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DRAFT REPORT

on the implementation of the European Arrest Warrant and the surrender procedures between Member States
(2019/2207(INI))

Committee on Civil Liberties, Justice and Home Affairs

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CONTENTS

Page

EXPLANATORY STATEMENT - SUMMARY OF FACTS AND FINDINGS 3

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....8

EXPLANATORY STATEMENT - SUMMARY OF FACTS AND FINDINGS

Procedure and sources

The 2002 Framework Decision on the European Arrest Warrant (EAW) is the first mutual recognition instrument in the field of EU criminal, and thus the instrument where most experience as regards the issue of mutual recognition exists. It is based on Articles 31(a) and (b) and Article 34(2)(b) of the former TEU and was proposed by the Commission under the former third pillar. It had to be transposed till 31 December 2003. Thus, Member States have 16 years of experience with the mentioned instrument. All Member States participate in the instrument. This report represents an opportunity to assess how the mechanism set up by Framework Decision 2002/584/JHA was applied in the Member States concerned.

As stated above, this instrument is based on the principle of mutual recognition, which means that EAWs issued in one Member State have to be directly recognised and enforced in another Member State, except in certain specific cases.

The report will look into:

— the obstacles encountered in the implementation at Member States level;

— the connection with complementary instruments;

— challenges related to the diversity of measures that Member States may apply in execution of the EAWs;

— the impact of the instrument in terms of protection of fundamental rights;

— recommendations on how to overcome the diverse challenges encountered in implementation.

The rapporteur has collected information and has relied on the following sources, among others:

— an extensive exchange of views with stakeholders in the LIBE committee meeting held on 20 February 2020;

— an Ex-post Impact assessment by Parliament's EPRS services, published in June 2020;

— exchange of information with the relevant stakeholders, such as the European Commission, Eurojust, FRA, academics (including the 2016 EP EAW report) and practitioners using the instrument;

- the Commission implementation report of 2 July 2020.

General overview of the implementation of the EAW

Since the entry into force of Framework Decision 2002/584/EU on the EAW in 2004, a substantial amount of data exists, although there is sometimes an issue with the coherence of data collected and to understand them correctly, for example the statistical divergence between EAWs issued and EAWs enforced whereby a simple reading of numbers would create the wrong impression that the rate of compliance is low. This is not the case as explained by the Commission. In addition, a comprehensive number of national and Court of Justice judgments exists further clarifying some issues and showing the need for possible improvements or consolidations. In addition, practitioners and EU bodies, such as Eurojust have collected a significant amount of expertise, as for example Eurojust published even a guidebook of CJEU case-law of the EAW. The issue has been also substantially analysed by NGOs, for example Fair Trials International, 2016 CCBE report and others.

Based on such data input it can be established that as a general principle the EAW functions satisfactory. However, some areas through the application of the instruments showed the need for further clarifications. They relate to:

- The definition of ne bis in idem; in the past the CJEU clearly defined the issue of the obligatory non-recognition based on ne bis in idem in Article 3(2) EAW, whereby the question of "same acts" and "execution of sanction" had to be clarified;

- The issue of several EAWs from different Members States and their order;

- The issue of proportionality – the issuing of EAWs for minor offences in some Member States; issue has been addressed through the EAW Manual;

- The issue of additional non-recognition grounds not foreseen explicitly in the EAW Framework Decision and relating to fundamental rights, such as prison conditions or independence of judiciary; it has been clarified by the CJEU that Article 3 ECHR (Article 4 of the Charter) fully applies as regards prison conditions as well as certain basic safeguards of a fair trial, like independence and impartiality of judiciary whereby CJEU used a lighter standard for assessment (not ECtHR flagrant denial of justice);

- Issues with the definition of judicial authority, CJEU clarified that issuing authorities can be only independent prosecutors and judges; in that regard Eurojust prepared a guide for interpretation of the different national prosecutorial systems;

- The issue of double criminality as regards assessment of offences outside the list of 32 offence for which double criminality has been excluded;

- The issue of coherence with other instruments as regards rights of the suspect, such as Directive on interpretation and translation in criminal proceedings, Directive on right to information in criminal proceedings and Directive on access to a lawyer, as well as regards other mutual recognition instruments, such as Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, or Directive 2014/41/EU on the European Investigation Order:

- - The issue of common understanding of certain EAW concepts, such as a common understanding of EAWs during a criminal procedure (and the notion of "trial ready),

the issue of accessory offences, time limits and notification requirements, etc.

