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Proposed Framework Decision on European arrest warrants

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How will the EU's new proposal on arrest warrants affect civil liberties?

The following analysis comments on:

- the context of the proposal;
- the future of the proposal;
- the legal effect of the proposal if adopted; and
- the text and civil liberties implications of each Chapter of the proposal:

Chapter I General Principles (Articles 1-6)

Chapter II Procedure (Articles 7-25)

Chapter IV Grounds for refusing extradition (Articles 26-32)

Chapter V Refusal of surrender (Articles 33-34)

Chapter V Special Cases (Articles 35-42)

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Context

At present, extradition between the EU Member States is based on several different measures. All of them are bound by the 1957 Council of Europe European Convention on Extradition (ECE). Seven of them are bound by a 1975 Protocol to that Convention (Protocol 1 ECE) and eleven of them are bound by the 1978 Protocol to that Convention (Protocol 2 ECE). All of them are bound by the 1977 Council of Europe European Convention on Terrorism (ECT), which affects extradition law.

Between the Member States, the Schengen Implementing Convention of 1990 contains further provisions supplementing the Council of Europe measures, in Articles 59-66. It also contains provisions expediting transmission of a request for extradition to other Member States by means of lodging that request in the Schengen Information System (SIS). The Schengen Implementing Convention, which was integrated into EU law in May 1999 by the Treaty of Amsterdam, now applies to thirteen Member States: all except the UK and Ireland.

The extension of some provisions of Schengen to the UK, including all the extradition provisions, was agreed by the Council in May 2000 but this has not yet been implemented.

Ireland applied to join many Schengen provisions in May 2000, including all the extradition provisions,

but this request has not yet been agreed by the Council. Two treaties concluded by the Council with Norway and Iceland extend all the Schengen provisions to those states from March 2001; this includes a commitment in principle for those states to apply all EU measures building upon the existing Schengen rules in future.

Also, the EU Member States agreed a Convention in 1995 supplementing the Council of Europe and Schengen measures as regards extradition when the 'fugitive' consents to it. A further EU Convention of 1996 further supplements the Council of Europe and Schengen measures in a number of respects. According to the Commission's Explanatory Memorandum to the proposed framework decision, only nine and eight Member States have ratified these measures respectively. However, The Justice and Home Affairs Council (JHA Council) of 20 September 2001 called upon all Member States to ratify both Conventions by the end of 2001.

A draft Decision of the EU Council would designate certain provisions of these two Conventions which are 'building on' Schengen, would mean that Norway and Iceland had to ratify them. In addition, the Council Presidency is currently negotiating a treaty between the EU and Norway and Iceland as regards extradition and mutual assistance. It is not known what this treaty will contain, but it will likely require those two countries to accept the entirety of the two EU extradition Conventions.

The proposed Framework Decision would replace all these measures as between the Member States and Norway and Iceland (see Articles 43 and 44). The Council of Europe measures would still remain in force as regards other third countries. Member States would be obliged to implement the Framework Decision by the end of 2002 (Article 52); it would not require any ratification by national parliaments as such, although parliaments will likely have to agree legislation to implement it.

There are regional extradition treaties between the Benelux and Nordic countries and bilateral extradition treaties between Member States. These will still apply to the extent that they set out simplified rules compared to this measure (Article 43(2)).

Future of the proposal

The 20 September 2001 JHA Council announced an intention to agree on this text by its meeting at 6/7 December 2001, and the 21 September 2001 European Council reinforced this. The European Parliament must be consulted, although its opinion is not binding. The intention to agree upon such a complex and detailed measure with such speed is quite unprecedented at EU level. It can be anticipated that the text will be altered, possibly considerably, during negotiations in the Council, and so it will be more necessary than usual for interested NGOs to be very vigilant about following the negotiations.

Progress can best be followed by checking the "Observatory" on the Statewatch website at:

www.statewatch.org/observatory2.htm

Background

The Commission's proposal goes much further than the plans to simplify extradition law within the EU set out in the 1998 Vienna Action Plan, the 1999 conclusions of the Tampere European Council, the 2000 strategy on the prevention and control of organised crime (OJ 2000 C 124/1; see Recommendation 28) and the 2000 programme on mutual recognition and organised crime (OJ 2001 C 12/10, point 2.2.1). Even the most recent of these plans refers only to measures to simplify extradition for 'the most serious offences referred to in Article 29 of the Treaty on European Union', while the 2000 organised crime strategy suggested that an extradition area was a 'long-term objective' for 2010. Since there has been only a modest result so far as regards the other proposals in the

organised crime strategy and the mutual recognition programme, what justifies a jump to the 'long-term objective' at such an early stage, especially since the mutual recognition programme was 'designed as a package...in order gradually to achieve mutual recognition of criminal decisions in the European Union' (OJ 2001 C 12/12)? Why not also move ahead to consider extending the principle of cross-border double jeopardy at this time (point 1.1 of the mutual recognition programme)?

