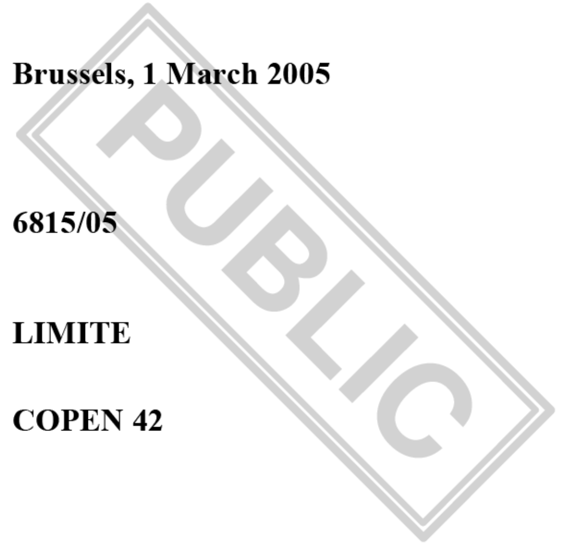

COUNCIL OF THE EUROPEAN UNION

Brussels, 1 March 2005

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COVER NOTE

from:	Secretary-General of the European Commission, signed by Ms Patricia BUGNOT, Director
date of receipt:	24 February 2005
to:	Mr Javier SOLANA, Secretary-General/High Representative
Subject:	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

Delegations will find attached Commission document COM(2005) 63 final.

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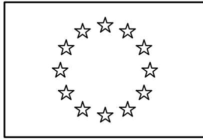

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.02.2005
COM(2005) 63 final

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

{SEC(2005) 267}

1. METHOD

The Commission is submitting this report evaluating the application of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[1] ("the Framework Decision") pursuant to Article 34 of the Decision. The evaluation is important since the arrest warrant is the first and most symbolic measure applying the principle of mutual recognition.

The evaluation criteria adopted by the Commission for this report are, firstly, the general criteria normally used nowadays to evaluate the implementation of framework decisions (practical effectiveness, clarity and legal certainty, full application and compliance with the time limit for transposal)[2], and, secondly, criteria specific to the arrest warrant, principally the fact that it is a judicial instrument, its effectiveness and its rapidity.

The Commission has based the report, primarily, on national provisions giving effect to the arrest warrant, as communicated to it by the Member States (Article 34(2)), and the supplementary information supplied by the Council (Article 34(3)), in particular the available replies provided to the questionnaires addressed to the Member States by the Council presidency[3].

The Commission has also tried to supplement its information, both by using the replies given to the European Judicial Network's questionnaire, which concerned the practical aspects of the arrest warrant prior to 1 September 2004, and by maintaining a bilateral dialogue with the designated national contact points. The contents of this report and its annex[4] have nevertheless been affected by the many delays and shortcomings in transmission, the uneven quality of the information obtained and the brevity of the period examined.

2. EVALUATION

2.1. A surrender procedure between the Member States that is now basically judicial

2.1.1. Delayed implementation though now almost EU wide

The arrest warrant has been implemented by 24 Member States with up to 8 months delay (CZ, DE). Only half complied with the time limit laid down (BE, DK, ES, IE, CY, LT, HU, PL, PT, SI, FI, SE, UK). The delay was the cause of transitional difficulties.

Nevertheless, as of 1 November 2004, all the Member States had transposed the Framework Decision except Italy, which still has its draft legislation before Parliament. All Member States have adopted specific legislation and several had to revise their constitutions in order to do this. However, some (DK and EE) have

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1 OJ L 190, 18.7.2002, p. 1.
2 COM(2001) 771, 13.12.2001, point 1.2.2.
3 COPEN 96, 10.10.2003; COPEN 94, 26.7.2004.
4 SEC(2005)267.

dispensed with binding rules for certain provisions, which do not meet the requirement of legal certainty.

In practice, from 1 January 2004, eight Member States applied the arrangements for the arrest warrant between them; by the date of enlargement the number had risen to 16, and since 14 January 2005, the date of first application in CZ, there have been 24.

In 2004 the arrest warrant thus gradually replaced extradition between Member States and appears even to have surpassed it in volume terms. Only a handful of Member States exercised the right to limit its temporal or substantive scope. As regards the former aspect, some did so in accordance with the Framework Decision, once this had been adopted, in particular by ruling out the warrant's application to acts that occurred before a given date (Article 32: FR, IT, AT). Others, however, wanted to make such a limitation without complying with the Framework Decision, whether with regard to procedure (Article 32: CZ, LU, SI), the substance of the limitation (CZ, LU) or even the effective date (CZ). The extradition requests which they continue to present therefore risk being rejected by the other Member States.

Obligations were also breached by those Member States which reduced the substantive scope as regards either the minimum thresholds for sentences (Article 2: NL, AT, PL ; Articles 4(7)(b): UK), or certain categories of offence, for which they have reintroduced (Article 2: BE, PL, SI), or created the risk of reintroducing (EE, EL, FR), a check on double criminality. However, there are no major difficulties at this stage with the transposal of the list of 32 categories of offence for which double criminality is abolished. It is remains regrettable that a few Member States thought it did not cover attempted and complicit acts (Article 2: EE, IE).

2.1.2. A surrender procedure that is basically judicial

The surrender of requested persons between Member States, pursuant to the Framework Decision (Article 1(1)), has become entirely judicial. This is attested to, for example, by the fact that the large majority of Member States authorises **direct contacts between judicial authorities**, at the different stages of the procedure (Articles 9(1), 15 and 23). However, certain Member States have designated an executive body as the competent judicial authority for all aspects (Article 6: DK) or for some (EE, LV, LT, FI, SE).

Following the Framework Decision, the interposition of a **central authority** with a monopoly on transmissions has been chosen only by a minority (Article 7: EE, IE, HU, MT, UK). However, it is to be regretted that there are cases where the decision-making powers conferred on central authorities exceed the simple facilitating role permitted by the Framework Decision (EE, IE).

2.1.3. Gradual dovetailing with the external system of extradition

While surrenders between Member States are now basically governed by the arrest warrant system, the Union's arrangements are taking longer to mesh with the system of international rules (Article 21: MT; Article 28: LT).

Not all Member States have notified the Council of Europe of their new system (Article 28 of the European Convention on Extradition of 13 December 1957)[5]. However, this omission should be temporary.

2.2. A more effective, faster procedure which respects fundamental guarantees

2.2.1. Surrenders more easily accepted

The Framework Decision limits the grounds for refusing a surrender between Member States, ruling out any decision based on political expediency and thus guaranteeing greater effectiveness. In general, the framework it provides has been respected. The effectiveness of the arrest warrant can be gauged, provisionally, from the 2 603 warrants issued, the 653 persons arrested and the 104 persons surrendered up to September 2004. It should also be noted that refusals to execute a warrant so far account for a modest share of the total warrants issued. The full picture can only be an improvement on these provisional figures, based as they are on returns/ declarations? from only about twenty Member States.

The number of mandatory grounds for refusal taken on from the Framework Decision ranges from 3 to 10, depending on the Member State. All Member States have transposed the three **mandatory grounds**, with a few exceptions (Article 3(1): NL, UK) or deficiencies (Article 3(1): DK, IE; Article 3(2): IE, UK). However, transposition of the optional grounds varies considerably from one Member State to the next: some States have only adopted them in part or have left a greater margin of discretion to their judicial authorities, while others have made them all mandatory. Although possible in principle, unless case law develops differently[6] (Article 4(3)), this choice of transposal is open to criticism if it goes so far as to make executing judicial authorities themselves prosecute rather than accept an arrest warrant when proceedings are in progress in the issuing Member State (Article 4(2)).

The variety of national arrangements also stems from the fact that not all Member States have opted to subject the execution of warrants to the three **specific guarantees** provided for in the Framework Decision. Where they have done so, however, some Member States have provided that extra conditions should be required (Article 5(1): MT, UK; Article 5(3): NL). Moreover, it seems that in practice some authorities are requiring assurances not provided for in the form, or are even refusing surrender when assurances have been given.

The **surrender of nationals** - a major innovation in the Framework Decision - has now become fact, except where exempted by the Decision itself (Article 33: AT). Most Member States, with a few exceptions (IE, SK, UK) however, have chosen to apply the condition that, in the case of their nationals, the sentence should be executed on their territory (Articles 4(6) and 5(3)). In the process, most Member States have opted for equal treatment of their nationals and their residents.

There are still some difficulties, however. According to the Commission's information, it seems that one could deplore the practice of certain judicial authorities which refuse to execute arrest warrants in the case of nationals, in

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5 Conclusions of the Council, 2-3.10.2003, point A/5.

6 Joined Cases C-187/01 and C-385/01 *Gozutok and Brugge* [2003] ECR I-1345.

invoking their powers (Article 4(2) and (7)), but do not themselves carry out the prosecutions. One Member State, moreover, has introduced a reciprocity clause and the conversion of sentences imposed on its nationals (Article 4(6): CZ). Another also considered that, with regard to its nationals, it should reintroduce a systematic check on double criminality and make their surrender conditional on the assurance that it would be able to convert their sentences (Article 5(3): NL). However, this condition, authorised by the Convention of 21 March 1983 on the Transfer of Sentenced Persons, is not reproduced in the Framework Decision. Furthermore, the Convention can provide a legal basis for the execution of a sentence delivered in another State, only if that sentence has already started, which is not normally the case where an arrest warrant is issued for the purpose of executing a sentence.

