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From :	General Secretariat of the Council
To :	COREPER/Council
Prev.doc.	13061/2/03 COPEN 92
Subject :	Review under Article 34(4) of the Framework Decision on the European Arrest Warrant

At its meeting of 18 November 2003, the Article 36 Committee agreed to submit the attached draft report on the implementation of the European arrest warrant that has been subject to several discussions of the Working Party on cooperation in criminal matters (experts on the European Arrest Warrant), to Council. Due to an amendment to the UK draft legislation, a technical amendment has been made to the report.

The attached report has been drafted pursuant to Article 34(4) of the Framework Decision, which requires the Council to conduct, in the second half of 2003, a review, in particular of the practical application, of the provisions of the Framework Decision by the Member States as well as the functioning of the Schengen Information System. This report constitutes the review provided for in that provision. The report reflects the way that Member States have implemented or are intending to implement the Framework decision on the European arrest warrant and does not imply an endorsement by the Council of the various ways of implementation by the Member States.

These ways of implementation will be examined by the Commission according to Article 34(3) of the Framework Decision.

At the meeting of the Article 36 Committee on 18 November 2003, the DK delegation laid down a parliamentary scrutiny reservation.

Subject to DK having lifted its parliamentary scrutiny reservation, COREPER/Council is invited to:

- take note of this report;
- forward the attached report to the European Parliament for information.

**Report of the Council of the European Union
on the implementation of the Framework Decision on the European arrest warrant,
under each Member State's law**

1. Framework Decision on the European arrest warrant

On 13 June 2002 the Council adopted the Framework Decision on the European arrest warrant and the surrender procedures between Member States (hereinafter referred to as “Framework Decision”¹). According to its Article 34(1), Member States shall take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003. From 1 January 2004, this new system will, with a few exceptions, replace the current extradition systems by the new surrender regime. As far as surrender between Member States is concerned, the corresponding provisions of the following conventions will be replaced:

- the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;
- the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;
- the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;
- the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;
- Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

¹ OJ L 190, 18.7.2002, p. 1.

According to declarations made pursuant to Article 32 of the Framework Decision, 3 Member States¹ will as executing states continue to apply the extradition regime applicable before 1 January 2004 to acts committed before 1 November 1993² or to acts committed before the date of entry into force of the Framework Decision³, i.e. 7 August 2002.

The Acceding States will apply the new surrender regime provided by the Framework Decision as from 1 May 2004. Both the Member States and the Acceding States have confirmed on several occasions that they will meet the time limits for the transposition of the Framework Decision.

According to Article 34(4) of the Framework Decision, the Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of the Framework Decision by the Member States as well as the functioning of the Schengen Information System. This report constitutes the review provided for in that provision. The report reflects the way that Member States have implemented or are intending to implement the Framework decision on the European arrest warrant and does not imply an endorsement on behalf of the Council of the various ways of implementation by the Member States. These ways of implementation will be examined by the Commission according to Article 34(3) of the Framework Decision.

2. Preparation of the implementation

In November 2002 the Danish Presidency sent out a questionnaire⁴ to the Member States containing questions on the implementation of the Framework Decision on the European arrest warrant, under each Member State's law. On 4 March 2003, the Greek Presidency organised a meeting of experts on the European arrest warrant in the framework of the Working Party on Co-operation in Criminal Matters. A second meeting of the experts was organised in June 2003. A number of additional questions were merged with the initial questionnaire. This consolidated list of questions⁵ was sent to Member States in March 2003.

¹ F, I and A

² F

³ I and A

⁴ doc. 14614/02 COPEN 57

⁵ doc. 7460/03 COPEN 28

This report has primarily been based on the Member States' replies that were sent in before 1 August 2003¹, as well as on additional information provided by experts on the European arrest warrant at meetings of the Cooperation in Criminal Matters Working Party (9 October and 11 November 2003). At the time of drafting three Member States had completed the implementation process².

3. Implementation of the Framework Decision on the European arrest warrant and surrender procedures between Member States and practical functioning of the European arrest warrant with regard to the Schengen Information System (SIS)

I) Implementation by Member States

a) Authorities

The nature of the authorities that are competent to issue European arrest warrants will vary among the Member States. In most Member States it will be the same one as the one that issues arrest warrants in domestic procedures under domestic law. In principle, this will be either a court or a public prosecutor. Only in one Member State³, the Ministry of Justice, in its function as a judicial authority, will issue European arrest warrants.

