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EUROPEAN COMMISSION

Brussels, 11.4.2011
COM(2011) 175 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**On the implementation since 2007 of the Council Framework Decision of 13 June 2002
on the European arrest warrant and the surrender procedures between Member States**

{SEC(2011) 430 final}

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1. INTRODUCTION

More than seven years have passed since the Council Framework Decision of 13 June 2002 on the European arrest warrant (hereinafter ‘EAW’) and the surrender procedures between Member States¹ (hereinafter ‘the Council Framework Decision’) entered into operation on 1 January 2004. Available statistics compiled for the years between 2005 and 2009² (see Annex 1) record 54 689 EAWs issued and 11 630 EAWs executed. During that period 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, European and national 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.

Since December 2009, as a result of the entry into force of the Lisbon Treaty and the legally binding nature of the Charter of Fundamental Rights, the provisions in the Lisbon Treaty governing legislative instruments in the area of police and judicial cooperation have changed the context in which the EAW operates. In accordance with the Treaty, whenever a pre-Lisbon instrument such as the Council Framework Decision is amended, the Commission's power to take infringement proceedings and the jurisdiction of the European Court of Justice becomes applicable to the amended measure. In any event those powers will apply after 1 December 2014 at the end of the transitional period laid down in the Treaty. In addition, any amendment of the Council Framework Decision means that the new rules introduced by the Lisbon Treaty for the adoption of legislative measures in this area will apply. These rules include co-decision between the European Parliament and Council and the possibility of the non-participation of some Member States³.

Another important effect of the Lisbon Treaty is that it makes the EU Charter of Fundamental Rights⁴ legally binding⁵. Moreover, the EU will sign up as an entity to the European Convention on Human Rights.⁶ The Commission has recently adopted a strategy to ensure respect for the EU Charter of Fundamental Rights⁷ and this will

¹ OJ L 190, 18.7.2002, p. 1.

² Council 9005/5/06 COPEN 52; 11371/5/07 COPEN 106; 10330/2/08 COPEN 116; 9743/4/09 COPEN 87; 7551/7/10 COPEN 64.

³ Pursuant to Protocols 21 and 22 of the Lisbon Treaty UK, IE and DK do not participate in measures in the area of Justice and Home Affairs. The UK and IE have the possibility to opt in to a measure.

⁴ OJ C364 18.12.200, p. 1.

⁵ Article 6(1) TEU.

⁶ Article 6(3) TEU.

⁷ COM(2010) 573 final. 19.10.2010.

inform its approach to all new and existing legislative and non-legislative initiatives (including the EAW) as well as the approach of Member States when they are implementing or applying the Council Framework Decision.

2. BACKGROUND

This third report and the accompanying Staff Working Document draw on a number of sources: the previous reports of the Commission pursuant to Article 34 of the Council Framework Decision in 2006⁸ and 2007⁹; the final report and recommendations of the fourth round of mutual evaluations carried out by the Council of the European Union (hereinafter ‘Council recommendations’)¹⁰ and adopted by the Council in June 2010¹¹; the outcome of an experts meeting on 5 November 2009; answers provided by the Member States to requests for updated information from the Commission on 30 June 2009 and 25 June 2010; and case law where applicable. The information obtained from the Member States varied in content and in quality, making it more difficult to produce a fully comprehensive analysis and comparison covering all Member States.¹²

The accompanying Staff Working Document contains a large amount of information on the current position in relation to the EAW. This should be of assistance to practitioners in general as well as to the Member States in the follow up to the round of peer evaluations by the end of June 2011 as agreed by the Council.¹³ Part I of the Staff Working Document contains a short descriptive analysis regarding those Member States that have introduced amending legislation since April 2007. Part II gives an overview of Member States' current positions in relation to the Council recommendations. Part III gives details of a number of EU legislative instruments that amend or complement the Council Framework Decision on the EAW. Parts IV and V contain some current information on the EAW and the Schengen Information System and Eurojust respectively. Part VI sets out the decisions of the Court of Justice of the European Union relevant to the Council Framework Decision on the EAW. Part VII gives the reference numbers of the individual Council evaluation reports of the Member States and Part VIII provides tables on each Member State setting out the following information:

- the recommendations set out in the individual evaluation reports of the Council and the Member States' responses where these have been provided; general information on the application of the Council Framework Decision in each Member State, with reference to issues raised in the Council Recommendations;
- the observations set out in the implementation report of the Commission from 2007 and the responses of Member States where provided.

