TEU). The question is whether that Article is the correct basis for the competence of the European Union to adopt a framework decision in this area. This note seeks to answer that question.
2.    According to settled case-law the choice of the legal basis for a Community act must rest on objective factors which are amenable to judicial review, including, in particular, the aim and content of the act <sup>1</sup>.

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<sup>1</sup>    See in particular Judgment of 4 April 2000, Commission v. Council, C-269/97, ECR I-2257, of 29 April 2004, Commission v. Council, C-338/01, not yet published in the ECR.

In substance, this case-law applies likewise to acts based on the TEU. It is therefore necessary to analyse the aim and content of the above proposal.

## II. AIM AND CONTENT OF THE PROPOSAL

3. This proposal seeks to define minimum common standards regarding certain procedural rights in criminal proceedings in the European Union, in order to enhance the protection of the rights of the individual. The granting of an equivalent level of protection to suspects and defendants throughout the European Union should facilitate the application of the principle of mutual recognition of decisions in criminal matters in the framework of judicial cooperation between the Member States.
4. The preamble to the proposal states that the implementation of the latter principle presupposes that Member States have trust in each other's criminal justice systems. This spirit of confidence can only be established if the judicial authorities see decisions of the judicial authorities of other Member States as equivalent to their own and do not call into question their professional competence and respect for fair trial rights.
5. In the preamble it is noted that there is not always sufficient trust in the criminal justice systems of the other Member States and this notwithstanding the fact that they are all parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR). In order to enhance this confidence, the proposal provides for certain minimum safeguards to protect fundamental rights that are to be observed in all criminal proceedings, whether or not the case in question has trans-border implications, depending on whether or not the cooperation of the judicial authorities of another Member States is sought during the proceedings.
6. Five areas have been identified by the Commission as appropriate ones in which common standards may be applied. These are: access to legal representation, access to interpretation and translation, ensuring that persons in need of specific attention because they are unable to follow the proceedings receive it, consular assistance to foreign detainees and notifying suspects and defendants of their rights in writing.

7. The right to legal assistance and the right to linguistic assistance for foreigners and, where necessary, for those suffering from hearing or speech impairments, are enshrined in Article 6 of the ECHR. The provisions of the proposal impose on Member States obligations identical to those imposed by the ECHR and set out common ways of complying with that Article.
8. The right to consular assistance exists by virtue of Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals detained abroad if they so wish. The provisions of the proposal confer this right with regard to European citizens detained in a Member State other than their State of origin.
9. The other provisions of the proposal constitute ways of improving fairness in proceedings and ensuring that those concerned are aware of their rights.
10. Finally, the proposal establishes a mechanism to assess its implementation. To that end, Member States will have to gather and record information for the purpose of evaluation and monitoring. This information will be used by the Commission to produce reports that will be made publicly available.

### III. BACKGROUND

11. In its opinion of 14 July 2000 (10341/00 JUR 241 COPEN 52) on the draft Framework Decision on the standing of victims in criminal procedure, the Legal Service examined the scope of Article 31 of the TEU. It considered whether it belonged to the objectives of the Union to harmonise the penal proceedings and practices of the Member States. While expressing doubts that this was what the authors of the Treaty of Amsterdam had in mind, given that those proceedings and practices applied to entirely internal cases, it nevertheless

noted that the wording of the provisions of Title VI of the TEU offered a rather wide margin of interpretation. In the words of the opinion "if the Council felt a need to deal with aspects of the functioning of the criminal justice systems of the Member States which are not expressly mentioned in Articles 30-32 of the TEU, in order to further the more general objective of the Union of providing citizens with a high level of safety, it would have the power to do so", adding that "The improvement of such support for victims may also enhance the credibility of, and trust in, the functioning of the criminal justice system as a whole, which can also be considered a contribution to the creation of an area of security and justice.". In the Legal Service's view the proposal now under consideration follows the same logic.

12. The Legal Service notes that, in the words of Article 29 of the TEU "*the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice*". The means of achieving that objective are laid down in Articles 29, 30, 31 and 32.