As regards the execution of a European arrest warrant issued by another Member State, the decision whether the person is to be surrendered will be taken by a court in most Member States. The public prosecutor will be involved in the decision by having the right to make representations to the court. Other Member States will give the competence to decide on the execution to the public prosecutor.

¹ Replies to questionnaire doc. 14614/02 COPEN 57: A, B, DK, FIN, IRL, I, LUX, NL, ES, S, UK, GR, D, FR and P (answers set out in doc. 5624/03 COPEN 4 + ADD 1 + ADD 2 + ADD 3); replies to consolidated questionnaire doc. 7460/03 COPEN 28: A, B, DK, F, FIN, GR, LUX, NL, IRL, ES, P and UK (answers set out in doc. 8935/03 COPEN 44 + ADD 1, ADD 2, ADD 3, ADD 4 and ADD 5);

² DK, ES and P.

³ DK

b) Control of the European arrest warrant by the competent authorities of the executing Member State with regard to the categories of offences listed in Article 2(2) of the Framework Decision

Article 2(2) of the Framework Decision states that the categories of offences listed therein, if punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as defined by the law of the issuing Member State, shall, under the terms of the Framework Decision *and without verification of the double criminality* of the act, give rise to surrender pursuant to a European arrest warrant. However, the question arises whether Member States will incorporate in the procedure some kind of verification in this respect whether the European arrest warrant was issued for one of the categories of offences listed in Article 2(2), at all.

It follows from the answers to the questionnaire that the executing authority in the majority of Member States will carry out a check of the formal requirements of the European arrest warrant. Therefore, an authority of the executing Member State involved in the execution of a European arrest warrant will control whether the arrest warrant contains all the information required.

Whilst executing authorities of some Member States will verify if the respective act constitutes, under the law of the issuing state, an offence listed in Article 2(2), other Member States will rely on the information on the nature of the offence given by the issuing state. A few Member States take the position that Article 2(2) of the Framework Decision does not permit any verification of a point of substance by the executing state. Several Member States will pursue an approach combining both avenues according to which the executing authority will basically rely on the information given by the issuing state unless the information appears to be manifestly incorrect.

c) Abolition of double criminality only for offences covered by Article 2(2) or further abolition

All Member States will in accordance with Article 2(2) of the Framework Decision renounce on double criminality for acts that are, under the law of the issuing state, punishable by a custodial sentence or a detention order for a maximum period of at least three years and that are covered by the offences listed in that provision. [...] Thus, it can be said that double criminality will remain a prerequisite for surrender for all offences that are not covered by Article 2(2) of the Framework Decision.

d) Optional grounds for non-execution and transposition of Article 1(3) of the Framework Decision on fundamental rights

As regards the incorporation of the optional grounds for non-execution, it is difficult to make a general assessment on the basis of the answers to the questionnaire since the extent and nature of incorporation vary a lot among the Member States. Nonetheless, a tendency to implement most of these optional grounds for non-execution (Article 4) can be observed. Several Member States will restrict the scope of each ground, though. No conclusion can be drawn yet as to whether Member States will implement the grounds listed in Article 4 of the Framework Decision as grounds for optional or for mandatory non-execution of surrender.

Article 1(3) of the Framework Decision states that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union. Furthermore, recital (12) of the Framework Decision stipulates that nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

The question arose whether Article 1(3) and recital (12) warranted any special transposition. Some Member States do not see, with reference to the respective guarantees enshrined in their constitutional law, a need to incorporate an equivalent ground for non-execution of surrender, whilst other Member States¹ intend to provide for mandatory non-execution in case of certain possible violations of the rights granted by the ECHR. In addition to that, some Member States will transpose recital (12) in whole² or in part³ as a ground for non-execution. Some Member States consider that special transposition of Article 1(3) and recital (12) is not required or appropriate.

e) revocation of the requested person's consent to surrender

Article 13 of the Framework Decision provides for the conditions for a simplified surrender and in particular the requested person's consent to surrender. In principle, consent may not be revoked. Notwithstanding this basic rule, each Member State may provide that consent and, if appropriate, renunciation of entitlement to the 'speciality rule' may be revoked, in accordance with the rules applicable under its domestic law. According to Article 13(4), a Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council. Four Member States⁴ have made such statements.

f) appeals and time limits

The Framework Decision determines certain time limits for the procedures to execute a European arrest warrant (Article 17) and time limits for the surrender (Article 23).