⁸ COM(2005) 63 and SEC(2005) 267 of 23.2.2005, revised by COM(2006) 8 and SEC(2006) 79 of 24.1.2006.

⁹ COM(2007)407 and SEC(2007) 979 of 12.7.2007.

¹⁰ Council 8302/4/09 COPEN 68; 7361/10 COPEN 59; 8465/2/10 COPEN 95.

¹¹ Council 10630/1/10 Presses 161 p.33.

¹² In response to its requests for information in 2009 and 2010 the Commission received very little or no information from Cyprus, Malta or the United Kingdom.

¹³ Council 10630/1/10 Presse 161 p.33 and 8302/4/09 COPEN 68 p.23 — Recommendation 20.

Part IX contains some further statistical data in chart form.

3. LEGISLATIVE CHANGES IN THE MEMBER STATES SINCE 1 APRIL 2007

The responses received by the Commission to its requests for information from Member States indicate that fourteen Member States (AT, BG, CZ¹⁴, EE, FR, HU, IE, LV, LT, PL PT, RO, SK and SI) have made amendments to their implementing legislations. The Commission acknowledges and welcomes the fact that many of the amendments take account of the recommendations of the Council and the Commission. One Member State (LU) amended one article of its transposing legislation in 2010 and a legislative proposal addressing a number of the recommendations is currently going through its parliamentary procedure. As is apparent from the tables in Part VIII of the Staff Working Document, the extent of the improvement varies greatly from one state to another and not all recommendations are reflected in the letter of the law.

Twelve Member States (BE, CY¹⁵, DK, DE, EL, ES, FI, IT, MT, NL, SE, UK) have not made amendments to their respective legislations, although they were recommended to do so in previous Council and Commission reports. This is even more regrettable in the case of Member States that were expressly mentioned in the 2007 Report of the Commission as requiring an effort to comply fully with the Council Framework Decision (CY, DK, IT, MT, NL, UK).

For those Member States where new legislation was adopted, a brief descriptive analysis of the amendments is provided in Part I of the Staff Working Document accompanying this report. The overall position of all Member States is set out in detail in the Tables in Part VIII of the Staff Working Document.

Some of the recommendations required practical measures rather than legislation and the Commission acknowledges the work done by Member States in streamlining their EAW systems and providing training, information and contact points. However the consistent application of the EAW and the mutual trust that is essential to its operation depend to a large extent on it being implemented in conformity with the Council Framework Decision. The current shortcomings in transposition with respect to each Member State are presented in an accessible format in the Staff Working Document accompanying this report. The Commission expects that this will provide a tool for those Member States to bring their legislation implementing the EAW into compliance with the Council Framework Decision.

4. THE EUROPEAN ARREST WARRANT AND THE STRENGTHENING OF THE PROCEDURAL RIGHTS OF SUSPECTED OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

While welcoming the fact that the EAW is a successful mutual recognition instrument in practice, the Commission is also aware of the EAW's remaining

¹⁴ Further legislative amendments are currently being prepared in CZ.

¹⁵ The latest information received from CY in August 2009 was that new legislation had been proposed.

imperfections, notably when it comes to its implementation at national level. The Commission has received representations from European and national parliamentarians, defence lawyers, citizens and civil society groups highlighting a number of problems with the operation of the EAW: 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 and 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, 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 roadmap¹⁶ for strengthening the procedural rights of suspected or accused persons in criminal proceedings. This roadmap, adopted by the Council on 30 November 2009, recognises in Recital 10 that 'a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual'. While retaining the possibility of adding other rights, the roadmap identifies the following six priority measures:

- the right to interpretation and translation;
- the right to information about rights (Letter of Rights);
- pre-trial legal advice and at-trial legal aid;
- a detained person's right to communicate with family members, employers and consular authorities;
- protection for vulnerable suspects;
- a green paper on pre-trial detention.

The first measure, a Directive on the right to interpretation and translation in criminal proceedings, was adopted by the European Parliament and Council in October 2010¹⁷. The second measure¹⁸ is now under discussion in the European Parliament and Council and preparatory work is underway by the Commission regarding the remaining measures. Research on the right to legal advice will examine the issue of representation for requested persons in both executing and issuing states in the

¹⁶ Resolution of the Council of 30 November 2009. OJ C 295, 4.12.2009, p.1.

