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WORKING DOCUMENT

on the impact of the European arrest warrant on fundamental rights; initial guidelines with a view to a recommendation to the Council

(Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - COM(2005) 63 and SEC(2005)267)

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This working document concerns the impact of the European arrest warrant (EAW) on fundamental rights. It also sets out initial guidelines with a view to the recommendation to the Council pursuant to Rule 94 of the Rules of Procedure.

1. Respect for fundamental rights, a key aspect of mutual trust

Are the legitimate efforts to make the EAW as effective as possible not liable to pose a threat to the protection of fundamental rights? Given that its aim is to ensure that an individual can be arrested, detained and handed over to the judicial authorities of an applicant country, the EAW has a direct impact on the physical liberty of the individual concerned and, more generally, of the whole of EU society.

1.1 Implementation dependent on constitutional case law relating, in particular, to nationals and fundamental rights

A few Member States considered that they needed to revise their constitutions prior to implementation of the EAW. Others considered that this was not necessary. The Supreme Courts of a number of Member States, i.e. those of Belgium, Germany, Finland, Greece, Poland and Hungary, and the French Court of Cassation, were required to give a ruling on the implementation of the EAW.

To date, two decisions, both of them relating more specifically to application of the EAW to nationals, have raised problems. In Poland, the Court, in its ruling of 27 April 2005, stated that the surrender of nationals could not take place without a revision of the constitution. The Court set the government a deadline of 18 months in which to revise the constitution in order to make it possible for Polish citizens to be surrendered, without however suspending the application of the EAW.

In the Federal Republic of Germany, the Constitutional Court, in its ruling of 18 July 2005, declared the German law implementing the Framework Decision to be null and void. While confirming that the Framework Decision could serve as a legal basis for surrender, it considered that the surrender of German nationals to another Member State would no longer be possible until a new law implementing the Framework Decision entered into force. In the intervening period the German authorities will have to apply the provisions on extradition and will not be authorised to effect 'surrenders'. However, they could continue to issue EAWs since the legal provisions concerning their issue have not been annulled.

The Belgian Court of Arbitration is currently considering an application for annulment of the Belgian law on the EAW relating both to the legal basis and to the risk of discrimination in the event of derogations from the principle of double criminality. In Finland, consideration could be given to a revision of the constitution, despite the fact that the Framework Decision has already been transposed, for the sake of legal certainty. An appeal on the grounds of unconstitutionality may be lodged with the Czech Constitutional Court.

As the situation in Germany shows, the full and coherent implementation of the EAW in all Member States still has a long way to go. It is hardly surprising that a number of these difficulties have arisen in relation to the key issue of fundamental rights.

1.2 What possibility is there that European arrest warrants may not be executed on

grounds of protection of fundamental rights?

The judicial nature of the EAW in contrast with conventional extradition procedures is a factor which should, a priori, facilitate respect for fundamental rights as it will restrict the scope for arbitrary decisions. It is also worth noting that the Framework Decision is more precise than traditional extradition as regards, for example, the *ne bis in idem* principle, the right to a lawyer and the right to deduct the period of detention served from the term of the sentence. The arrest warrant therefore also represents a step forward for the rule of law.

Recitals 12 and 13 of the preamble and Article 1 of the Framework Decision explicitly refer to the obligation to respect fundamental rights. Article 1.3, stipulates that 'this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'[1]. Non-uniform application of the Framework Decision could lead to discrimination against persons arrested on the basis of the EAW, depending on whether or not the courts in the State of execution checked the EAW's compliance with fundamental rights. This kind of verification might be contrary to the principle of mutual recognition.

The European legislator's intention, based on the principle of mutual trust, was to concentrate judicial verification of respect for fundamental rights in the issuing State, while the court of the executing State would remain obliged to refuse to recognise or execute an EAW which violated fundamental rights.

The positive reference to Article 6 of the TEU[2] might unfortunately not be sufficient to guarantee full protection of human rights, as was pointed out by the German Constitutional Court with regard to German nationals.

The mandatory grounds for refusing to execute an EAW do not explicitly include cases in which the executing State has responsibilities under the European Convention on Human Rights. Under the Convention's provisions, a Member State could be held responsible if there was evidence that an individual was in genuine danger of being subjected to ill-treatment (in particular, torture or inhuman or degrading treatment) and that, despite this, he was surrendered to the issuing State[3]. The decisions of the European Court of Human Rights are clear in this respect and emphasise that the State party to the Convention is under an obligation not to surrender the individual in question under such circumstances. In its evaluation, the Commission considers this risk to be low[4].

Only three grounds for non-execution of the arrest warrant are made mandatory by the

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[1] Article 6 of the Treaty on European Union calls for respect for fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Charter of Fundamental Rights of the European Union and the constitutional traditions common to the Member States.