Particularly the time limits envisaged for the decision on the execution of a European arrest warrant (in cases where the requested person consents to his or her surrender: final decision within 10 days after consent; other cases: final decision within 60 days after arrest; both time limits may be extended by further 30 days in exceptional cases) may run afoul of legal remedies and the respective time limits under domestic law.

¹ B, D, FIN, GR, IRL and UK.

² IRL, NL, UK and FIN

³ P, DK, GR, S and B, F and A

⁴ B, DK, IRL and FIN

The decision of the executing authority will not be open to legal remedies or, in a few Member States, only to a limited extent. Other Member States will provide for short time limits for appeals or – in several Member States in addition to that – short periods of time during which the appeal authorities have to decide. One Member State will most likely incorporate relatively flexible time limits for appeals. Thus, most Member States will enable the executing authorities to take a final decision within the deadlines stated by Article 17(2) and Article 17(3). Only a few Member States will have to invoke the additional limit of 30 days (Article 17(4)) which is intended to apply to exceptional cases only, in every case where the avenues of appeal are being entirely exhausted.

Whilst Article 23(5) of the Framework Decision provides that the expiry of time limits for surrender (basically 10 days after the final decision with possible postponement) entails release of the person in custody, the Framework Decision does not provide explicitly for consequences of violation of the time limits for the final decision (Article 17). Most Member States seem to be of the opinion that the time limits in Article 17 of the Framework Decision are of a non-mandatory, but indicative nature. For that reason, the majority of Member States will not foresee a non-observation of these time limits as ground for provisional or final release from detention or as ground eligible to affect the validity of proceedings or judgements.

It should be noted that Article 17(5) of the Framework Decision provides that as long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

g) plurality of offences

The issue of plurality of offences appears in several contexts. One is the question whether Member States will issue one or several European arrest warrant(s) in cases where the requested person is charged with several different offences. The vast majority of Member States deems it appropriate to cover several offences by one single European arrest warrant instead of issuing separate arrest warrants for each offence as they deem that the latter option would lead to unnecessary confusion and cumbersome practices and that the inclusion of more than one offence is intended by subparagraph (e) of the Annex to the Framework Decision. All Member States agreed that the fact that a European arrest warrant has been issued for more than one offence does not justify its non-execution. However, a few Member States point out that only offences that are dealt with in the same proceedings, could be subject to the same European arrest warrant.

As regards the question how to proceed when, according to the decision of the executing authority, surrender is admissible for certain, but not all offences, all Member States supporting the idea of having one arrest warrant for a plurality of offences consider that a partial execution is possible. Some of these Member States took the view that, in such cases the issuing state was bound by the principle of speciality. Thus, the requested person could be prosecuted merely for the offences subject to surrender.

Another issue appearing in the context of plurality of offences is the so-called “accessory surrender”. The term refers to surrender for one or several offences punishable by a lower sanction than the threshold set out in the Framework Decision if surrender for such minor offences is envisaged at the same time as surrender for one of the offences covered by the Framework Decision.

The Framework Decision itself does not explicitly provide for a way to deal with the issue of accessory surrender. While the experts have looked at various ways of dealing with this issue, most seemed to consider that nothing in the Framework Decision prohibits Member States from granting accessory surrender.

II) Functioning of the SIS

a) Use of the SIS and alerts under the Schengen Convention

Article 9(1) of the Framework Decision allows for direct transmission of the European arrest warrant to the executing authority when the location of the requested person is known. Article 9(2) provides that the issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS). According to Article 9(3) of the Framework Decision, an alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1) of the Framework Decision.