¹⁷ Directive 2010/64/EU — OJ L 280 26/10/2010.

¹⁸ COM(2010) 392 final 20.7.2010.

course of surrender proceedings. The Directives already proposed contain articles expressly applying the rights therein to EAW cases. The Directive on the right to information in criminal proceedings also proposes a model letter of rights specifically for EAW cases.

A number of judgments of the European Court of Human Rights have highlighted deficiencies in some prisons within the EU.¹⁹ The court has ruled that unacceptable detention conditions (which must reach a minimum level of severity) can constitute a violation of Article 3 of the European Convention on Human Rights, even where there is no evidence that there was a positive intention of humiliating or debasing the detainee. It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions.

A further issue related to EAW cases is that EU citizens who are not residents in the Member State where they are suspected of having committed a criminal offence are quite often kept in pre-trial detention, mainly because of the lack of community ties and the risk of flight. On 23 October 2009 the Council adopted 'Council Framework Decision 2009/829/JHA'²⁰ on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.'²¹ This Council 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 or her normal environment pending trial in the foreign Member State.

5. THE ISSUE OF PROPORTIONALITY

Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences. In this context, discussions in Council arising from the conclusions of the Member State evaluations²² show 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 Article 2(1)²³ of the Council Framework Decision on the EAW, are not serious enough to justify the

¹⁹ See, *i.a.*, the judgments in the cases *Peers v. Greece* (19 April 2001), *Salejmanovic v Italy* (16 July 2009), *Orchowski v Poland* (22 January 2010).

²⁰ OJ L 294, 11.11.2009, p. 20.

²¹ Implementation date 1 December 2012.

²² Council 8302/4/09 COPEN 68; 7361/10 COPEN 59; 8465/2/10 COPEN 95; 10630/1/10 Presses 161 p.33.

²³ Article 2(1) *A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.*

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. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based.

In the follow up to the recommendations in the final report on the fourth round of mutual evaluations, the Council included an amendment to the handbook on the EAW in respect of proportionality²⁴. This report was adopted by Council in June 2010²⁵. 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.²⁶ 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 Commission is of the view that against the background of general agreement in Council on the merits of a proportionality test and the undermining of confidence in the EAW system where a proportionality test is not applied, it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory. The Council Framework Decision is a tool for Member States to use when they consider it necessary to have a person present on their territory in order to prosecute that person or to enforce a custodial sanction upon that person. The agreed handbook provides guidance on the uniform implementation of this tool. Article 2(1) of the Council Framework Decision provides that ‘A European arrest warrant may be issued for acts...’ It is within this discretionary area that issues addressed in the handbook (including the operation of a proportionality test) are discussed and agreed upon. To ensure the mutual trust that is essential to the continued operation of the EAW, judicial authorities in all Member States must respect the agreements reached in this discretionary area.

6. THE WORK AHEAD

This report is an opportunity to take stock of the state of implementation and functioning of the EAW, which does provide the efficient and effective surrender system which is necessary in a Europe of open borders. The information collected for

²⁴ Council 8436/2/10 COPEN p.3.

²⁵ Council 10630/1/10 PRESSE 161.

²⁶ Council 8302/4/09 COPEN 68 p.15; 7361/10 COPEN 59 p.4; 8436/2/10 COPEN p.3.

the report shows that, while the EAW is a very useful tool for Member States in the fight against crime, there is room for improvement in the transposition and application of the Council Framework Decision. Protection of fundamental rights in particular must be central to the operation of the EAW system. Action is required in the following areas:

- **Transposition:** Member States should take legislative action, where required, to address the areas (set out in detail in the tables in Part VIII of 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 adoption and implementation of the measures arising from the roadmap on procedural rights for suspects and accused persons to ensure that fundamental rights and freedoms 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. Training for judicial authorities is essential to ensure consistency in issues such as the application of a proportionality test across Member States. The Commission notes that the European Judicial Network will launch a new website in 2011, which will provide a useful tool to ensure that judicial authorities have access to appropriate information on the EAW.
- **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 (set out in detail in Part III of the Staff Working Document) that affect the operation of the EAW. These measures address the issues of transfer of sentences, *in absentia* judgments, conflicts of jurisdiction and recognition of supervision orders. Their expeditious implementation by Member States in the near future may further improve the practical operation of the EAW.
- **Statistics:** We now have several years of statistical data based on replies to the questionnaire devised by the Council Working Party on Cooperation on Criminal Matters in April 2005²⁷. To date replies to the questionnaire have been collated and published for years 2005 to 2009 inclusive²⁸ (see Annex 1 to this report and

²⁷

Council 8111/05 COPEN 75.

