



Mutual Recognition Initiatives in the EU: The Council Framework Decision on the European Arrest Warrant

*Professor Susan Nash,
University of Westminster,
London, UK*

The Tampere European Council conclusions stated that:

‘...the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast-track extradition procedures, without prejudice to the principle of fair trial.’¹

This statement is in line with other EU initiatives to expedite the extradition process including Recommendation 28 of the strategy of the EU for the next millennium regarding the prevention and control of organised crime. Initiatives to reform the surrender mechanisms within Member States were expedited by the events that took place in the United States in September 2001. At an Extraordinary European Council meeting held on 21 September 2001, the Heads of State of the EU, the President of the European Parliament and the President of the European Commission called for the creation of a European warrant for arrest and extradition in accordance with the conclusions reached at the Tampere meeting. The European Commission presented a Proposal for a Council Framework Decision on the European arrest warrant (EAW) and the surrender procedures between the Member States.² The purpose of the Framework Decision is to introduce a simplified system for the surrender of convicted persons or suspects for the purpose of enforcing judgments or conducting criminal proceedings. It was intended that this mechanism should replace extradition within the EU with a system of surrender on the basis of mutual recognition of the warrant.

¹ Tampere European Council, item 35.

² Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1. Under Article 34(2)(b) of the Treaty on European Union framework decisions, which are legal instruments of the third pillar, are binding on Member States as to the result achieved but allow national authorities some autonomy in choosing the form and method. The underlying assumption of framework decisions is that Member States trust the integrity and fairness of judicial institutions in other Member States.

The EAW is designed to facilitate law enforcement in Member States by speeding up the transfer of suspects and removing the political dimension to extradition.³ This system of surrender only applies to Member States. The European Commission gave assurances that persons detained under the EAW will not be surrendered to a third State. This initiative is based on the principle of mutual recognition of judicial decisions and on mutual trust between the judicial authorities of Member States, which forms the cornerstone of future developments in judicial co-operation. Mutual recognition is based on the assumption that the criminal justice systems in all Member States conform to the standards of human rights set out in the European Convention on Human Rights. The success of this initiative is a reference point for other mutual recognition initiatives including the European evidence warrant. Further, the approach taken by Member States to problems of implementation of the EAW is considered to be 'a test of the reality of respect for fundamental rights in the field of justice and home affairs'.⁴

The Council of the European Union adopted the Framework Decision establishing the European Arrest Warrant in June 2002. Article 1 of the Framework Decision provides:

'The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.

Implementation of the EAW makes significant changes to the practice of extradition between Member States. In addition to removing the double criminality requirement and the role of the executive, the EAW abolishes the political offence exception and the exception for surrender of own nationals.⁵ However, the Framework Decision does not alter existing obligations to respect fundamental rights and fundamental legal principles set out in Article 6 of the Treaty on European Union. Similarly, the EAW will not alter Member States obligations with respect to extradition under other international human rights instruments. Nevertheless, national courts interpret these obligations differently and Member States are frequently found in violation of their obligations under the European Convention on Human Rights. Whether these obligations provide adequate protection for suspects throughout the EU

³ There was some disquiet regarding the involvement of the Home Secretary in the decision to refuse an extradition request by the Spanish authorities in the case of *R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte* [1999] 2 All ER 97.

⁴ S. Alegre and M. Leaf, *European Arrest Warrant: A solution ahead of its time?* JUSTICE 2003 at p. 11. This publication provides detailed discussion of the EAW and provides an overview of national approaches to implementation. See also *Handbook on the European Arrest Warrant* Ed. R. Blekxtoon, 2005 Asser Press The Hague

⁵ The removal of the double criminality rule applies to offences that are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum of at least three years.

remains to be seen.