As regards the use of the Schengen Information System (SIS), all Member States currently participating in the SIS which have sent in replies to the respective questions, are in favour of transmitting European arrest warrants through the channels of the SIS. The two Member States that are not participating in the SIS¹ for the time being have provided or will provide for the necessary legislative means to enable their full participation. In general, Member States plan to make use of the SIS for alerts based on European arrest warrants in the same way as they currently do as regards the SIS. In line with this, most of the Member States envisage keeping alerts for the same periods as they currently keep alerts based on Article 95 of the Convention implementing the Schengen Agreement.

Most Member States agreed to treat alerts issued before 1 January 2004, in case of a hit, as European arrest warrants. Should the information provided for by the SIRENE bureaux not be sufficient according to Article 8 of the Framework Decision, the issuing authority should be contacted and enabled to complete the information or issue a European arrest warrant. During the transitional period, Member States will thus continue to arrest the requested person on the basis of the SIS alert in order to execute a European arrest warrant in cases where the location of the requested person is unknown.

¹ UK and IRL

b) Translation of the European arrest warrant and language used for transmission via the SIS

Article 8(2) of the Framework Decision states that the European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. At the same time it enables Member States to declare that they will accept a translation in one or more other official languages of the Institutions of the European Union. At least three Member States¹ have announced that they will accept European arrest warrants drawn up in another language than their official languages, although it is likely that more Member States will eventually be able to do so. Furthermore, one Member State's² competent authorities will, in case of arrest of a person pursuant to an SIS alert, ensure, if necessary translation into that Member State's official language. In some Member States the discussion were still ongoing. One Member State³ answered that outgoing European arrest warrants would normally be in one of its official languages and that translation into the language of the executing Member States would be produced only upon request.⁴

The linguistic regime to which alerts effected via the SIS when the location of the requested person is unknown, will be subject to, as well as the linguistic regime used by the SIRENE bureaux in general, shall be the same as currently used by the SIRENE bureaux.

The expert group has also discussed the issue of languages concerning the European arrest warrant and the practical implications for the surrender procedure. In that context, Member States could seek to find practical solutions for this matter, in particular with a view to the future enlargement of the European Union, by making use of all the possibilities allowed for by the Framework Decision.

¹ B has announced that it will probably accept European arrest warrants in English, S intends to accept European arrest warrants in English, Danish or Norwegian; FIN will probably accept European arrest warrants in English.

² ES

³ IRL

⁴ As the Framework Decision lays down a number of short delays in order to speed up surrender procedures, it will be crucial for the executing authority to commence surrender procedures without delays that might be entailed by translations of the European arrest warrant.

c) Means of transmission of the European arrest warrant (co-operation with the European Judicial Network and use of its secure telecommunications system, use of the services of Interpol and transmission via other secure means)

Article 10(3) creates a legal basis for a call upon Interpol to transmit a European arrest warrant in cases where it is not possible to effect it via the SIS. Article 10(4) permits transmission by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity. As for the future, Article 10(2) of the Framework Decision also enables the issuing judicial authority to effect the transmission of a European arrest warrant via the secure telecommunications system of the European Judicial Network (EJN), which, at present, is not yet operating.

In general, Member States will leave it to their competent authorities to choose the means of secure transmission they consider appropriate.

The use of the Interpol network is commonly seen as one possible way to transmit European arrest warrants in relation to the two Member States¹ that currently do not participate in the SIS during a temporary period before the SIS will be available for them. Several other Member States endorse the supplementary character of the communication via Interpol whereas they prefer direct transmission, where possible. Some Member States will, during the transitional period, continue to use Interpol alerts when it is not possible to use SIS alerts .

Other secure means of transmission could be, according to the replies to the questionnaire, (encrypted) fax, e-mail (with jpeg attachments) or the "SIRPIT" currently being introduced within the SIRENE network. One Member State² takes the view that, if necessary, possible problems regarding the authenticity of documents could be solved by direct contacts between the authorities involved. One Member State³ considers it desirable and appropriate that the means of secure transmission are co-ordinated at EU level in order to ensure compatibility of the various means used by Member States.