Main finding and recommendation of the Rapporteur

Based on the above mentioned the rapporteur would like to point out the following:

a. General issues

The EAW system, based on available statistics, is a success and existing limited problems do not put this into question. One of the main points of added value is the applicability to all EU Member States; in that regard any corrections and improvements should take this into account and built on it.

b. Past legal issues and the role of the CJEU and other soft law tools

A significant amount of open legal questions could be addressed by a cooperation between national courts and the CJEU through preliminary questions; based on this answers on the definition of "issuing judicial authority" were provided (courts and independent prosecutors); prohibition of torture, inhuman and degrading treatment as regards prison conditions as well as the importance of independence of national judicial systems has been highlighted; the principle of ne bis in idem has been clarified: as well as connection with other instruments clarified (on recognition of prison sentences), etc. In addition questions could be clarified in the past by soft law measures, such as EAW manuals, Eurojust information notices, training of judges and experts.

c. Dual criminality and further development of the Area of Freedom, Security and Justice

Dual criminality presented an issue in certain cases mainly as regards the different interpretation of the scope of the check and the issue of the category of 32 offences for which no check should take place; certain practical and judicial clarification in that regard seems necessary. In that regard, in view of further integration, a possible enlargement of the list of 32 offences should be considered (for example hate crime or offences against public order and constitutional integrity of Member States) or even a different approach within the Framework Decision on the European Arrest Warrant on the matter with a so-called "negative list as was foreseen in Articles 27/28 of the initial Commission proposal on the EAW (COM(2001)0522 final). There the Commission stated: "Under Article 27, each Member State may draw up a list of forms of conduct for which it declares in advance it will refuse to execute European arrest warrants ("negative list" system). This list may include forms of conduct that do not constitute offences in the Member State making the list but which are in other Member States. Offences which have been decriminalised over the years (abortion, drug use, euthanasia, etc.) are typical of what might be on this list. Decriminalisation in these cases can be seen as the outcome of a democratic debate within the State which, consequently, no longer agrees to cooperate with

other States which still treats these forms of conduct as criminal offences. The list will also cover more general aspects of criminal liability, such as the minimum age for liability. The list of offences provided for by this Article must be communicated to the General Secretariat of the Council and to the Commission, and it must be published. But at least three months will be needed after publication of the list before the Member State can rely on the exceptions in it.".

d. Coherency

The Rapporteur considers that one of the main issues is coherency of application. The issue is often not the EAW FD as such but mainly a different understanding of some concepts and the need by the Commission to offer certain guidance and, if necessary, to start infringement proceedings to provide for a common understanding;

In that regard it is important that a clear coherent vision for EU criminal law and mutual recognition in criminal law exists, taking into account also the existing level of harmonisation of procedural and fundamental rights in criminal law. Such a coherent view demands that the same solution is applied in different mutual recognition instruments and a case by case patchwork is neither good legislation not helpful for practitioners. For example the use of obligatory and facultative non-recognition grounds in the EAW FD but only facultative ones in other instruments, the systematic use and definition of a fundamental rights non-recognition ground and the same catalogue of non-recognition grounds, etc.

The identified coherency issues shall be addressed by practical measures (training of practitioners), soft-law (manuals and recommendations), possibly very targeted legislation (definition of judicial authority, *ne bis in idem*, fundamental rights, etc.,) and supplementing legislation (pre-trial detention). In the medium and long term also an EU code in criminal matters shall be established.

e. Training

Training is one of the main components for an adequate application of the EAW. A lot has been done through past years by platforms such as EJTN, co-financed by the Commission, introducing special training for judges and prosecutors on EU mutual recognition instruments and language training. Unfortunately, not all member States and schools of judiciary are regularly part of such training. In that regard an additional EU platform, including all EU Member states, shall be considered, intended for information exchange and learning, including an overview of the different national EAW case-law.

f. Harmonisation of procedural rights and guarantees and mutual trust

Often the issue is not the FD EAW but the lack of mutual trust due to lack of harmonisation of certain common fundamental procedural rights and standards. A certain achievement was made by the six directive on procedural rights of suspects, the Directive on victims' rights and harmonisation of certain criminal offences under Article 83(1) TFEU. However, as a priority

supplementing legislation shall be assessed in the field of admissibility of evidence (the importance of common standards as regards final judgments and their mutual recognition) and even more as regards pre-trial detention. For prison conditions in the phase of pre-trial detention a legal basis in Article 82(2) TFEU exists. Such standards should aim for the highest possible standards and not the lowest common denominator. In should be avoided, as in the past in some directives, that unclear exceptions are provided furthering Member States to use them in a broad way (like limitations to a right to a lawyer in the pre-trial phase). In that regard as a matter of urgency the Commission should warn Member States that did not transpose common standards and start infringement proceedings, if necessary. Only a full adherence to commonly agreed standards can foster mutual trust.