²⁸

Council 9005/5/06 COPEN 52; 11371/5/07 COPEN 106; 10330/2/08 COPEN 116; 9743/4/09 COPEN 87; 7551/7/10 COPEN 64.

Part IX of the Staff Working Document). However, there are considerable shortcomings in the statistical data available for analysis. There are a number of reasons for this. Not all Member States have provided data systematically and Member States do not share a common statistical tool. Moreover, different interpretations are to be found in the answers to the Council's yearly questionnaire. There is also evidence of underreporting to Eurojust of breaches of the time limits in the Council Framework Decision, despite the obligation to report in Article 17 (see Part V of the Staff Working Document). 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. It is imperative that Member States provide full statistical data, especially those which have not done so to date. 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.

While recognising both the success of the EAW and its remaining imperfections, the Commission welcomes the amount of work currently in hand to improve the system. It is an innovative and dynamic instrument. Since it came into force in 2004 it has given judicial authorities an accessible and efficient mechanism to ensure that offenders do not evade justice wherever they may hide within the European Union. However, its operation requires ongoing close scrutiny. The Commission will continue to monitor the operation of the instrument with respect to the issues discussed in this report and will consider all possible options, including legislation, in the light of further experience, while taking into account the new context brought about by the Treaty of Lisbon.

ANNEX 1 — STATISTICAL DATA RELATING TO THE EUROPEAN ARREST WARRANT

(based on data from COPEN 52 REV 59005/5/06, COPEN 106 REV 511371/5/07, COPEN 116 REV 210330/2/08, COPEN 87 REV 49734/4/09 and COPEN 64 REV 47551/7/10)

Average time of surrender procedures

In cases where the person consented to the surrender (time between the arrest and the decision on the surrender of the person sought) the average time of surrender was:

2005: 14.7 days. **2006:** 14.2 days. **2007:** 17.1 days. **2008:** 16.5 days. **2009:** 16 days.

In cases where the person did not consent to the surrender (time between the arrest and the decision on the surrender of the person sought) the average time of surrender was:

2005: 47.2 days. **2006:** 51 days. **2007:** 42.8 days. **2008:** 51.7 days. **2009:** 48.6 days.

Percentage of "consent" surrenders

The percentage of persons surrendered who consented to their surrender was:

2005: 51 %. **2006:** 53 %. **2007:** 55 %. **2008:** 62 %. **2009:** 54 %.

European Arrest Warrants in Member States — Number of issued European Arrest Warrants ('issued') and number of European Arrest Warrants resulting in the effective surrender of the person sought ('executed') from year 2005 to year 2009

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	TOTAL
<i>2005 issued</i>			4	64		38	38	519	1914	29	121	44	44	500	42	42	1	373	975	1448	200		81	56	86	144	131	6894
<i>2005 executed</i>			0	19		10	12	54	162	6	57	3	10	69	24	23	0	30	73	112	38		10	14	37	10	63	836
<i>2006 issued</i>			168	52		42	53	450	1552	43		20	65	538	35	115	4	325	391	2421	102		67	111	69	137	129	6889
<i>2006 executed</i>			125	19		15	4	62	237	20		2	14	57	22	55	3	47	67	235	52		14	23	37	27	86	1223
<i>2007 issued</i>			435		1785	31	83	588	1028	35		20	97	316	44	373	3	403	495	3473	117	856	54	208	84	170	185	10883
<i>2007 executed</i>			66		506	14	16	59	345	14		4	16	60	15	84	1	17	47	434	45	235	8	71	43	22	99	2221
<i>2008 issued</i>			494	52	2149	46	119	623	1184	40		16	140	348	40	975	2		461	4829		2000	39	342	107	190		14196
<i>2008 executed</i>			141	26	624	22	10	93	400	13		3	22	68	22	205	1		28	617		448	11	81	44	40		2919
<i>2009 issued</i>	508		439	96	2433	46	116	489	1240	33		17	171	354	46	1038	7	530	292	4844	104	1900	27	485	129	263	220	15827
<i>2009 Executed</i>	73		67	51	777	21	19	99	420	16		3	40	84	26	149	2	0	37	1367	63	877	6	79	47	28	80	4431