



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**on the implementation since 2005 of the Council Framework Decision of 13 June 2002
on the European arrest warrant and the surrender procedures between Member States**

[SEC(2007) 979]

1. METHOD

Pursuant to Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹, the Commission presented a revised report evaluating the application of this instrument ("the Framework Decision") by all the Member States².

The second report being presented here is in response to a call made by the Council (Justice and Home Affairs) on 2 June 2005³ to update this evaluation to 1 June 2007 with the entry of Romania and Bulgaria into the Union on 1 January 2007. The evaluation criteria used by the Commission for this report are the general criteria now normally applied for evaluating the implementation of framework decisions (practical effectiveness, clarity and legal certainty, full application, compliance with the time limit for transposition)⁴ and criteria specific to the arrest warrant, principally the fact that it is a judicial instrument, its efficiency and its rapidity.

To produce this report the Commission has based itself primarily on the new national provisions giving effect to the arrest warrant as sent in by the Member States, on their published comments on the first report,⁵ and on the supplementary information supplied by the Council General Secretariat, in particular the available replies to the statistical questionnaire sent to the Member States by the Council Presidency⁶ and the declassified evaluation reports produced for Belgium⁷, Denmark⁸ and Estonia⁹. The Commission has also conducted a bilateral dialogue with the designated national contact points and attended the dialogue set up by the European Parliament with the national Parliaments on the subject¹⁰.

2. EVALUATION

2.1. Now general practice despite some initial difficulties with transposition

The arrest warrant is a success. This report shows how its use has grown year by year, in practice making it easy for judges to get persons handed over within binding time limits that are much shorter than with conventional extradition procedures (see 2.1.1). The Commission does, however, highlight in this report the transposition difficulties that had to be overcome in 2005, some of them stemming from constitutional requirements (2.1.2).

¹ OJ L 190, 18.7.2002, p. 1.

² COM(2005) 63 and SEC(2005) 267 of 23.2.2005, revised by COM(2006) 8 and SEC(2006) 79.

³ Council press release No 8849/05, 3.6.2005, p. 10; document No 8842/1/05, 19.5.2005.

⁴ COM(2001) 771 of 13.12.2001, point 1.2.2.

⁵ COPEN 118 of 2.9.2005.

⁶ COPEN 75 of 15.4.2005.

⁷ 16454/1/06 REV1 COPEN 128 dated 3 January 2007.

⁸ 13801/1/06 REV1 COPEN 106 dated 6 December 2006.

⁹ 5301/01/07 REV1 COPEN 6 dated 20 February 2007.

¹⁰ European Parliament recommendation to the Council on the European arrest warrant, 2005/2175(INI), 15.3.2006.

2.1.1. *The use of the European arrest warrant is now standard practice.*

The total number of requests exchanged between Member States has risen sharply. The European arrest warrant has therefore not only virtually replaced the extradition procedure within the European Union, but the use made of it, because of its advantages, is now much more widespread. The remaining cases of non-application mainly concern certain restrictions on:

- the transitional application of the European arrest warrant (Article 32/FR, IT and AT made the appropriate statements, but CZ, LU, SI did so incorrectly). Article 30(1) of the Italian Law states, however, that its provisions apply only to requests for execution of European arrest warrants issued and received after its entry into force, i.e. 14 May 2005; this is not in conformity with the Framework Decision. CZ and LU have made statements that are not consistent with Article 32 of the Framework Decision in that they concern European arrest warrants for which CZ and LU are both issuing States and executing States. For CZ, this difficulty was resolved by the adoption of an amendment to the law of transposition which came into force on 1 July 2006. In addition CZ now accepts and issues arrest warrants for offences committed before 1 November 2004, except in the case of its own nationals. For offences committed by Czech citizens prior to 1 November 2004, no surrender is possible other than by application of the European Convention on Extradition and its two Protocols of 15 October 1975 and 17 March 1978. For offences committed by Czech citizens after 1 November 2004, surrender is still subject to reciprocity;
- the surrender of nationals (Article 33/AT, which notified the Council to this effect, and also DE for part of 2005-2006 and CY and CZ, two countries that authorise surrender of their nationals only for offences committed after 1 November 2004 for CZ and 1 May 2004 for CY). For PL, the surrender of nationals is possible since the law was amended on 7 November 2006, but double criminality is always checked.