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the implementation of the European Arrest Warrant and the surrender procedures between Member States
(2019/2207(INI))

The European Parliament,

– having regard to Articles 2, 3, 6 and 7 of the Treaty on European Union (TEU) and Article 82 of the Treaty on the Functioning of the European Union (TFEU),

– having regard to the Charter of Fundamental Rights of the European Union,

– having regard to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States[1],

– having regard to Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[2],

– having regard to the Commission reports on the implementation of the European Arrest Warrant and the surrender procedures between Member States (COM(2005)0063 and SEC(2005)0267, COM(2006)0008 and SEC(2006)0079, COM(2007)0407 and SEC(2007)0979, and COM(2011)0175 and SEC(2011)0430),

– having regard to the revised version of the handbook on how to issue and execute a European Arrest Warrant,

– having regard to its resolutions of 15 December 2011 on detention conditions in the EU[3] and of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant[4],

– having regard to the 2009 Council roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[5],

– having regard to Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings[6],

– having regard to Directive 2012/13/EU of the European Parliament and of the Council

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[1] OJ L 190, 18.7.2002, p. 1.
[2] OJ L 81, 27.3.2009, p. 24.
[3] OJ C 168 E, 14.6.2013, p. 82.
[4] OJ C 285, 29.8.2017, p. 135.
[5] OJ C 295, 4.12.2009, p. 3.
[6] OJ L 280, 26.10.2010, p. 1.

of 22 May 2012 on the right to information in criminal proceedings[7],

– having regard to Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[8],

– having regard to Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings[9],

– having regard to the European Parliamentary Research Service (EPRS) European Implementation Assessment of June 2020 on the European Arrest Warrant,

– having regard to the Commission report of 2 July 2020 on the implementation of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (COM(2020)0270),

– having regard to the European Added Value Assessment completed in January 2014 at the request of EPRS on the European Arrest Warrant,

– having regard to the final report of the Council of 27 May 2009 on the fourth round of mutual evaluations – the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States,

– having regard to the Commission report of 26 September 2019 on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (COM(2019)0560),

– having regard to the Council conclusions of 13 December 2018 on mutual recognition in criminal matters – 'Promoting mutual recognition by enhancing mutual trust'[10],

– having regard to the EU Strategy on victims' rights (2020-2025) (COM(2020)0258),

– having regard to Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust)[11],

– having regard to the 2002 Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,

– having regard to Rule 54 of its Rules of Procedure, as well as Article 1(1)(e) of, and

[7] OJ L 142, 1.6.2012, p. 1.
[8] OJ L 294, 6.11.2013, p. 1.
[9] OJ L 297, 4.11.2016, p. 1.
[10] OJ C 449, 13.12.2018, p. 6.
[11] OJ L 295, 21.11.2018, p. 138.

Annex 3 to, the decision of the Conference of Presidents of 12 December 2002 on the procedure for granting authorisation to draw up own-initiative reports,

– having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A9-0000/2020),

A. whereas the EAW is a simplified and fast-track judicial surrender procedure which, since its launch, has been the flagship and most used instrument for mutual recognition in criminal matters;

B. whereas the EAW is a success and has replaced extraditions with transfers; whereas transfers have been shortened to 40 days on average where the individual does not consent;

C. whereas EU judicial cooperation on criminal matters is based on mutual recognition introduced by the 1999 Tampere European Council; whereas the Treaty of Lisbon significantly changed the EU's prerogatives and provided an explicit legal basis in Article 82 TFEU;

D. whereas mutual recognition is not new but was developed in the area of free movement of goods, persons, services and capital (*Cassis de Dijon* logic);

E. whereas mutual recognition means the direct recognition of judicial decisions from other Member States with non-recognition as an exception; whereas it also entails cooperation between the competent judicial authorities;

F. whereas mutual recognition is a consequence of mutual trust based on a common understanding of the rule of law and fundamental rights; whereas reinforcing trust is key for the EAW to operate smoothly;

G. whereas the EAW is the foundation for establishing an area of freedom, security and justice; whereas its incorrect application could have devastating effects on the functioning of the Schengen area;

H. whereas a Union of equality that protects must ensure protection for all victims of crime[12];

I. whereas most issues raised by the application of the EAW have been clarified by the CJEU, such as *ne bis in idem*[13], judicial authority[14], primacy and EU harmonisation[15], independence of the judiciary[16], fundamental rights[17], double criminality[18] and the extradition of EU citizens to third countries[19];