The EAW is a standard form sent directly from one judicial authority to another. It can be issued in respect of all offences carrying a sentence of imprisonment of at least 12 months, or for persons already sentenced to a custodial or detention order exceeding four months.⁶ Having received a request from a judicial authority for the surrender of a convicted person or a person wanted for prosecution, Member States must arrange transfer. The warrant imposes strict time limits to ensure rapid surrender.⁷ Grounds for refusal to execute a warrant are very limited. For example, a request must be refused if its execution would infringe the principle of double jeopardy or the requested person is below the age of criminal responsibility under the law of the executing state.⁸ The Framework Decision does provide some optional grounds for refusing a request.⁹ A request may be refused, for example, in the case of a parallel prosecution i.e. where the requested person is being prosecuted in another state for the same act on which the warrant is based. Surrender can be made conditional if the requested state undertakes to execute the sentence.¹⁰ The whole process takes place between the judicial authorities of the Member States with no executive or administrative discretion to refuse surrender and no exception for nationals. Persons arrested under a warrant cannot rely on either the double criminality rule for 32 serious offences¹¹ or the specialty rule. However, with the exception of the 32 offences, a warrant will only be issued if the acts on which it is based constitute an offence in the executing state. The European Court of Justice (ECJ) recently held that the removal of the double criminality requirement in the EAW did not result in a breach of the principle of legality in criminal proceedings. In *Advocaten voor de Wereld VZW v Leden van de Ministerraad*,¹² the ECJ noted that:

‘The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties they attract. Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover stated in Article 1(3) of the Framework Decision, must respect fundamental rights and the fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences

⁶ Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States (2002/584/JHA) OJ 2002 L 190/1, Article 2.

⁷ Ibid. Articles 17 and 23.

⁸ Ibid, Article 3

⁹ Ibid. Article 4(2).

¹⁰ Ibid Article 4(6).

¹¹ Ibid Article 2(2). The list of offences can also be found in Schedule 2 to the UK Extradition Act 2003.

¹² Case C-303/05.

and penalties.¹³

The procedure for referring cases to the ECJ for a preliminary ruling ensures that there is a uniform interpretation of law within all Member States.

The mechanism of the arrest warrant has replaced many of the instruments authorising extradition within the EU including provisions of the 1990 Schengen Implementing Convention. In its response to the Council Framework proposal, the English Criminal Bar Association concluded that:

If the new European Warrant scheme rids us of a system the public perceive to be unnecessarily slow and cumbersome, we welcome it. We particularly endorse a system based on the principles of recognition. We caution, of course, against any new system, however, which deprives a defendant or requested person, of the proper opportunity to arrange his defence or fairly scrutinise the case against him. We accept and encourage these proposals which allow the Courts to continue to supervise and uphold individual rights, such as bail and access to a lawyer and court. Most importantly, as paragraph 11 of the preamble to the Framework proposal makes clear, a key condition is that the execution of the warrant does not lead to a violation of fundamental rights.¹⁴

Although the Framework Decision establishing the EAW entered into force on 1 January 2004, only 8 Member States, including the UK, were ready to implement it. Most states missed the deadline and did not provide the Commission with details of national legislation until the end of 2004. The EAW is now operational in all Member States.

The Hague programme identified the importance of evaluation mechanisms to assess the application and implementation of mutual recognition initiatives such as the EAW. Two assessment mechanisms have been used to assess progress so far. The first is conducted under Article 34(3) of the Framework Decision which provides that the Commission should submit a report to the European Parliament and the Council evaluating the operation of the EAW, and if necessary to submit legislative proposals. The second is based on the Joint Action of 5 December 1997 which establishes a mechanism for evaluating the application and implementation of initiatives to tackle organised crime.¹⁵ In February 2005, the Commission produced a report analysing national legislative developments. A revised report was submitted in January 2006, which took account of national legislation adopted after the presentation of the first report.¹⁶ Art 34(2) of the Framework Decision provides that Member States transmit the text of national legislation to the Council and the

¹³ Ibid para 52-53.

¹⁴ www.criminalbar.co.uk/reports/dec01.cfm.

¹⁵ OJ L 344.

¹⁶ 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(2006)8 final.

Commission. The Commission's report, which provides an overview of the manner in which Member States have adapted national law, was critical of many Member States attempts at implementation, and in an annex to the report identifies errors in transposing the Framework Decision into national law. However, Member States have expressed doubts regarding the accuracy of the Commission's analysis. Although the report assists Member States to understand the mechanisms used in other states to implement the EAW, the Third Pillar does not provide the Commission with the power to take enforcement action before the ECJ.¹⁷ As part of the evaluation programme, the Council collected quantitative information on the practical application of the EAW from Member States.

