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Directorate B

**Unit B3 Judicial Cooperation in Criminal Matters**

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**Proposal for a Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union**

**Synopsis of talk to be given at JUSTICE conference:**

**The Eurowarrant: European Extradition in the 21st century**

**London 5/6 July 2003**

The Commission plans to submit a proposal for Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union to the November 2003 Justice and Home Affairs Council of Ministers. In this talk, the Commission's thinking and working methods, the reason for submitting the draft Framework Decision and its aims for the future in this area will be discussed.

The proposal for a Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union has its origins in the mutual recognition programme decided upon in 1999 by the Justice and Home Affairs Ministers of the 15 EU Member States at a Council meeting in Tampere, Finland. The Conclusions of the Tampere European Council endorsed the principle of mutual recognition as "the cornerstone of judicial co-operation". The Conclusions state that "enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and *the judicial protection of individual rights*".

Having common minimum standards of procedural safeguards throughout the EU is the best way of ensuring homogenous protection of individual rights. The proposed

Framework Decision is seen as the first step towards achieving common minimum standards. Common minimum standards can only be set if action is taken at the EU level since if Member States retain the discretion to set their own standards, discrepancies are inevitable. Discrepancies cause the lack of mutual trust that has undermined the principle of mutual recognition to date. This problem may become more acute after enlargement, making it highly desirable that common minimum standards are agreed prior to April 2004.

The Commission has consulted widely on this issue, culminating in publication of a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (COM(2003) 75 final) on 19 February 2003 and a public hearing on the Green Paper on 16 June 2003. The consultation process carried out prior to the Green Paper consisted of a Consultation Paper posted on the Commission's DG JHA's website in January 2002 to which about 100 responses were received, a questionnaire sent to the Ministries of Justice of the Member States, numerous bilateral meetings with practitioners, NGOs and other experts and an experts' meeting held in October 2002.

The Green Paper, adopted by the Commission on 19 February 2003, covers proposals in five areas:

- access to legal representation, both before the trial and at trial. The proposal is to agree a common minimum standard of interpreting Article 6 of the ECHR (a provision with which all Member States and acceding countries are obliged to comply), by devising ways of ensuring that competent lawyers are available to suspects from the earliest practical point after arrest. The Commission also intends to address the question of adequate pay for lawyers undertaking this type of work to ensure that poor pay is not a deterrent to suitably qualified professionals, and a method of verifying competence.
  
- access to interpretation and translation for non-native defendants, which implies that court interpreters be qualified and competent, and that the defendant have translations of all material documents used in the proceedings. As with legal representation, this is a right under Article 6 ECHR with which the Member States have already agreed to comply by becoming parties to the ECHR.
  
- ensuring that vulnerable suspects and defendants in particular are properly protected, by placing an obligation on Member States to implement a mechanism for identifying vulnerable suspects as soon as possible after arrest. This obligation would operate in tandem with a further obligation to take whatever steps were necessary in order to offer a high duty of protection and care to vulnerable suspects and defendants.

- consular assistance to foreign detainees. The Commission notes that the mechanisms for this are in place since all Member States are parties to the Vienna Convention on Consular Relations which provides for such assistance. The Commission's proposal would be to oblige Member States to ensure that there is a consular official available who can offer basic assistance to nationals arrested abroad, and

- notifying suspects and defendants of their rights by way of a standard document to be translated and distributed on arrest to all persons arrested throughout the European Union (the "Letter of Rights"). This Commission proposal should make it easier for suspects to enforce their rights since they would be made aware of them in an accessible and understandable form, even if not nationals of the State of arrest.

The Green Paper also includes a section on proposals for evaluation and monitoring of compliance. The Commission proposes that this evaluation should be carried out by an independent body reporting to the Commission.

The public hearing, held on Monday 16 June 2003, brought together experts from NGOs, universities, practising lawyers' organisations and government ministries. Respondents who sent in written comments were invited to make their points orally at the hearing. There was wide support for action in the five fields set out, especially from practitioners and NGOs.