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[12] EU Strategy on victims' rights (2020-25).
[13] C-261/09, *Mantello*.
[14] C-453/16 PPU, *Özçelik*; C-452/16 PPU, *Poltorak*; C-477/16 PPU, *Kovalkovas*; Joined Cases C-508/18 and C-82/19 PPU, *OG and PI*.
[15] C-399/11, *Melloni* or C-42/17, *M.A.S. and M.B*.
[16] C-216/18 PPU, *Minister for Justice and Equality*.
[17] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*; C-128/18, *Dorobantu*.
[18] C-289/15, *Grundza*.
[19] C-182/15, *Petruhhin*, judgment of 6 September 2016; C-191/16, *Pisciotti,* judgment of 10 April 2018; C-247/17 *Raugevicius*, judgment of 13 November 2018 and C-897/19 PPU, *Ruska Federacija*, Judgment of the Court (Grand Chamber) of 2 April 2020, etc.

J. whereas double criminality is a concept of international extradition and is scarcely compatible with mutual recognition; whereas the list of offences without a double criminality check should be reassessed; whereas in its initial proposal, the Commission sought an exhaustive list for which surrender could be refused ('negative list');

K. whereas mutual recognition needs harmonisation of criminal material law and procedure; whereas progress has been made in the last few years, such as the six directives on procedural rights, Directive 2012/29/EU on victims' rights[20], and the harmonisation of criminal offences;

L. whereas there are difficulties with certain provisions of Directive 2013/48/EU on the right of access to a lawyer and the EAW;

M. whereas other instruments have clarified some EAW issues, such as Directive 2014/41/EU on the European Investigation Order[21] and Regulation (EU) 1805/2018 on the mutual recognition of freezing and confiscation orders[22];

N. whereas mutual recognition requires practitioners to be trained in EU law;

O. whereas facilitation and coordination by Eurojust has proven a useful tool for mutual recognition; whereas the mandate of Eurojust is independent of the EPPO;

P. whereas data comparisons shows a trend of increased EAWs;

Q. whereas a harmonised EAW implementation will prevent forum shopping;

General assessment of EAW implementation

1. Points out that the EAW is a major achievement and an effective and indispensable instrument; states that the EAW has substantially improved cooperation on surrenders;

2. Notes the existence of particular problems; finds that these do not call the system into question;

3. Notes that such problems relate to prison conditions, proportionality, the execution of custodial sentences[23], time limits[24] and *in absentia* decisions; acknowledges that certain cases raised the issue of double criminality[25];

4. Notes that issues were solved by a combination of soft law (EAW handbook), mutual assessments, the assistance of Eurojust, CJEU case law and supplementing legislation (Framework Decision 2009/299/JHA and Directive 2013/48/EU);

5. Points out that the EAW should be enhanced as all Member States take part in it;

6. Notes that the Treaties (Protocols 21 and 22) provide special status for two Member States – Ireland has an opt-in option and Denmark does not take part in EU criminal

[20] OJ L 315, 14.11.2012, p. 57.
[21] OJ L 130, 1.5.2014, p. 1.
[22] OJ L 303, 28.11.2018, p. 1.
[23] CJEU, C-579/15, *Popławski*.
[24] CJEU, C-168/13 PPU, *Jeremy F*.
[25] With guidance from C-289/15, *Grundza*, referring to Council Framework Decision 2008/909/JHA.

law; highlights the importance of ensuring consistency on JHA;

7. Underlines that the EAW should not be misused for minor offences; urges the use of less intrusive legal instruments; points out that issuing authorities should carry out proportionality checks;

8. Highlights that according to the CJEU, the refusal to execute an EAW is an exception to mutual recognition and must be interpreted strictly[26];

Recommendations to improve how the EAW functions

9. Calls on the Commission to provide for understandable data as the existing data is confusing and can offer a false impression of the (non)efficiency of EAWs; calls on Member States to collect and transfer data to the Commission;

10. Points out that a double criminality check limits mutual recognition and, according to the CJEU, must be interpreted restrictively; notes that mutual recognition should ideally work automatically[27];

11. Calls on the Commission to analyse common offences in the Member States and to assess the possibility of expanding the list of offences that do not require a double criminality check; highlights the importance of assessing the inclusion of additional offences such as particular environmental crimes (e.g. ship-source pollution offences), hate crimes, sexual abuse, offences committed through digital means such as identity theft, offences against public order and the constitutional integrity of the Member States, crimes of genocide, crimes against humanity and war crimes;

12. Calls on the Commission to analyse the possibility of reducing the three-year threshold in Article 2(2) of the EAW for certain offences, such as trafficking in human beings and sexual exploitation of children and child pornography;