¹ UK, IRL

² FIN

³ IRL

d) Practical use of the SIS – transitional and final solution

Starting from the idea that the European arrest warrant as such should be introduced in the SIS, the Framework Decision provides for a different regime during a transitional period (Article 9(3) last paragraph) until the SIS will have the capabilities to transmit all the information contained in a European arrest warrant (Article 8(1)). This is, at present, technically not feasible in the SIS in a narrow sense (without the SIRENE bureaux), but will be when SIS II becomes operational (which is foreseen for 2006). From then on, only one input will be required, namely the introduction of the European arrest warrant by the issuing state. The Article 36 Committee¹ unanimously endorsed this option for a final period.

For the transitional period, Article 9(3) states that “the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority”. The alert referred to is an alert according to Article 95 of the Convention implementing the Schengen Agreement.

For the time being, only the data listed in Article 94(3) of the Convention implementing the Schengen Agreement are entered into the SIS in order to effect an alert. In addition to that, the data covered by Article 95(2) of the Convention implementing the Schengen Agreement are currently entered in a so-called A-form and sent by the SIRENE bureau of the requesting country to the SIRENE bureaux of the other parties.

The European arrest warrant will contain additional information which is currently transmitted neither by the SIS nor by the A-form. As regards the transmission of this additional information, the Article 36 Committee accepted that the information that is not included in the A-form, will be sent by an additional separate form, the so-called M-form, to the SIRENE bureaux. The M-form can be used for several types of alerts. It shall also be used for sending any additional information concerning the European arrest warrant to other SIRENE bureaux.

¹ Meeting of the Art. 36 committee of 25 July 2003; outcome of the proceedings set out in doc. 11899/03 SIRIS 64 COPEN 79 COMIX 487

4. Conclusions

On several occasions, all Member States have stated that they will take the necessary measures to ensure that their authorities will be able to apply the European arrest warrant from 1 January 2004. But not only the efforts by Member States to cope with the time limits for the implementation, but also the work regarding the practical use of the SIS will make it feasible to put the European arrest warrant in operation by 1 January 2004.

Apart from that, the question arises whether the European arrest warrant and its practical application in connection with the SIS possibly requires additional legislative acts to complete the legal framework. It is the opinion of the Presidency that it is too early to examine this matter at this stage of the process. Nevertheless, it may be useful to keep the following issues in mind for possible future work:

a) Revision of the provisions of the Convention implementing the Schengen Agreement

The Article 36 Committee discussed the question whether Article 9 of the Framework Decision would in itself allow for the introduction of European arrest warrants into the Schengen Information System and their transmission through that System or whether a revision of the provisions of the Convention implementing the Schengen Agreement would be required.

Article 9(3) of the Framework Decision states that alerts based on a European arrest warrant shall be effected in accordance with the provisions of Article 95 of the Convention implementing the Schengen Agreement. Pursuant to this, the provisions of Article 95 of the Convention implementing the Schengen Agreement apply with respect to Article 94(3) of this Convention. The latter provision limits the categories of data that may be entered into the SIS by enumerating them exhaustively. In addition to that, Article 95(2) of the Convention implementing the Schengen Agreement lists further data which are to be communicated through the fastest means of communication when an alert pursuant to Article 95 of the Convention implementing the Schengen Agreement is entered in the SIS.

In essence, that information corresponds to the information which, according to Article 8(1) of and the Annex to the Framework Decision, should be set out in a European arrest warrant. In some respects, the European arrest warrant must contain additional information which cannot be entered into the SIS under the provisions of Article 94 (3) and which are not required under the provisions of Article 95(2) of the Convention implementing the Schengen Agreement (e.g. information about the penalty imposed which remains to be served or the prescribed scale of penalties for the offence under the law of the issuing Member State).

The second subparagraph of paragraph 3 of Article 9 of the Framework Decision envisages transmission of the entire contents of European arrest warrants according to Article 8(1) through the SIS. As far as such additional personal data are concerned, the provisions of the Convention implementing the Schengen Agreement could be looked upon as an instrument that would require a modification since the list of Article 94(3) is exhaustive.

b Further steps

Pursuant to Article 34(3) of the Framework Decision, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

Possible proposals for further legislative measures should be based on the Member States' experience with the practical application of the European arrest warrant and the functioning of the SIS during a representative period as well as the Commission's report. In any case, the results of the practical application of the European arrest warrant and its transmission through the SIS should be awaited before measures aiming at a modification of the legislative framework should be taken.