Although there is no common statistical tool shared by all the Member States, the data they have sent in seem to confirm that the European arrest warrant is now used as a matter of course everywhere and the general trends illustrated suggest that the procedure is effective.

For the whole of 2005, nearly 6 900 warrants were issued by the 23 Member States that sent in figures¹¹, twice as many as in 2004. In over 1 770 cases, the person wanted was traced and arrested. Unofficial figures for 2006 confirm this upward trend from year to year.

The warrants were transmitted mainly by Interpol (58% of all those issued) and/or by the Schengen Information System, in the 13 Member States with access to it (52% of the same total). In most of the remaining cases the European arrest warrants were simply sent direct between the Member States concerned¹². The figure

¹¹ BE and DE were unable to send in figures for 2005 (COPEN 52 9005/4/06 REV 4 of 30.6.2006 plus REV 5 of 18.1.2007).

¹² The sum of the figures 58% and 52% is higher than 100% as a single warrant can be sent by a number of different channels.

communicated by 23 Member States for the total number of European arrest warrants received was over 8 500, i.e. more than the number issued, since a European arrest warrant can be sent to more than one Member State.

In 2005 over 1 770 wanted persons were arrested on the basis of a European arrest warrant in the 23 Member States considered above. Of those arrested over 86% were actually surrendered to the issuing Member State (1 532 persons surrendered) (60% in 2004). Half of those surrendered in 2005 had given their consent to the procedure (a third in 2004). And over a fifth of those surrendered in 2005 within the European Union were nationals (or residents) of the Member State that agreed to their surrender, a guarantee under Article 5(3) of the Framework Decision having been required in half the cases.

The other types of guarantees which may be required in cases of sentencing *in absentia* or life sentences, are rarely asked for, except for certain countries such as NL that demands it systematically, thereby causing problems for the executing countries.

Overall the figures available for 2005 confirm that with the European arrest warrant, surrenders are effected within much shorter time limits than in the past. On average the time taken to execute requests, which used to be around a year under the old extradition procedure, has been reduced to under 5 weeks (43 days to be precise), and even 11 days in the frequent cases¹³ where the person consents to surrender (the corresponding figures for 2004 being around 45 and 15 days respectively). However, this average must not hide the fact that certain countries (IE and UK) take much longer and even exceed the maximum time limits set in the Framework Decision, something the Commission very much regrets. In 2005, the Commission noted around 80 cases (scarcely 5% of surrenders) where the 90-day time limit set in Article 17(4) of the Framework Decision could not be respected. The Commission would point out that while all delays are systematically reported to Eurojust by certain countries, this is not true for all of them and would urge all Member States to make the appropriate efforts.

In practical terms, if the form of the European arrest warrant annexed to the Framework Decision (Article 8) satisfies virtually all the Member States, experience shows that the sections relating to the identification of the person and the description of the offence must be completed with utmost care¹⁴. It should also be noted that the European Judicial Network has made information available on line to make it easier to identify the appropriate national judicial authorities (Article 10(1))¹⁵ and that Eurojust has published guidelines for deciding on competing European arrest warrants (Article 16(2))¹⁶.

¹³ The statistics for IE (answer to question 7.2 "between a week and a year") have not been included (COPEN 52 REV 4 of 30.6.2006).

¹⁴ RJE 6 of 31.3.2006.

¹⁵ <http://www.ejn-crimjust.eu.int>

¹⁶ Annex II to the annual Eurojust report for 2004.

2.1.2. *Difficulties with transposition deriving from constitutional requirements in certain Member States have now been overcome.*

Conflicts of laws prevented full application of the Framework Decision throughout the Union for a time in 2005 and 2006. All or some of the national implementing provisions were found to be unconstitutional in certain Member States (PL, DE, CY) in 2005. The Commission is pleased to report that these difficulties have been overcome and today are no longer an obstacle to application of the European arrest warrant.