13. Calls on the Commission to assess, with a view to further integration, the establishment of an exhaustive list for which surrender could be refused (‘negative list’) instead of the list of 32 offences;

14. Calls on the Commission to clarify accessory or related offences;

15. Stresses the importance of defining more precisely the duties and competencies of the bodies involved in EAW procedures and ensuring that they are specialised and have practical experience; affirms that a broad margin of discretion for the executing authority is scarcely compatible with mutual recognition; considers that discretion should be limited in cases of double criminality;

16. Calls on the Commission to continue assessing the transposition of the EAW and other judicial cooperation instruments and to initiate infringement proceedings where necessary;

17. Calls on the Member States to implement the EAW and alternative legal instruments on

[26] See, for example, Case C-216/18 PPU, *Minister for Justice and Equality*.
[27] See, for example, the Commission communication of 26 July 2000 on the Mutual Recognition of Final Decisions in Criminal Matters (COM(2000)0495).

criminal matters in a timely and proper fashion;

18. Notes the Commission's worrisome report on the implementation of Directive 2013/48/EU on the right of access to a lawyer in EAW proceedings; calls on the Commission to continue to assess Member States' compliance with the directive and to take appropriate measures to ensure conformity with its provisions;

19. Calls on the Member States to provide flexibility for EAW language regimes;

20. Calls on the Commission to provide for a uniform application and effective monitoring of time limits;

21. Calls on the Commission to ensure adequate funding for Eurojust and EJN for facilitating and coordinating the EAW; notes that the Commission's budgetary plans for Eurojust would have led to a stagnation in financing despite an increased workload;

22. Calls on the Commission and the Member States to provide appropriate funding for the training of EAW practitioners, including police, prosecutors, the judiciary and defence lawyers; notes the value of EJTN programmes, such as EAW simulations and language training;

23. Calls on the Commission to launch a training platform for experts and practitioners on mutual recognition instruments, including the EAW; affirms that it should provide them with knowledge about the close relationship between instruments, including a common space to exchange experiences;

24. Notes that cooperation between authorities, including compliance on fundamental rights, can be improved by using technology and digitalisation; requests that a centralised database be developed on national EAW application (as with other areas of EU law)[28];

25. Calls on the Commission to take account of the opinions of national parliaments in line with Protocol 2, as their participation provides a democratic check on EU criminal law;

Recommendations on fundamental rights

26. Calls on Member States to respect the obligations of Article 2 TEU (on human dignity, freedom, democracy, equality, the rule of law and human rights, including minority rights);

27. Notes that although Article 7(1) TEU can affect mutual recognition, according to the CJEU, the executing authority must assess in each specific case whether there are substantial grounds for believing that, following the surrender, the person will run the risk of having their fundamental rights contravened; underlines that the triggering of Article 7(1) TEU does not amount to automatic non-recognition;

28. Reiterates the importance of an EU mechanism on democracy, the rule of law and fundamental rights, in the form of an interinstitutional agreement consisting of an annual independent and evidence-based review to assess the compliance of all EU

[28] See the EPRS European Implementation Assessment of June 2020 on the EAW.

Member States with Article 2 TEU, plus country-specific recommendations;

29. Calls on the Commission to issue supplementing instruments on procedural rights, such as on admissibility and prison conditions in pre-trial detention, matching or surpassing CoE standards, including time limits on pre-trial detention; states that the Commission should aim for the highest standards;

30. Calls on the Commission to provide an assessment of *ne bis in idem* and possible legislative action;

31. Calls on the Member States to ratify the Optional Protocol to the UN Convention against Torture;

32. Points out that shortcomings with the EAW can lead to a denial of access to justice and a lack of protection for victims; emphasises that impunity, as a result of deficiencies in judicial cooperation, has a very negative impact on the rule of law, judicial systems and society;

For a coherent EAW legal framework

33. States that the EAW is effective; believes, however, that the main issue relates to coherence;

34. Calls on the Commission to provide for a coherent policy on mutual recognition to avoid different answers to the same issues;

35. Calls on the Commission to conduct a cross-case study of instruments so as to prevent abnormalities, as with the rules on transfer of prisoners and EAWs;

36. States that coherency issues must be addressed by practical measures (training of practitioners), soft law (handbooks and recommendations), very targeted legislation (the definition of judicial authority, *ne bis in idem*, fundamental rights, etc.) and supplementing legislation (pre-trial detention);

37. Recommends, in the medium term, the promotion of an EU judicial code in criminal matters to guarantee legal certainty and coherence;

Brexit

38. Calls on the Commission to continue negotiations with the UK in order to find the best solution that guarantees effective cooperation in criminal matters;

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39. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.