Legal Effect

It should be emphasised that the effect of this measure, if agreed, will be to subject all extradition between the EU Member States and Norway and Iceland to the jurisdiction of the European Court of Justice, which at present only has jurisdiction over the extradition rules in the Schengen Convention. However, as regards references for a preliminary ruling, this will only apply in those eleven Member States which have accepted the Court's jurisdiction over 'third pillar' matters (all except France, Ireland, Denmark and the UK). Any questions regarding the framework decision sent to the Court of Justice could potentially be answered by means of an accelerated procedure agreed in a recent reform of the Court's rules of procedure, and applied recently for the first time to decide on a reference regarding vaccinations for foot and mouth disease within five months of the reference (Case C-189/01 Jippes).

It will also be possible for all Member States to refer disputes between themselves on the interpretation of the framework decision to the Court of Justice.

Many provisions of the proposed framework decision are sufficiently clear and precise to provide directly effective rights for the requested person, if it were permissible for framework decisions to be directly effective – but Article 34 of the EU Treaty expressly rules this out. Having said that, it is arguable that a principle of indirect effect applies (see the Marleasing judgment of the Court of Justice), requiring Member States to interpret their national law in light of the framework decision as far as possible. The question of damages for breach of the framework decision is also open.

Civil liberties issues

The framework decision should make provision for the effect of a reference to the Court of Justice upon deferment of execution or surrender.

Overview of the proposal

The proposal would abolish the term 'extradition', but it is used throughout this analysis for the sake of convenience.

Chapter I General Principles (Articles 1-6)

This chapter sets out the framework decision's subject-matter, scope and definitions. A fugitive is referred to as a 'requested person'; the state that wants that person and so issues a warrant for arrest and surrender is called the 'issuing state'; and the state which executes the warrant is called the 'executing state'. It should be emphasised that the 'European arrest warrant' will be used both for the purposes of arrest and surrender; this will change the current situation, in which an authority sends first a request for provisional arrest and later a formal, more detailed request for extradition (see Article 16 ECE).

The warrant will also be used for 'searching'. It will apply whenever a requested person is wanted for a trial for a crime punishable by more than one year in the issuing state or to serve a sentence of over four months in that state, for which he or she has already been convicted (Article 2). This will alter current rules, which also require a crime to be punishable in the executing state by a period of over one

year (ECE) or six months (1996 EU), and which only apply the four month sentencing rule in conjunction with the one year rule (ie there may be only a four month sentence but the crime could have been punished by a sentence of over one year). In short, the ‘double criminality’ rule, requiring a crime to be punished in both states before an extradition can take place, will be abolished between EU Member States, subject to exceptions in Articles 27 and 28 (discussed below).

The measure also requires Member States to specify competent judicial authorities to issue and execute European arrest warrants and one or more central authorities to assist them. It also specifies the content of a ‘European arrest warrant’ (Article 6).

Civil liberties issues

The ‘double criminality’ rule has long been seen as an essential feature of extradition law. The prospect of abolishing it will likely give rise to concerns. Also, it may be questioned why extradition should be extended to persons who were convicted of a crime punishable by less than a year’s sentence in the issuing state.

The use of the European arrest warrant as a basis for search (and seizure?) measures is questionable, because of the proposed abolition of double criminality in this measure. At present double criminality is required to conduct search and seizure, according to other international treaties on mutual assistance.

Article 2(2) of the ECE, which permitted extradition for separate offences falling under the thresholds if at least one offence fell above it, does not appear here, so would not apply as between Member States. It follows that the extension of that rule to financial penalties also would not apply (Article 1 of Protocol 2 ECE; Article 2(3), 1996 EU Convention).

Chapter II Procedure (Articles 7-25)

This is divided into four sections. Section 1 (Article 7) concerns the situation when a judicial authority knows where the requested person lives. In that case, it will simply send a warrant directly to a judicial authority in the state where that person resides. This simplifies the procedure as compared to the ECE, which requires documents to be sent through diplomatic means (Article 12(1) ECE) and of Schengen, which requires request to be sent through ministries (Article 65, Schengen).