Among those means are those mentioned in Article 31(1)(c), on which the Commission based its proposal. According to that provision, common action on judicial cooperation in criminal matters "*shall include*" "*ensuring compatibility in rules applicable in the Member State, as may be necessary to improve such cooperation*". The application of this provision depends in principle on two factors: (a) the action must aim at *ensuring compatibility* in Member States' rules and (b) the action must not exceed what *may be necessary to improve* judicial cooperation.

Provided we remain in the area of "judicial cooperation in criminal matters", Article 31 should be interpreted broadly, in view of the expression "*shall include*" which appears in the introductory sentence of Article 31(1). We should examine whether the competences assigned to the Union by this provision may be the basis for common action which aims to establish a pedestal of standards to ensure a minimum of compatibility between the rules applicable in the Member States to the extent necessary to improve judicial cooperation between the Member States with a view to creating an area of freedom, security and justice.

13. The adoption of Framework Decisions <sup>2</sup> by the Council implementing the principle of mutual recognition was not accompanied by the adoption of minimum standards for the protection of individual rights. Such standards are provided for by existing international human rights treaties. While it may be true that currently, in the words of Opinion 2/94 of the Court, "No Treaty provision confers on the Community institutions any general power to enact rules on human rights" <sup>3</sup>, it must be said that there is nothing to prevent the Union, under the TEC, from laying down its own standards in order to create a high level of protection in a specific legal environment – in this case an area in which legal decisions must be recognised and executed on the basis of the principle of mutual recognition and hence of mutual trust – insofar as the essential aim of such measures is to facilitate the mutual recognition of decisions by Member States, rather than the protection of human rights.
14. Common action based on Article 31(1)(c) must to a certain degree seek to ensure compatibility between Member States' rules. It is true that the Commission has not specified whether there is currently any incompatibility between these rules, in the sense that there may be contradictions, opposition or conflict between them, either as regards basic commitments or rules governing procedure or competence, which would prevent their simultaneous application in specific cases. However, the Treaty does not stipulate that common action should consist in eliminating existing incompatibilities. The evidence of greater compatibility between the rules applying to procedural rights in criminal proceedings would increase trust between the legal systems of the various Member States.

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<sup>2</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 2; Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45.

<sup>3</sup> Opinion of the Court of 28 March 1996, ECR I-1759.

15. Common action based on Article 31(1)(c) must not – as was stated in point 12 of this opinion – go beyond what is necessary to improve judicial cooperation. In fact, this is more generally about the obligation on the Union to respect the principle of subsidiarity (see second paragraph of Article 5 of the TEC, made applicable to the Union by Article 2 of the TEU). Given that most cases affected by the procedural guarantees in question are purely internal to each Member State, it may be asked whether the proposal is compatible with the principle of subsidiarity laid down in Article 5 of the TEC and further developed in the Protocol on the application of the principles of subsidiarity and proportionality.

Taking account of the guidelines in that Protocol, it may be said that, in strictly internal cases, action at national level alone or lack of action by the Union would not be contrary to the requirements of the Treaty and would not damage the interests of the Member States. In practice, however, it will not be possible to foresee in which cases the judicial cooperation of another Member State should or could be requested at successive stages of the proceedings. For this reason it is not possible to draw a distinction, for the purposes of determining the scope of the Framework Decision, between internal cases and others. The result is that it cannot be said that the measures laid down (which in fact are minimal) go beyond what is necessary to encourage judicial cooperation in criminal matters <sup>4</sup>.

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<sup>4</sup> Note the difference on this point between Article 31 of the TEU and Article 65 of the TEC, which refers to "civil matters having cross-border implications".

Therefore, if the Council is of the opinion that the guarantees laid down in the proposal at Union level offer advantages because of the positive effect on mutual trust between Member States and between courts and on the functioning of criminal justice systems, and that these measures do not go beyond what is necessary to improve judicial cooperation, the Union may adopt the proposed measures and Article 31(1)(c) of the TEU is the correct legal basis for that <sup>5</sup>.

## **CONCLUSION**

16. The Legal Service considers that the Commission proposal is correctly based on Article 31(1)(c) of the TEU and that the Council can adopt the proposed measures if, in compliance with the principle of subsidiarity, it considers that they do not go beyond what is necessary to improve judicial cooperation in criminal matters.

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<sup>5</sup> It should be noted that, under Article III 270 of the Treaty establishing a Constitution for Europe, "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States". According to Article III-270(2), "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, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals."