



**COUNCIL OF
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Subject: Political orientation debate on issues arising from the Commissions report of
23 February 2005, based on its evaluation of the European Arrest Warrant
("EAW") and the surrender procedures between Member States and subsequent
Member State responses

1. During the Council of 24 February there was a policy debate on the follow-up to Commission reports on Member States' transposition of instruments adopted on the basis of Title VI of the TEU. It was concluded that the more politically important reports (to be decided on a case by case basis) should be brought to the attention of the Council for political discussions to be undertaken.
2. This document is the first application of the Council's request for issues to be raised for consideration in this way. It sets out several issues of political significance which have been identified as arising from the review, and associated debates, on the legislative steps taken by Member States in their transposition of the Framework Decision on the European Arrest Warrant.

3. The Commission's report¹ substantiates the generally held view that the implementation of this first instrument on mutual recognition has, in practical terms, been a demonstrable success. It cites by way of example, the fact that whilst safeguarding the fundamental rights of the accused person, the average time taken for surrender has now fallen from 9 months, under the pre-existing Extradition system, to a period of just 43 days at present (and a mere 13 day average in cases where consent to surrender has been forthcoming). It will be appreciated that this of itself is of great importance to the administration of justice and to the victims of crime in general. The Commission also noted that in excess of 2,600 warrants had been issued at the time of the report, making this an instrument of great practical importance.
4. At this time all Member States have transposed the EAW Framework Decision, and a further Commission report on the latest transposition is proposed for submission at a later stage.
5. Notwithstanding this success, Ministers may wish to discuss some of the questions that have been raised by the Commission in its report, with a view to providing a political response and set in motion a process of common reflection on certain issues.

A. Additional ground for refusal based on fundamental rights

- Commission findings - Transposing legislation dealing with Article 1 paragraph 3 (fundamental rights and fundamental legal principles), and recitals 12 and 13 (discrimination) is varied in content. A number of Member States adopted the view that these principles (being enshrined by Article 6 TEU in any event) had an existence independent of the Framework Decision and need not be specifically referred to. Others transposed, in full or in part Article 1 paragraph 3, and/or recitals 12 and 13 and/or referred to the European Convention on Human rights.

¹ 6815/05 COPEN 42.

- Member State responses - Certain Member States express the view that as Article 1 paragraph 3 must be considered as a basis for refusal on the grounds of enshrined fundamental principles, the transposition of those rights could not be incompatible with the Framework decision. Others noted that Recitals could not be used by the judicial authority to examine the Framework Decision when deciding on the execution of an EAW and so felt that there was merit in their transposition.

- Points on which Ministers may wish to have a political orientation debate

Whilst recognising that Member States and judicial authorities are under an obligation to respect fundamental rights, at present it could be questioned whether the way in which these grounds of refusal have been expressed in national law goes beyond the ambit of the Framework Decision. While it is obvious that the judge in the executing state is under an obligation to refuse to recognise and execute an EAW which - prima facie - violates fundamental rights, the EU legislator's intention, based on the principle of mutual trust in each others legal systems, was to concentrate the judicial review in the issuing state. Moreover, an uneven implementation of the Framework Decision on this point could entail a discrimination in respect of the persons arrested on the basis of an EAW depending on whether or not the judge of the executing state has to review the consistency of the EAW with fundamental rights. Furthermore, such a review could run counter to the principle of mutual recognition.

B. Additional ground for refusal based on political reasons

- Commission findings - In transposing the express mandatory grounds set out in Article 3, additional grounds had been inserted whereby the surrender shall be refused namely: (1) if the EAW was issued on account of political reasons, or (2) if, after "surrender", the requested person will suffer persecution for political reasons.

- Member State responses - Member States concerned were of the view that the political reasons transposed did not equate to a political crime per se, they perceived a clear distinction and viewed this addition as necessary to cover issues of political discrimination.

- Points on which Ministers may wish to have a political orientation debate

The question which is raised in this context is whether a ground of non-recognition as regards political reasons for issuing an EAW would go beyond the Framework Decision.

C. Designation of the Ministry of Justice as Executing/Issuing Authority

- Commission findings - Implementing legislation which designates an organ of state as the competent (executing or issuing) judicial authority, whilst within the provision of the Framework decision, is not within its spirit. Ministers of Justice, and their civil servants having authority over surrender was not the intention behind Article 6. Such a designation, although in line with national law, impacts on the principle on which the EAW is based, namely direct contact between judicial authorities.
- Member State responses - Certain Member States were of the view that by virtue of resource constraints, such a designation was rational and indeed helpful to the expeditious processing of EAW requests. Others opined that whereas the authority to make such designations was expressly provided for, and therefore correctly transposed from the Framework Decision, issues of transparency arose and that this was not an appropriate step. Practically speaking, certain central authorities had been noted as taking a more active role in the executing process than the mere facilitation of transmission and had generated requests for the provision of further information by the issuing state. Other Member States noted that under national law, the Ministry of Justice was considered to be a judicial authority.

- Points on which Ministers may wish to have a political orientation debate

The issue which is raised here is whether a perceived governmental filter is compatible with the letter and the spirit of the EAW. The EAW has been conceived as being entirely judicial, with the guarantees of judicial independence and freedom from political influence that follows.

D. Application "ratione temporis" of the Framework Decision

- Commission findings - Certain Member States apply transitional provisions in breach of the Framework Decision. In such cases, provision had been applied both as executing and issuing state and/or, the absolute time limit of 7 August 2002 has been substituted for a more restrictive date, that being 1 November 2004, for the commission of offences to be treated under the pre existing extradition regime.
- Member State responses - Member States who had complied with the Framework Decision considered that (other than in limited bilateral instances), in cases where the prescribed statements had not been made, or had been made incorrectly, they would be unable to execute extradition requests received from non-compliant Member States, nor could they issue extradition requests instead of EAWs.
- Points on which Ministers may wish to have a political orientation debate

The Council may wish to discuss how to resolve the fact that the legislation of some Member States is incompatible and that certain EAWs or extradition requests cannot be issued or executed.

E. Other issues

The Commission's supplemental report, encompassing all Member States, is awaited. The practical impact of the subsequent transpositions is unknown. However, early analysis seems to indicate that certain issues may arise in connection with double criminality and as regards certain grounds for refusal. The Council should revert to this and other issues, if necessary, when the Commission's supplemental report has been sent to the Council.

6. Proposals:

- *The Presidency is aware that Member States faced sensitive internal discussions in the transposition of the Framework Decision on the EAW, and believes that the Member States have managed to implement this first instrument of mutual recognition successfully. The EAW has delivered an immediate and positive impact for the creation of the Area of Freedom, Security and Justice.*

- *The Presidency therefore suggests that the Council:*
 - *takes note of the report of the Commission and the Member States responses to it;*
 - *discusses the questions raised in this document and gives its political orientations;*
 - *invites the Commission to report further to it by June 2006 on the steps undertaken by Member States on the basis of the political orientations retained by the Council, with a view to enhance the compliance of their national legislation with the Framework Decision;*
 - *notes that it may be necessary to discuss the conclusions of the Commission's supplemental report when it has been finalized;*
 - *endorses that an early practical analysis of the application of the European Arrest Warrant and corresponding surrender procedures between Member States be conducted in the framework of the Multidisciplinary Group on Organised Crime.*