European arrest warrant and surrender procedures between Member States. Framework decision

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The Commission presents its report on the implementation since 2007 of Council Framework Decision 2002/584/JHA on the European arrest warrant (EAW) and the surrender procedures between Member States, which entered into operation on 1 January 2004. Available statistics compiled for the years between 2005 and 2009 show that between 51% and 62% of requested persons consented to their surrender, on average within 14 to 17 days. The average surrender time for those who did not consent was 48 days. This **contrasts very favourably with the pre-EAW position** of a one-year average for the extradition of requested persons and has undoubtedly reinforced the free movement of persons within the EU by providing a more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice.

Nevertheless, the past seven years have also shown that, despite its operational success, the EAW system is far from perfect. Member States, parliamentarians, groups from civil society and individual citizens have all expressed some concerns in relation to the operation of the EAW and in particular its effect on fundamental rights. There are also shortcomings in the way some Member States implement the Council Framework Decision. These include the following;

- no entitlement to legal representation in the issuing state during the surrender proceedings in the executing state;
- detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons;
- the non-uniform application of a proportionality check by issuing states, resulting in requests for surrender for relatively minor offences that, in the absence of a proportionality check in the executing state, must be executed.

From the issues raised in relation to the operation of the EAW it would seem that, despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights (ECHR), there are often some **doubts about standards being similar across the EU**. While an individual can have recourse to the European Court of Human Rights to assert rights arising from the European Convention on Human Rights, this can only be done after an alleged breach has occurred and all domestic legal avenues have been exhausted. This has not proved to be an effective means of ensuring that signatories comply with the Convention's standards. This situation has informed the Commission's ongoing work on the implementation of the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. This report sets out the measures being taken to implement the roadmap. As part of the measures proposed in the roadmap, the paper notes that research on the right to legal advice will examine the issue of representation for requested persons in both executing and issuing states in the course of surrender proceedings.

It also notes that in 2009 the Council adopted Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. The Framework Decision introduces the possibility of transferring a non-custodial supervision measure from the Member State where the non-resident is suspected of having committed an offence to the Member State where he/she is normally resident. This will allow a suspected person to be subject to a supervision measure in his normal environment pending trial in the foreign Member State.

On the issue of **proportionality**, the Commission goes on to note that there is general agreement among Member States that a **proportionality check is necessary** to prevent EAWs from being issued for offences which, although they fall within the scope of the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires. Several aspects should be considered before issuing the EAW including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. In 2010, the Council included an **amendment to the handbook on the EAW** in respect of proportionality. The amended handbook now sets out the factors to be assessed when issuing an EAW and possible alternatives to be considered before issuing an EAW. If the amended handbook is followed by Member States, it will provide a basis for some consistency in the manner in which a proportionality check is applied. The Commission endorses this approach and urges Member States to take positive steps to ensure that practitioners use the amended handbook (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.

The report concludes that action is required in the following areas:

- **Transposition:** Member States should take legislative action to address the areas (set out in detail in the tables in the accompanying
- Staff Working Document) where their implementing legislation fails to comply with the Council Framework Decision on the EAW.
- **Fundamental Rights**: there must be implementation of the measures arising from the roadmap on procedural rights for suspects and accused persons to ensure that fundamental rights are protected and to improve the mutual trust that is essential to the continued operation of mutual recognition instruments such as the Council Framework Decision on the EAW.
- **Proportionality:** judicial authorities should use the EAW system only when a surrender request is proportionate in all the circumstances of the case and should apply a proportionality test in a uniform way across Member States. Member States must take positive steps to ensure that practitioners use the amended handbook (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.
- **Training:** the Commission communication planned for September 2011 on European judicial training is intended to address the need for specific training for both judicial authorities and legal practitioners on the implementation of the EAW and on the new measures for strengthening procedural rights for suspects and accused persons.
- **Implementation of complementary instruments**: a considerable amount of work has been done since 2004 on identifying problems and improving the EAW system. There have been four Council Framework Decisions that affect the operation of the EAW, addressing the following issues: (i) in absentia judgments; (ii) conflicts of jurisdiction; (iii) recognition of supervision orders. Their expeditious implementation by Member States may further improve the practical operation of the EAW.
- **Statistics:** there are considerable shortcomings in the statistical data available for analysis. The Commission urges Member States to meet their obligation to report. Comprehensive statistics are essential for a proper evaluation of both the successes and shortcomings of the EAW. The Commission will make every effort to address the shortcomings in the questionnaire on EAW statistics and will look at ways of improving the collection of statistics.