Section 2 (Articles 8 and 9) applies where the issuing state does not know where the requested person is. In that case, the issuing state’s authority may, as at present, issue an ‘alert’ in the SIS (Article 8). The executing state may, as at present, place a ‘flag’ on this SIS alert to indicate that it will not arrest this person (Article 9). However, the grounds for placing this ‘flag’ is quite restricted as compared to the more general possibility presently permitted by the Schengen rules (see Article 94(4) and 95, Schengen). In particular, there is no prospect of placing the flag in order to apply the ‘double jeopardy’ (or ne bis in idem) rule in Article 29 of the proposal (preventing a person from being tried twice in the EU as regards the same events).

Civil liberties issues

The limit upon the executing state’s ability to ‘flag’ alerts may be questioned, in particular as regards double jeopardy.

Section 3 (Articles 10-14) concerns the arrest and detention of the requested person. This section covers details not found in extradition treaties. Article 10 requires the executing state to take ‘coercive measures’ under its national law. Article 11 gives the requested person the ‘right to be assisted by a

legal counsel and, if necessary, by an interpreter' (Article 11(2)). It also requires the competent authority to inform the person of the warrant and the possibility of consenting to surrender (Article 11(1)). Article 12 requires the executing authority to inform the issuing authority of the arrest.

Article 13(1) requires the issuing authority to inform the executing authority immediately as to whether the warrant is still valid. If not, the requested person must be released immediately (Article 13(2)). The executing authority may also release the arrested person on his or her own recognisance and suspend the warrant, but the warrant may be reactivated if the requested person does not keep the agreement to appear at a later date (Article 13(3)). Article 14 requires the executing authority to take a separate decision on whether a requested person will remain in detention; that person may be released subject to certain conditions.

Civil liberties issues

Article 10 could make further reference to protection for the requested person as regards the 'coercive measures'. Article 11(2) is an essential provision that should not be weakened in any way. However, Article 11(1) is potentially deficient because it does not specify what information should be given to the requested person immediately upon arrest, or even how quickly the authority should provide that person with the relevant information.

Article 13(1) and (2) contain essential safeguards and should not be weakened in any way. Article 13(3) and 14 could be improved to provide that the requested persons should be granted release on the same basis as nationals, given the expedited possibility of extraditing those persons if they breach the relevant conditions. There could also be provision for regular review of the detention and other safeguards in accordance with Article 5 of the European Convention on Human Rights (ECHR).

Section 4 (Articles 15-25) concerns the judicial procedure for surrender. Again, this section covers details not found in extradition treaties. It requires a judicial examination of the arrest warrant unless the requested person consents to 'surrender' (extradition) to the issuing state. The explanatory memorandum makes clear that this is the extent of review of the extradition to be permitted; there is to be no 'political' aspect to the procedure.

Article 15 specifies that this judicial examination must be within ten calendar days of the arrest. Article 16 sets out the expedited procedure in case of consent, addressing the issue governed by Schengen (Article 66) and in more detail by the 1995 Convention, particularly Articles 7 and 8 of that measure. Unlike the 1995 Convention, the framework decision does not provide for any possibility of revoking consent.

Article 17(1) requires immediate execution of the arrest warrant if the requested person has breached conditions of release. A hearing can only be held in such cases if the requested person challenges the conclusion that these conditions were breached (Article 17(3)). A hearing must also be held if the executing court thinks that certain grounds for refusing extradition may apply (Article 17(2)), or if the requested person does not consent to extradition (Article 18). The issuing Member State may submit observations at the hearing. Also, the executing court may request further information from the issuing Member State (Article 19).

The decision on the execution of the warrant must be made within 90 calendar days of arrest (Article 20). If no decision is taken by that date, or the extradition is refused, then the requested person must be released unless there is another ground for detention or the 'reintegration' principle of Article 33 applies (Article 21(1)). Reasons must be given on expiry of the time limit or for any refusal (Article 21(2)). The decision must be notified to the issuing authority (Article 22).

The requested person must then be extradited on a date agreed between the authorities, which must be twenty days after consent or execution of the warrant, failing which that person must be released (Article 23(2)). An extension of twenty days is possible in cases of force majeure; or extradition could also be delayed because of the 'personal situation' of the requested person or because the extradition has been deferred in accordance with Article 39 (Article 23(3) and (4)). Article 24 requires deduction of any time served in the executed state; the wording is taken from Article 56 of Schengen, but improves upon that provision, which only applies that principle where a person has been tried already in one Member State for the same offence. Finally, Article 25 requires the issuing judicial authority to terminate the arrest warrant from the date of surrender.