In the first case (PL), only the provision of the law authorising surrender of nationals was deemed unconstitutional (Article 55(1)). But this provision continued to be applied until 6 November 2006, the deadline set by the Constitutional Court to allow the Government time to bring the constitution into line with the European obligations¹⁷. During this period PL therefore continued to surrender its nationals. The Polish Code of Criminal Procedure was amended following the revision of the Constitution on 7 November 2006. Although the amendments did not enter into force until 26 December 2006¹⁸, the new Article 55 of the Constitution was made directly applicable in Polish law from 7 November 2006 by decision of the Constitutional Tribunal.

In the second case (DE), the Constitutional Court considered it necessary to annul the entire law adopted for the execution of the European arrest warrant, on the ground that certain provisions were in conflict with the Basic Law. So between 18 July 2005 and 2 August 2006, the date on which the new German implementing law took effect, DE stopped surrendering or even extraditing its nationals. It agreed to surrender other wanted persons only under the extradition arrangements. It did, however, continue to issue European arrest warrants for other Member States¹⁹.

This situation gave rise to an unprecedented period of legal uncertainty. Two Member States (ES and HU) invoked a principle of reciprocity and during this period refused to recognise the European arrest warrants that DE continued to issue. ES and HU considered that as DE was no longer applying the principle of mutual trust, it could not demand in return that the other Member States accept its requests for the surrender of non-nationals. This situation ended on 2 August 2006 with the entry into force of the new implementing law adopted on 20 July 2006.

In the third case (CY), the Supreme Court held that the surrendering of Cypriots was unconstitutional, obliging the Government, as in PL, to embark on a constitution revision, which came into force on 28 July 2006²⁰. The new Article 11 as thus amended places, however, a time constraint on the possibility of surrendering nationals inasmuch as this is possible only for acts committed after the date of

¹⁷ Decision of the Constitutional Court (PL) P 1/05 of 27.4.2005, published in the official reports of decisions of the Constitutional Tribunal (Orzecznictwie Trybunału Konstytucyjnego. Zbiór urzędowy) 2005 ser. A No 4, item 42.

¹⁸ Articles 607p, 607t, 607w of the Polish Code of Criminal Procedure.

¹⁹ Decision of the Constitutional Court (DE) of 18.7.2005, BvR 2236/04, also available in 58 NJW (Neue Juristische Wochenschrift) 2289 (2005).

²⁰ Supreme Court (CY) decision of 7.11.2005, Ap. No 294/2005 (an English summary is also available: Council document No 14285/05 of 11.11.05).

accession of CY to the Union, i.e. 1 May 2004. The Constitution thus revised allows, moreover, the extradition of Cypriots for acts committed subsequent to the revision on the basis of international conventions ratified by CY.

It is also noteworthy that, conversely, in several other Member States the higher courts have upheld domestic provisions authorising the surrender of nationals (CZ²¹, EL, PT, etc.). In this respect the Constitutional Court of CZ has come out on the side of effective transposition of the Framework Decision. In its decision of 3 May 2006, the Constitutional Court refused to annul the transposition law concerning the European arrest warrant on the ground that the Member States of the European Union had to have mutual trust in each other's legal systems, including in criminal matters, and that Czech citizens, being in possession of European citizenship, had to assume the obligations as well as enjoy the rights that went with that status. Accordingly, the temporary surrender of a Czech citizen for sentencing or punishment is not contrary to the Czech Constitution, which cannot be construed as forming an obstacle to the effective transposition of a rule of European law.

Overall, this emphasises the importance Member States must place on creating greater consistency between their internal legal systems with a view to transposing framework decisions. Close attention must also be paid to what the Court of Justice had to say in response to the request for a preliminary ruling from the Belgian Court of Arbitration concerning the basis for Article 35 TEU.

In that case, a non-profit association, *Advocaten voor de Wereld*, lodged an appeal before the Belgian Court of Arbitration against the law of 19 December 2003²² transposing the Framework Decision in BE on the ground that it was incompatible with Articles 10 and 11 of the Belgian Constitution. The Constitutional Court stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling on the Framework Decision's compatibility with Article 34(2)(b) TEU, which provides that framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States, and on the conformity of the abolition of double criminality checks with Article 6(2) TEU and, more particularly, with the principles of legality in criminal matters and of equality and non-discrimination guaranteed by that provision.

In his conclusions, Advocate-General Colomer stated that the Framework Decision was not contrary to Articles 34(2)(b) and 2(2) and that it infringed neither the principle of legality in criminal matters nor the principle of equality and non-discrimination. In its judgment²³ the Court followed the Advocate-General's opinion and rejected all the arguments advanced by *Advocaten voor de Wereld*.

The balance sheet regarding the surrender system introduced by the Framework Decision is thus largely positive.

²¹ Constitutional Court decision of 3.5.2006, 434/2006 Sb.

²² *Moniteur belge* of 22.12.2003, 2nd edition, p. 60075.

²³ Judgment of 3 May 2007 in Case C-303/05, not yet reported.

2.2. A largely positive transposition balance sheet

2.2.1. *New implementation measures notified since 2005*

The new domestic legislative measures taken by Member States have in particular helped to define more closely the legal basis making it possible at national level to:

- take over execution of the sentence on the wanted person (Article 4(6)/BE)²⁴;
- provisionally arrest a person forming the subject matter of an Interpol alert issued by a Member State which is not yet party to the Schengen Information System (Article 9(3)/NL, SE, PL)²⁵;
- allow accessory surrender (for offences not all of which fall within the scope of the Framework Decision) (HU)²⁶.

These measures meet a need identified in the first report and confirmed in practice. They deserve to be considered good practice for those Member States which do not yet afford the same possibilities.

It should also be noted that:

- CZ has amended its transposition law so as to give full retroactive effect to the European arrest warrant²⁷. The amendment entered into force on 1 July 2006. As indicated above, there remains a limitation, however, in the case of Czech nationals in that the arrest warrant still cannot apply to offences committed by them before 1 November 2004;
- DE adopted a new transposition law on 20 July 2006. Entering into force on 2 August 2006, the law enables compliance with the above-mentioned Constitutional Court decision. Article 80 of the new German law, interpreted in conformity with the Constitutional Court decision, nevertheless stipulates that in “mixed” cases for which there is no clear national or foreign reference a double criminality check should be carried out and that the seriousness of the alleged offence should be weighed against the effectiveness of any proceedings – a provision which is seemingly incompatible with the Framework Decision;
- MT has adopted a new law amending the MT transposition law concerning the European arrest warrant, which entered into force on 19 September 2006.

Following the Commission’s first report, SI expressed its intention, like CZ, of amending its legislation in order to give full force to the European arrest warrant. As at 1 June 2007, the amendment had yet to be adopted.

²⁴ Paragraph 2.2.1 of the first report.

²⁵ Paragraph 2.2.2 of the first report.

²⁶ Article 2 of the Council of Europe’s European Convention on Extradition of 13.12.1957.

²⁷ Paragraph 2.1.1 of the first report.

2.2.2. *Comments and new information submitted following the first evaluation*

Most Member States reacted in writing to the Commission's first report. Their comments, which were published by the Council²⁸, induced the Commission's departments to revise partially the document annexed to this report. Of these comments, more than half consist of information which the Member States should in the first place have transmitted to the Commission under Article 34 of the Framework Decision, a quarter are justified by errors of fact or interpretation in the first report, and the remainder involve assessments which the Commission cannot share or mere observations.

In the light of these comments, while the general conclusions of the Commission's revised first report remain valid, the transposition balance sheet takes on a better appearance. Having said that, more still needs to be done in the area of compliance with the Framework Decision.

2.2.3. *More still needs to be done*

The improvements which the Member States have made since 2005 to the state of transposition of the Framework Decision, which overall is satisfactory, nevertheless leave intact the principal shortcomings highlighted by the Commission in its previous report.