Lastly, the introduction of grounds not provided for in the Framework Decision is disturbing. The additional ground of refusal based on *ne bis in idem* in relation to the International Criminal Court, which enables certain Member States to fill a gap in the Framework Decision, is not an issue here. The same can be said of the explicit grounds of refusal for violation of fundamental rights (Article 1(3)) or discrimination (recitals 12 and 13), which two thirds of the Member States have chosen to introduce expressly in various forms. However legitimate they may be, however, apart from where they exceed the Framework Decision (EL, IE, CY), these grounds should be invoked only in exceptional circumstances within the Union. More noticeable still is the introduction of other reasons for refusal, which are contrary to the Framework Decision (Article 3: DK, MT, NL, PT, UK), such as political reasons, reasons of national security or those involving examination of the merits of a case.

2.2.2. Surrenders performed as soon as possible

The speed of the arrest warrant is due not only to an entirely judicial procedure, but also to having a single form, several means of transmission and rules for procedural time limits. In general, the Member States have transposed these points well. It is provisionally estimated that, as a result of the entry into force of the Framework Decision, the average time taken to execute a warrant has fallen from more than nine months to 43 days. This does not include those frequent cases where the person consents to his surrender, for which the average time taken is 13 days.

All Member States (except MT and UK) have explicitly adopted the **single form** and provided for several possible **means of transmission.** A difficulty in this respect is that the Framework Decision does not provide for making an Interpol alert equivalent to a request for provisional arrest, unlike an SIS alert (Article 9(3)). Pending the application of the second Schengen Information System (SIS II), each Member State could remedy this with a national provision.

Member States' requirements vary considerably in detail as to the time limits for the receipt of warrants following an arrest (from 2 to 40 days), translations (from a single language accepted to more than four) and means of authentification (from the requirement of exclusively the original to a simple fax). In practice, these differences can delay surrenders or even cause them to fail.

More specifically, some Member States impose requirements not provided for in the Framework Decision, such as the obligation to attach items or documents not stipulated in the form (Article 8(1): CZ, MT) or to issue a separate warrant for each

offence (IE). It should be possible, however, gradually to resolve these difficulties as practice in each national system becomes more standardised and the requirements of other systems become more familiar. A complete review of pre-existing alerts, the extension of secure means of transmission (SIS II) and, more generally, the consolidation of mutual confidence will help to achieve this. Greater acceptance by each Member State of languages other than its own is likely to facilitate work within the enlarged Union.

Unlike the extradition procedure, the execution of the arrest warrant is subject to precise **time limits** (Articles 17 and 23). On the whole, the Member States have very largely fulfilled their obligations in this respect. Most surrenders appear to take place within the time limits laid down.

However, in the event of an appeal, some Member States have not agreed to put a time limit on their higher courts (CZ, MT, PT, SK, UK), or have set a maximum period for the proceedings which exceeds the norm of 60 days (BE) or even the ceiling of 90 days (FR). It should be noted in this respect that a domestic appeal is not in itself an exceptional circumstance (Article 17(7)). For the moment, while significant delays are still rare, Eurojust having been informed of them, it is too soon yet to draw any conclusions.

2.2.3. Surrenders consented to in accordance with the person's fundamental guarantees

Although more efficient and faster than the extradition procedure, the arrest warrant is still subject to full compliance with the individual's guarantees. Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights a ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States. However, in a system based on mutual trust, such a situation should remain exceptional.

All Member States have on the whole transposed the provisions of the Framework Decision relating to the **rights of a requested person** (Article 11), with it being possible for the degree of detail to vary from one Member State to another, in particular with regard to the expression of consent. However, there are still some shortcomings, in particular, concerning vague procedural rules (Article 13: DK, LV, PL, PT; Article 14: DK). It should be emphasised, lastly, that the improvements due to the arrest warrant also benefit the persons concerned, who in practice now consent to their surrender in more than half the cases reported.

The evaluation of the arrest warrant from the viewpoint of guaranteeing fundamental rights leads one to compare the current situation with what went before. Several positive features should be emphasised. The Framework Decision is more precise as regards **ne bis in idem**. It has strengthened the right to the assistance of a lawyer (Articles 11(2), 12(2), 27(3) and 28(2)), to examine the appropriateness of keeping a person in detention (Article 12), and to the deduction from the term of the sentence of the **period of detention served** (Article 26). More generally, as a result of the speed with which it is executed, the arrest warrant contributes to better observance of the "reasonable time limit" principle. Through its effectiveness, in particular in

obtaining the surrender of nationals of other Member States, it makes it easier to decide to release individuals provisionally irrespective of where they reside in the European Union (Article 12).

3. CONCLUSION

Despite an undeniable initial delay, the European arrest warrant is now operational in most of the cases provided for. Its impact is positive, since the available indicators as regards judicial control, effectiveness and speed are favourable, while fundamental rights are equally observed.

This overall success should not make one lose sight of the effort that is still required by Italy and certain other Member States (in particular CZ, DK, EE, IE, LU, MT, NL, SI, UK) to comply fully with the Framework Decision and for the Union to fill certain gaps in the system.

As this evaluation has been made at an early stage, it remains provisional; it will need to be reviewed, in particular as more systematic information comes in. The Commission accordingly reserves the right to present proposals for amending the Framework Decision (Article 34(3)) in the light of further experience.