Since January 1 2004 the United Kingdom has received over 5,500 warrants and issued over 200.¹⁸ The reasons for the disparity in inward and outward requests is due, in part, to the fact that many of the inward warrants were posted as alerts with Interpol or on the Schengen Information System and not necessarily targeted at the UK. In the period 1 January 2004 to 22 February 2006, the authorities in the UK issued 175 arrests and surrendered 88 people. Some of the requests for surrender were discharged because the judge considered that the offence mentioned in the warrant was not an extraditable offence, or considered the warrant to be insufficiently specific. In *Palar v Court of First Instance of Brussels*,¹⁹ the Divisional Court drew a distinction between scrutinising the description of the conduct in an EAW and an inquiry into evidential sufficiency of the case. The Belgian authorities issued a warrant alleging that the suspect was wanted for swindling offences. The warrant stated that another suspect had been found in Belgium in possession of store loyalty cards which had magnetic strips containing information from the defendant's legitimately held cards. These cards were used to withdraw money. The warrant also referred to alleged telephone conversations between the appellant and other suspects in which they discussed money withdrawals and bankcard thefts. Discharging the warrant, the Divisional Court noted that while request should proceed in the spirit of co-operation and comity, the court still needed to be satisfied that the description of the alleged conduct amounted to an offence. In this case no criminal activity was alleged against the suspect, the alleged criminal conduct of others was, by itself, insufficient to justify surrender.

As predicted, many Member States experienced problems transposing the Framework Decision into national law due to the abolition of the exception to surrender their own nationals. This issue presented problems during the negotiations to conclude the 1996 Convention relating to extradition between the Member States of the European Union. Traditionally many Member States from civil law systems have guarantees in national constitutions prohibiting

¹⁷ For a detailed discussion of the evaluation process see A. Zarza ' Evaluation of Member States in the Third Pillar of the European Union: The specific case of the European Arrest Warrant' in *Comment évaluer le droit pénal européen?* Eds A. Weyembergh and Serge de Biolley 3rd edition (2006 Brussels Institut d'études européennes).

¹⁸ See the report from the UK House of Lords European Union Committee: European Arrest Warrant: Recent Developments. Published April 2006. HL paper 156.

¹⁹ BLD 184051604.

the extradition of nationals. Domestic law authorising the surrender of nationals to the prosecuting authorities of another Member State will be unconstitutional. The Polish Constitutional Tribunal, for example, considered it necessary to annul national legislation implementing the EAW because it was incompatible with Article 55 of the Polish Constitution prohibiting extradition of Polish nationals.²⁰ The Supreme Court of Cyprus held that the EAW was incompatible with articles in the constitution prohibiting the surrender of its citizens for prosecution abroad. Similarly, the German Federal Constitutional Court was asked to consider whether eliminating the right to review by a national court effectively removed a fundamental right of German citizens.²¹ The Spanish authorities had issued a warrant requesting the surrender of a person suspected of terrorist changes. The suspect sought a ruling as to whether the charges amounted to a criminal offence in other Member States. Following the decision of the German Court to annul national law implementing the EAW, the Spanish authorities refused to execute German EAWs on the ground that under the Spanish Constitution extradition was based on the principle of reciprocity. Despite its decision in this case, the German Court noted that the Framework Decision did not necessarily infringe the German Constitution. Careful drafting by the legislator could avoid a conflict.²² Subsequently, the Bundestag adopted new implementing legislation on 20 July 2006, which entered into force on 2 August 2006.²³ Subsequently, several Member States have now agreed to introduce amendments to national legislation, and in some cases to amend their national constitutions, in order to give effect to the EAW. On a more fundamental issue, the Belgian Court of Arbitration has sought an opinion from the ECJ on whether a Framework Decision was an appropriate legal instrument for surrender procedures between Member States. It was argued that the Framework Decision was invalid on the ground that the subject matter of the EAW should have been implemented by way of a convention. The Advocate General held that the Framework Decision establishing the EAW was a proper mechanism to achieve the objectives laid down by the TEU, which included the maintenance and development of an area of freedom, security and justice.²⁴

²⁰ For a discussion of this case see A. Lazowski, 'Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005' (2005) 1 *EuConst*, 569.

²¹ Judgment of the Second Senate of 18 July 2005.

²² For further discussion see H. Satzger and T. Pohn, 'The German Constitutional Court and the European Arrest Warrant: 'Cryptic Signals' from Karlsruhe' *Journal of International Criminal Justice* 2006 4(4) 686-701.

²³ *Bundesgesetzblatt* 2006 Teil I Nr. 6 of 25.07.06.

²⁴ Reference for a preliminary ruling of 13 July 2005 from the Arbitragehof (Belgium) Case C-303/05.