For the record, apart from the above-mentioned problems concerning the temporal application of the European arrest warrant (CZ and PL for nationals, LU, SI) and the surrendering of nationals (CY), it is regrettable to still have to note the following defects in transposition:

- modification of the required minimum sentence thresholds (Article 2/NL, AT, PL; Article 4(7)(b)/UK);
- reintroduction of double criminality checks in respect of the entire list of 32 offence categories (Article 2/IT) or a single category (BE, SI²⁹, UK – where part of the offence is committed in its national territory, PL systematically for their nationals);
- appointment of an executive body as the competent judicial authority in whole (Article 6/DK) or in part (DE, EE, LV, LT);
- decision-making powers entrusted to the central authorities, going beyond the mere role of facilitation which the Framework Decision makes it possible to assign to them (Article 7/EE, IE, CY);
- alteration of grounds for mandatory non-execution (Article 3(1)/DK, IE); Article 3(2)/IE), or worse, introduction of grounds for refusal going beyond the Framework Decision (Article 1(3)/EL, IE, IT, CY, PL) or not provided for therein, such as those based on the application of treaties or conventions not expressly ruled out by the Framework Decision (Article 3/NL, UK). The new MT law

²⁸ http://ue.eu.int/cms3_Applications/applications/PolJu/details.asp?lang=FR&cmsid=545&id=66

²⁹ Draft law planned by SI for 2007.

amending the transposition law concerning the European arrest warrant has, however, abolished certain grounds for refusal such as those based on unjust and oppressive circumstances as provided for in Article 16(2) of the domestic law;

- imposition of additional conditions (Article 5(1)/MT, UK; Article 5(3)/NL, IT) or of particulars or documents not mentioned on the form (Article 8(1)/CZ, IT, MT). With regard to CZ, the Commission has been informed that a Ministry of Justice circular dated 19 May 2006 states that the form to be used for issuing an EAW will be that contained in the Framework Decision, a circular being a legislative instrument under Czech law. Moreover, a request for additional information may be made by the Czech judicial authorities only where they act as issuing authority. In practice, some countries (UK, IE) seem to ask almost systematically for additional information or even to insist on the arrest warrant being re-issued – a requirement which poses problems for certain countries whose legislation does not allow this and which lengthens proceedings considerably;
- in relation to the surrender of nationals, introduction of a time limit (Article 4(6)/CZ and PL for nationals) or reintroduction of double criminality checks (Article 5(3)/NL, PL) and of conversion of the sentence imposed in another Member State (CZ, NL, PL);
- procedural vagueness when it comes to obtaining the wanted person's consent (Article 13/DK; Article 14/DK);
- diversity of practices in relation to "accessory surrender" (situation where the European arrest warrant concerns not only an offence covered by the Framework Decision but also other offences outside the Framework Decision's scope) due to the lack of any express provision in the Framework Decision (Article 16). Such surrender is possible in at least nine Member States (DK, DE, EE, ES, FI, LV, LT, AT, SE). In France, it is for the courts to decide whether such surrender is possible since the law does not cover such an eventuality;
- absence of a maximum time limit for the higher courts' decision (Article 17/CZ, MT, PT, SK, UK) or a total maximum time limit exceeding the standard 60 days (BE) or the 90-day ceiling in the event of a final appeal (FR, IT).

3. CONCLUSION

This report confirms the general conclusions drawn with respect to 2004. Despite an initial delay of up to 16 months (IT) and hiccups caused by constitutional difficulties in at least two Member States (DE during part of 2005 and 2006, CY), the implementation of the Framework Decision has been a success. The European arrest warrant has been operational throughout all the Member States including BU and RO since 1 January 2007. Its positive impact is borne out daily in terms of judicial control, efficiency and speed, always with full respect for fundamental rights.

Although the need for certain improvements in transposition became apparent in 2005, these corrections remain peripheral to the process. The list of those Member States which need to make an effort to comply fully with the Framework Decision (notably CZ, DK, EE, IE, IT, CY, LU, MT, NL, PL, SI, UK) is still a long one.

Given its nature, the present evaluation is without prejudice to any future in-depth analysis of practice. Hence the Commission is also taking part fully in the mutual evaluation exercise (peer review) concerning the application of the European arrest warrant and has sought in this report and in the enclosed annex to underscore the practical aspects of the Framework Decision's implementation in the 27 Member States.