Civil liberties issues

There is no reference to appeals from these judicial decisions; Article 20 could be interpreted to rule out such appeals, unless held very quickly. Article 15 does not make clear whether the requested person can make representations as regards the 'examination' provided for. Any delay providing the information pursuant to Article 11(1) would prejudice the requested person's ability to challenge the extradition at this examination or at the hearing.

The Commission does not adequately explain why a requested person should be unable to revoke consent, as permitted (if the Member States opt for it) by Article 7(4) of the 1995 Convention.

The relationship between the various rules in Articles 17 and 18 regarding the right to a hearing is very unclear.

The Commission does not explain why persons who have breached the conditions of release should be 'punished' by removing their right to a hearing on the merits of the extradition request. The courts can prevent any further attempts to escape by simply detaining the requested person.

There is no reason to limit the reasons for which a court can order a hearing to those in Articles 27-34; Articles 35-39 are also important. Also, while the explanatory memorandum states that the hearing can address all issues raised by Articles 27-39, Article 18 does not state this expressly; what if 'the national rules of criminal procedure' preclude this?

There are no provisions governing the requested person's right to hear and respond to the issuing authority's submissions at the hearing.

Article 19 does not require any supplementary information to be disclosed to the requested person.

There are no provisions preventing the issuing state from simply sending a fresh arrest warrant for the same alleged offences (or different offences, in relation to the same acts) just before the original deadline for deciding on whether to execute the warrant expires.

It might be questioned whether the time limit in Article 20 is adequate in light of the possible complexity of many cases and the prospect of appeals. This provision also makes no allowance for possible references to the European Court of Justice.

Article 21(1) contains essential safeguards that should not be weakened in any way. Article 21(2) could be strengthened by specifying that reasons must also be given for a decision to extradite, and requiring the authority to disclose the reasons in all cases to the requested person. The decision should also be notified to the requested person.

The obligation to release if surrender is not agreed and to deduct all time served in the executing state

from any sentence (Article 23(2) and 24) are essential safeguards that should not be weakened in any way. However, Article 24 should be redrafted to refer to ‘any deprivation of liberty which may be imposed’, as the present wording infringes the presumption of innocence (and also assumes that the requested person will receive a custodial sentence).

There is no provision permitting the requested person to challenge the surrender before the courts as regards his or her personal situation (Article 23(3)).

Article 25 should specify that the issuing authority must cancel the SIS alert immediately (as discussed in the explanatory memorandum).

Chapter III Grounds for refusing extradition (Articles 26-32)

Articles 27-32 set out the grounds upon which extradition may or shall be refused. These are:

- 1) where a Member State lists the conduct which the requested person has allegedly committed on an exhaustive list of conduct which it will not extradite for (Article 27);
- 2) where the executing Member State does not criminalise the act for which extradition is requested, and that act did not take place in the territory of the issuing state (Article 28);
- 3) where the executing Member State has already convicted, terminated proceeding or decided not to institute proceedings against that person (Article 29);
- 4) where the executing Member State has granted that person an amnesty (Article 30);
- 5) where the executing Member State has granted that person immunity (Article 31);
- 6) where there is insufficient information or the identity of the requested person cannot be established (Article 32).

Only points 3 and 5 are mandatory grounds; the remainder are only options for executing states. Point 2 should be compared with Article 7 of the ECE, which contains a narrower principle, while the wording relating to point 3 (double jeopardy) is nearly the same as Article 9 ECE. On this issue, the framework decision improves upon the ECE by requiring that extradition must be refused where proceedings were terminated or not instituted. However, it does not provide for the broader application of the double jeopardy principle found in Article 2, Protocol 1 ECE, even as an option. Nor does it refer to the double jeopardy rules in Articles 53-57 Schengen; the Commission notes in the explanatory memorandum that a 1987 Convention containing the same provisions has not been widely ratified, but seems unaware that the same rules already apply to almost all Member States (and the UK and Ireland soon).

Article 30, on amnesties, is based on Article 4, Protocol 2 ECE, also found in Article 62 Schengen and Article 9 of the 1996 EU Convention. However, the framework decision transforms the obligation to refuse extradition found in the Protocol and the 1996 Convention into an option. The explanatory memorandum claims that ‘the drafting is identical’, but this is simply not the case (in any event, the Schengen provision is drafted differently from the other two prior provisions).