One factor that is currently unknown is whether the Member States will agree to this measure which some see as violating the subsidiarity principle (and which will inevitably be costly to implement). The Commission has an idea how Member States are likely to view this initiative because of the consultation process to date, (e.g. responses to the questionnaire and the views expressed by representatives from most Justice Ministries at the experts meeting held in October 2002 and at the public hearing on 16 June 2003). This has been supplemented by the views expressed by representatives of the Member States when the Green Paper was discussed at an informal meeting of the EU's Justice and Home Affairs Ministers in Greece on 29 March 2003. It was received generally favourably, at least in principle, but the reactions to the specific provisions were mixed. Some Member States will agree only to some of the five proposals, others to the evaluation element. One or two Member States view this initiative as merely duplicating the European Convention on Human Rights. This is not the Commission's position, since research and consultation has shown that in practice, the ECHR is implemented to very differing standards in the Member States and that there are numerous instances of

violations, not all of which result in cases before the European Court of Human Rights. The aim of the initiative is not to provide for new rights, nor to reiterate what is in the ECHR, but to set *common minimum standards*, something that has not yet been done.

Another argument against action in this area is the lack of a legal basis. The Commission relies on various agreements reached at Head of State and ministerial level, on Article 6 of the Treaty on European Union which commits Member States to respecting fundamental rights, as set out in the ECHR and Article 31 (1) of the Treaty on European Union, which has been in force since 1999. Article 31 (1) TEU envisages that the EU may develop "common action" on judicial cooperation in criminal matters and specifies:

"Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

(b) facilitating extradition between Member States;

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

(d) preventing conflicts of jurisdiction between Member States;

(e) 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."

This provision, which is the best justification for this action, is open to interpretation. So a crucial element in the evolution of this measure is the discussion of its legal basis.

The Commission has identified other rights in respect of which it is appropriate for the EU to take action. Two of the rights the Commission had identified appeared to warrant separate measures of their own. These were the right to bail (provisional release pending trial) and the right to have evidence handled fairly.

The work on the right to bail (which also covers detention conditions) is an important and substantial area. It forms the subject-matter of a measure in the Mutual Recognition programme. A Communication on the subject is included in the Commission's Work Programme for 2003. Also in the Work Programme for this year is a Green Paper on

approximation, recognition and enforcement of criminal sanctions in the EU (the drafting of which is in the final stages). This is designed to ensure equality of treatment for convicted persons throughout the EU so that, for example, those sentenced in a Member State other than their own are not discriminated against by virtue of their foreign nationality.

Fairness in handling evidence actually covers many rights and many aspects of the proceedings. It soon became clear that this area should be covered in a separate measure since it was too broad to cover in a Green Paper that already proposed several rights. The Commission has published a call for tenders for a study of safeguards in fairness in gathering and handling of evidence. This is to cover, *inter alia*, the right to silence, the right to have witnesses heard, the problem of anonymous witnesses, the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed) and many other aspects of the law of evidence. A study of *ne bis in idem* (a measure included in the Mutual Recognition Programme) is also underway and there is a Greek proposal on the subject currently being discussed in Council. *In absentia* (or default) judgments were not considered to be among the first priorities for the work on safeguards and consequently were postponed to a later date. It is now hoped to devote a Green Paper to the subject in 2004, with a view to a proposal for legislation perhaps at the end of 2004 or early in 2005.

To conclude, the Commission sees this measure as necessary in order to ensure the mutual trust which forms the basis of the measures set out in the mutual Recognition programme, of which the European Arrest Warrant was the first to reach political agreement. However, a common set of minimum standards on safeguards will be necessary for all the mutual recognition measures, to allay anxieties about the acceding States after enlargement and to ensure that the fundamental rights of the European citizen are respected in this important area. Whilst the Commission can see the arguments relating to the legal basis or that subsidiarity precludes such a step, it does not agree. It will put forward the proposal in the autumn and defend it vigorously.