[2] and to the mechanism under Article 70 TEU (case of a serious and persistent breach of principles mentioned in Article 6), as referred to in paragraph 10 of the preamble to the Framework Decision.

[3] Article 23(4) of the Framework Decision states, in particular, that: 'The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist.'

[4] 'In a system based on mutual trust, such a situation should remain exceptional', COM(2005)63, p. 6.

Framework Decision (Article 3). The seven other grounds are left to the discretion of the Member States (Article 4). The three possible grounds for mandatory non-execution are an amnesty; the requested person has been finally judged in respect of the same acts; or the person may not, owing to his age, be held criminally responsible for the acts. In this connection, it is regrettable that the Framework Decision does not explicitly include the obligation not to surrender an individual in the cases referred to in Article 3 of the ECHR[1].

1.3 Stepping up evaluation to strengthen mutual trust

In general, if a genuine area of freedom, security and justice is to be successfully introduced, with due respect for the diversity of judicial cultures and systems, a common reference framework needs to be established, as well as a mutual evaluation mechanism aimed at guaranteeing that European citizens are treated in a similar manner. The Constitutional Treaty offered the prospect of more effective evaluation, as a complement to the measures already taken since Tampere[2].

Mutual evaluation is essential in guaranteeing equivalent treatment for all European citizens throughout the European Union and strengthening mutual trust between Member States, thereby facilitating the application of the principle of mutual recognition of judicial decisions and, in particular, the surrender of citizens by their own Member State to a court in another Member State[3].

In addition to legislative measures and as a support for such measures, steps should be taken to develop the common fundamental rights culture in Europe[4]. Measures to promote dialogue, exchanged of information and the establishment of networks between supreme courts, judicial bodies, the legal profession and researchers should be encouraged, as already recommended by Parliament. Trust cannot be decreed but must be developed and consolidated in practice.

The future Fundamental Rights Agency should play a role in this respect[5].

2. Initial guidelines with a view to the recommendation to the Council

With a view to the discussion in the LIBE Committee and the debates we will hold with our colleagues from the national parliaments at the Parliamentary Meetings on 17 and 18 October 2005, I am putting forward the following initial guidelines which will subsequently be

[1] Article 3 of the Convention on Human Rights stipulates that 'no-one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
[2] In particular, Article III-260, which provides for the creation of a mechanism for the mutual evaluation of measures relating to the AFSJ.
[3] European Parliament Recommendation to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States (P6_TA(2005)0030, 22.02.2005). Rapporteur: Mr Antonio Costa (2005/2003(INI)).
[4] Resolution on promotion and protection of fundamental rights: the role of national and European institutions, including Fundamental Rights Agency (P6_TA-PROV(2005)0208, 11.05.2005). Rapporteur: Mrs Kinga Gál (2005/2007(INI)).
[5] Parliament will shortly vote on the proposals for a Council Regulation and a Council Decision establishing a European Union Agency for fundamental rights COM(2005)280, 30.06.2005.

converted into a series of recommendations pursuant to rule 94 of the Rules of Procedure:

- It is regrettable that, as the EAW is a third pillar instrument under Articles 31 and 34 of the Treaty on European Union, the European Parliament has been given a limited role in its adoption, as has control by the Court of Justice. In order to remedy this democratic shortcoming, the *'passerelle' clause in Article 42 of the TEU* should be applied as soon as possible in the spirit of the provisions contained in the Constitutional Treaty which - it should be noted - were not a controversial issue during the recent ratification campaigns.

- The EAW is an innovative measure which may serve as an example for the development of judicial cooperation and the strengthening of mutual trust and may have a direct impact on public freedoms. Specific *evaluation* procedures should therefore be devised, including a detailed evaluation of the problems encountered by legal practitioners on the ground. It would also be very useful for a breakdown of EAWs by category of offence to be included in future evaluations. The European Parliament and the national parliaments should be closely involved in the evaluation process in the spirit of Article III-260 of the Constitutional Treaty.

- It is important that the necessary resources be allocated to verifying the quality of *transposition*, a task coming under the responsibility of the Commission as guardian of the Treaties. The Commission must therefore be provided with the necessary resources for this task. It is also important to avoid carrying out a large number of parallel studies on the same subject even though the Council may be tempted to do its own research work on the grounds that this is a third pillar measure. What is needed is detailed and reliable information, which will be summarised by the Commission and forwarded for consideration to the European Parliament, the Council and the national parliaments.

- Mutual recognition and minimum harmonisation must go hand in hand. It is to be hoped that a more dynamic approach to harmonisation will develop which, without ignoring or minimising the differences between national judicial systems, will consolidate the common legislative corpus on which to base mutual recognition. At the present stage, the Council is far too timid in its approach to harmonisation, basing the whole process of building a European judicial area solely on mutual recognition. This recognition enables a certain amount of progress to be made, but will have a limited impact so long as the common legislative base remains too narrow.