Civil liberties issues

Article 27 is ambiguous and it may be difficult to apply in practice because of its wording. First, while the explanatory memorandum suggests that a Member State could invoke Article 27 to exclude extradition due to different ages of criminal liability, the text of Article 27 does not make this clear. Similarly it is not clear whether a Member State could list an offence in Article 27 on the grounds that it punishes that offence, but with non-custodial sentences or custodial sentences of less than one year. Secondly, the wording of Article 27 would make it difficult for a Member State to react to changes in other Member States’ criminal law. The ‘negative list’ approach means that an extension of criminal liability in one Member State to a novel area (or an increase in sentencing requirements above the

threshold) will automatically mean that the framework decision applies, without any possibility for the other Member States to scrutinise whether they wish extradition to apply in such cases. Since there is no requirement for Member States to inform each other of changes in their criminal laws, such changes will come as a surprise to other Member States. Thirdly, it is not clear how the three-month waiting period for application of Article 27 to new cases will apply to arrest warrants issued previously or to arrest warrants issued during the three-month period. The Commission does not adequately explain why such a waiting period should be imposed. Since other Member States will likely become aware of a Member State's intention to list a new exception before publication of that decision in the Official Journal, their authorities could rush to issue many arrest warrants before the deadline despite the clear intention of the Member State to disapply the framework decision in relation to such conduct.

Article 28 is an essential safeguard that should not be weakened in any way. In fact, the Commission does not adequately explain why this safeguard is only optional, not mandatory.

The mandatory nature of Article 29(2) is welcome, as is the retention of mandatory refusal pursuant to Article 29(1). These protections should not be weakened in any way. However, the limitations on Article 29 are indefensible. It is startling that the Commission is unaware of the ne bis in idem obligations applying in the Schengen Convention, which are already the subject of a reference to the Court of Justice and which are reflected in the EU Charter of Fundamental Rights. Of course, Article 54 of the Schengen rules will prevent a second conviction after a person has been extradited to the issuing state; but why permit extradition at all in such cases? This invites abuse by prosecutors, because an issuing state might seek extradition for a serious offence for which a person has already been convicted, only to drop such charges after the extradition and lay charges for offences which it could not have sought extradition for under the framework decision (see discussion below of the abolition of the speciality rule). Even if the issuing state is forced to give up its prosecution following the extradition, pursuant to the Schengen rules, there will be much avoidable disruption to the life of the requested person. Jurisdictional issues should always be settled as soon as possible, in particular where serious consequences such as detention and extradition are involved.

While the explanatory memorandum argues that the executing state will not have the information on conviction in a third state to hand, the same could equally be said of the issuing state. In such cases, the requested person will obviously be willing to provide as much information as possible regarding the prior conviction for the same facts, and if necessary, the time periods under the framework decision could be extended in such cases. It is hard to avoid the conclusion that the Commission is not taking the EU Charter of Fundamental Rights seriously.

The Commission does not explain why the amnesty exception in Article 30 should become optional, rather than mandatory as in existing measures.

It might be questioned whether Article 31 of the measure should provide for limits on immunity, particularly as regards crimes governed by the treaty establishing the International Criminal Court and by ad-hoc tribunals established by the Security Council.

It is hard to see why Article 32 is only optional. Why should the executing authority be permitted [to execute] the warrant if the information is inadequate or the identity cannot be established?

It should be emphasised that many traditional grounds for refusing extradition would be abolished by the framework decision. These are:

1) the 'political offence' exception (see Article 3 ECE; this exception has been narrowed, but not abolished, by Article 1, Protocol 1 ECE, the ECT and Article 5 1996 EU Convention);

- 2) the 'military offence' exception (Article 4 ECE);
- 3) the 'fiscal offence' exception (see Article 5 ECE; this exception was narrowed, but not necessarily abolished, by Article 2, Protocol 2 ECE, Article 63 Schengen, and Article 6 1996 EU Convention);
- 4) the possibility of refusing to extradite a state's own nationals (Article 6 ECE, limited but not abolished by Article 7 EU);
- 5) the refusal to extradite due to lapse of time in the issuing or executing state (Article 10 ECE; Article 62(1) Schengen and Article 8, 1996 EU Convention state that only the limitations in the issuing state apply, although the latter provided for some flexibility on this matter);
- 6) the refusal to extradite to face capital punishment (Article 11 ECE), although this exception may have been dropped because no EU state imposes this penalty in normal circumstances;
- 7) the specialty rule, which does not permit states to prosecute for an offence other than those for which extradition was requested (Article 14 ECE, limited by Articles 10 and 11, 1996 EU Convention); and
- 8) the rule against re-extradition to another state without the executing state's consent (Article 15 ECE, limited by Article 12, 1996 EU Convention as between Member States)

As regards the specialty rule, Article 41 of the framework decision instead permits prosecution for any offence which was not the subject of an extradition request, except where Articles 27, 28 or 30 apply. A contrario, this would permit prosecution where Articles 29 or 31 apply, or for an offence punishable by less than one year in the issuing state.

The Commission does not explain why it is necessary to abolish the remaining possibility of applying a political offence exception, where a person is being persecuted on certain grounds (Article 3(2) ECE and Article 5 ECT, maintained in force by Article 5(3), 1996 EU Convention).

The Commission gives no rationale for abolishing the military offence exception.

The Commission does not explain why the fiscal offence exception should be abolished, given that its application has already been limited.

The refusal to extradite a state's own nationals is in many Member States a guarantee protected in that state's constitution. The Commission does not explain why the 'extradite or prosecute' principle cannot be applied (or strengthened if necessary) in order to ensure that persons who allegedly commit a crime and then return to their state of nationality to avoid extradition are nonetheless prosecuted. It should be emphasised that the EU Mutual Assistance Convention will make it much easier for the state of nationality to obtain the evidence needed to prosecute its national for acts allegedly committed abroad. Similarly, as regards persons who have already been convicted by a final decision, the Commission does not explain why the principle of 'extradite or enforce the sentence' should not be developed instead, as detailed in the 2000 programme on mutual recognition in criminal law (points 3.1.1 and 3.1.2).

The abolition of 'lapse of time' limitations as regards even the issuing state is hard to justify. Why should the issuing state be permitted to ignore the limitation periods of its own law, merely because the alleged offender has left its territory? This would place the alleged offender in a worse position merely because he or she has crossed a border. The prospect of maintaining the issuing state's lapse of time rules is not even preserved as an option. Member States presumably take the prospect of absconding offenders into account when they set limitation periods, and it should be recalled that many planned or adopted EU measures will make it easier to investigate an alleged crime that has cross-border dimensions.

As for abolition of the specialty rule, this creates a prospect of abuse. An issuing state might request

extradition for a serious offence, intending to drop those charges once extradition has been completed and then charging a person with certain crimes which it could not have obtained extradition for, thereby circumventing any refusal to extradite on grounds of double jeopardy or immunity, or alternatively circumventing the thresholds for extradition set by the framework decision. It will be difficult for the executing state to prevent such abuse because of the cursory checks on the arrest warrants provided for in the framework decision. To prevent this problem, the framework decision should be amended so that Article 41 prevents prosecution in all such cases where extradition could or must be refused, not just those presently listed.

The abolition of the re-extradition rule could be interpreted to mean that re-extradition to a third state outside the EU would now be permitted without the consent of the executing state. It is inappropriate for this framework decision to make the extradition to non-EU states simpler, and so this should be clarified.

Chapter IV Refusal of surrender (Articles 33-34)

Articles 33 and 34 permit an executing authority to refuse surrender on two grounds. First, the authority may refuse surrender if the requested person would have better possibilities of reintegrating if the sentence is served in the executing Member State. Secondly, the authority may refuse surrender if the requested person can instead take part in the issuing state's proceedings by means of videoconference.

Civil liberties issues

According to the explanatory memorandum, Article 33 can only apply to persons who have already been convicted by the issuing state, rather than those wanted for trial there. This should be specified expressly.

Article 34 does not take over Article 10(9) of the EU Mutual Assistance Convention fully, as the Commission claims in the explanatory memorandum. Article 10(9) specifies that 'Member States may at their discretion also apply the provisions of this Article' to accused persons. The other provisions of Article 10 of the Convention contain a number of detailed protections for persons participating in a videoconference, and Article 10(9) further provides that the Council may adopt a further measure concerning the rights of the accused in such proceedings if necessary. There is no reference in the framework decision to the protections of Article 10 of the Convention or to the prospect of future necessary Council measures.

Article 34(3) should also specify that such detention decisions must be in accordance with the ECHR.

Chapter V Special Cases (Articles 35-42)

Article 35 requires a new hearing of the case if the conviction was issued *in absentia*, but Article 3 contains a limited definition of 'in absentia' for this purpose. Article 36 permits execution to be subject to the condition that the arrested person is returned to serve the sentence in the executing state. Article 37 allows a Member State to make execution conditional on avoiding a life sentence; this reflects a provision in the treaty of Portuguese accession to Schengen. Article 38 allows deferment of the execution of the warrant due to the state of health of the requested person. Article 39 addresses various situations in which the requested person is being tried or is serving a sentence in the executing state; this is a more complex version of Article 19 ECE. Article 40 addresses the situation where there are multiple requests for extradition or arrest warrants. Here, Article 40(1) is a shorter version of the rule applying in Article 17 ECE; the framework decision omits any consideration of the nationality of

the requested person and the possibility of subsequent extradition to another state.

Article 41 all but abolishes the specialty rule, and was considered above. Article 42, on handing over property, is almost identical to Article 20 ECE.

Civil liberties issues

The in absentia rules do not take full account of the ruling of the Court of Justice and the Court of Human Rights in the recent Krombach cases. Also, they do not permit a person to argue for a new trial on grounds that he or she was inadequately represented at the prior trial. There are no provisions allowing for appeal against prior in absentia judgments.

The Commission does not explain why Article 36 should be optional, rather than mandatory. As drafted, this Article appears to presume the guilt and custodial sentencing of the requested person, and must be redrafted to make it clear that it only applies if the requested person is convicted and is subjected to a custodial penalty as a result.

Article 38 is welcome, but the earlier provisions of the proposal make no cross-reference to it (and vice versa). The proposal should therefore regulate the relationship between Articles 20 and 38. Also, it is not clear why this provision should not also apply to deferment of surrender, and how it relates to Article 23(3) of the proposal on the 'personal situation' of the requested person.

Article 39(3) and (4) are based on Article 9 of the EU Mutual Assistance Convention. However, they omit many provisions of Article 9 of that Convention, including aspects regarding protection of the suspect. In particular, there is no requirement to deduct the period in custody during the transfer from any sentence imposed (Article 9(4) of the EU Mutual Assistance Convention); Article 24 of the proposed framework decision would not apply to such cases, since it makes no reference to temporary transfer.

Chapter VI Other Instruments (Articles 43-44)

As noted at the outset, the framework decision would replace all multilateral extradition agreements and all EU or Schengen extradition arrangements at end 2002.

The Commission does not explain why every aspect of the extradition rules must be regarding as building on the Schengen acquis for Norway and Iceland, given that only certain provisions of the EU Conventions are considered to be building on the acquis.

Chapter VII Transit, transmission, languages and expenses (Articles 45-48)

The transit provision simplifies Article 21 ECE, itself simplified by Article 16 of the 1996 EU Convention. It is not clear how the UK government's reservation on Article 21 ECE would apply as between Member States. The provision on transmission of documents is based on Article 6 of the EU Mutual Assistance Convention. The rule on languages adapts Article 23 ECE, by requiring translation if needed into the executing state's language, not just an official language of the Council of Europe (English or French). The expenses rules simplify Article 24 ECE.

Chapter VIII Safeguard (Article 49)

Article 49 permits a Member State to suspend application of the Framework Decision in the event of a 'serious and persistent' breach of human rights in another Member State for which that Member State could be sanctioned pursuant to Article 7 EU. This suspension must terminate after six months unless

the procedure set out in Article 7 is initiated. Also, a Member State must assert jurisdiction over the relevant offences if it applies such a suspension.

Civil liberties issues

Article 49 does not regulate what happens to proceedings under way already when such a suspension is applied, or what happens when the suspension is terminated. Also, it does not regulate what happens when a proceeding for a possible sanction pursuant to Article 7 EU is actually under way at EU level, or where such a proceeding results in a sanction (a so-called 'red card'). The framework decision should provide for an obligation to suspend proceedings (with transitional rules) in such circumstances.

Also, the proposed Treaty of Nice allows for the EU to issue a warning (a so-called 'yellow card') to a Member State that risks a serious breach of human rights. This framework decision should also take account of that Treaty's entry into force in future, and provide for an obligation to suspend proceedings (with transitional rules) in the event that such a 'yellow card' is issued.

It may be questioned whether the framework decision can validly relieve Member States' authorities of any further obligation to consider the human rights situation in issuing states that results from ECHR or their national constitutional law. Also, it may be questioned why it is not expressly possible for a requested person to argue that an issuing state is engaging in a serious and persistent breach of human rights.

It should also be possible for requested persons to offer evidence as regards their particular circumstances that the prison conditions in the issuing state breach Article 3 ECHR or that there is a risk of the 'fair trial' rights of Article 6 ECHR not being applied in the trial in the issuing state. If such evidence is convincing, the extradition should not be permitted, although the framework decision could provide that in such a case the executing state could prosecute or enforce the sentence against the requested person itself if it also has jurisdiction to do so.

Chapter IX Final Provisions (Articles 50-53)

The framework decision must be applied by the end of 2002, and a report will review it and consider possible changes, in mid-2003.

Addendum (16.10.01)

Further Developments

The EU JHA ministers have recently discussed two key points in relation to the proposed framework decision. These are the scope of the proposal and the system of judicial remedies in the executing state. The issues in relation to these points are set out in Council document 12646/01, 10 October 2001.

Scope of the Proposal

From a civil liberties perspective, it is welcome to read that delegations do not support the 'negative list' proposal of the Commission (see the separate comments on the problems with this proposal).

Of the four alternative options, the first (total abolition of double criminality) is highly problematic, since it would lead to wholly extraterritorial application of criminal law (ie even to acts which took place outside the issuing state in a state which does not criminalise those acts).

The second option is less problematic (although logically it would be appropriate to extend the principle to prohibit extradition where the acts took place in **any** state which does not criminalise the behaviour in question). Moreover, the second option does not expressly refer to the maintenance of a threshold in the issuing state. It would be highly objectionable to drop such a threshold, which would mean extending extradition law to all alleged crimes. If such a threshold did apply, there is still no detailed explanation of why the principle should apply where a person was convicted for a crime of less than a year's length, unlike current extradition law.

In addition, the concerns about the combination of the abolition of double criminality with the abolition of the specialty rule (see separate comments) and the abolition of other rules would still apply.

The third option would be the best of the four presented, because it would mean that fast-track extradition only applied where Member States had agreed to harmonise their criminal law. This option should only apply where the instruments in question require the Member States to make the offence in question extraditable, thus guaranteeing that a threshold will still apply in *both* states. It should also only apply subject to reservations made by Member States to the relevant instruments, or to options exercised by Member States pursuant to those instruments. But the proposed framework decision would still need a number of improvements from a civil liberties perspective (set out separately). Also the relationship between the EU system and the remaining ECE system (with EU amendments) would have to be scrutinised in great detail. More broadly, it is hard to comment fully on this option because none of the documents detailing the state of discussions on the proposal on freezing of evidence and assets (referred to in the Council document) have been released to the public.

The fourth option is also less objectionable, because it would effectively maintain safeguards concerning double criminality and thresholds in all cases, provided again that the 'harmonised offence' provisions only applied where an instrument required Member States to make an offence extraditable. This presumes that the thresholds would apply in both the issuing and the executing state. Again, other aspects of the framework decision would need to be changed from a civil liberties perspective.

Whichever option is chosen, there is a particular need to examine the issues of double jeopardy, abolition of the specialty rule and the human rights standards of the issuing state in the proposal.

Judicial Remedies

The recent Council document suggests that judicial protection in the executing state should be simplified in one of two ways or subject to a time limit.

The proposal sets out a detailed system of judicial remedies regarding the execution of the arrest warrant. As set out separately, many of the details of this proposed system contain essential safeguards for requested persons that should not be weakened in any way, although conversely these safeguards could be further improved. It follows that there must be grave civil liberties concerns about any attempt to 'simplify' judicial protection. However, if the scope of the proposal is narrowed as suggested elsewhere in the Council paper, the civil liberties concerns will inevitably be partly assuaged to the extent that the scope is narrowed.

Option 1, limiting judicial supervision to the issue of legality of detention, is not acceptable from a

civil liberties perspective. It is not clear whether what the 'legality of detention' means, but it is objectionable in principle to preclude the courts in the executing state from examining any issue within the scope of the framework decision. The possibility of review by the courts in the executing state is an essential safeguard against improper use of the arrest warrants system by the issuing state's authorities. Any weakening of such review would remove an effective deterrent against such abuse. If a review could only be carried out in the issuing state's courts, it would be too late to prevent an illegal extradition from occurring. In any event, option 1 does not suggest that such a review would then have to be carried out in the issuing state.

Option 2, allowing for an appeal, is obviously the only acceptable approach from a civil liberties perspective. Any time limits which apply to such an appeal should be long enough to allow for the appeal to be exercised effectively and there must be provision to extend them in light of changed circumstances or new information. Additionally, there is no convincing case for an abolition of the right to further appeal. This would be a disproportionate interference in the judicial system of Member States and would place too much faith in the infallibility of the first instance judges. It would always be possible for Member States to apply a 'leave to appeal' procedure as regards any further appeals.

Also, the Council document still takes no account of the possibility of references to the European Court of Justice regarding the framework decision. Indeed, if the first instance courts are the 'final' courts as regards application of the framework decision, then they will arguably be obliged to send references to the Court of Justice in any Member State which has opted to impose such an obligation upon its 'final' courts in the third pillar framework.

As for reducing the overall time limit of 90 days, this would only be acceptable from a civil liberties perspective in light of the points made above about sufficient time, the necessity of allowing for appeal, and the role of the Court of Justice.

Other Statewatch briefings in the series covering the civil liberties implications of post-11 September 2001 measures and practices are:

- 1.
- 2.

Up to date details can be found on: www.statewatch.org/observatory2.htm