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The European Arrest Warrant and its application by the Member States

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Summary

The framework decision relative to the European Arrest Warrant and the surrender procedures between Member States adopted on 13th June 2002 symbolises the launch of the principle of mutual recognition in an area that has so far been on the sidelines of European Union policies, and that is criminal law. It bears witness to the growing desire on the part of Member States for closer co-operation on the free circulation of penal decisions, the only possible answer to the free movement of criminals across the European territory. The European Arrest Warrant, which is the vehicle of considerable progress in the fight against trans-border crime, suffers however due to its own inadequacies and ambiguities. Since the framework decision indeed only serves as a framework for general action the effectiveness of the European Arrest Warrant depends too greatly on national transposal legislation and the attitudes adopted by the competent legal authorities; this is even more the case since some States did not waste time internally in taking liberties with a text that they had voted upon just a few months previously on a European level.

Mots clefs :
European Union – European law-enforcement area – European Arrest Warrant

The framework decision of 13th June 2002[1] establishing the European Arrest Warrant offers a general common framework of action for all Member States and introduces a series of totally innovative measures in comparison with the old extradition laws: it heralds an enormous step in the construction of a European law-enforcement area. In that the European text only serves as a general outline the European Arrest Warrant is not fixed: on the contrary it is to be gradually moulded by national transposal legislation and also by the competent judicial authorities who are responsible for applying it on a daily basis. This is why it comprises an excellent indicator of the desire on the part of the States to commit themselves on the route to the mutual recognition of judicial decisions in the law-enforcement area. In effect as soon as the link of causality between the opening of the borders and the development of organised crime is established Member States will have to choose between Europe as a “sieve” or Europe as a “fortress”. Will Member States accept relinquishing a significant share of their national sovereignty in the area of law-enforcement in order to provide the European Union with the effective tools to fight against criminality? The framework decision aims to proceed in this direction; but will the same apply for the national transposition laws? Shall we also try to determine to what degree the European Arrest Warrant, as transposed by the national legislation, meets the criteria set out by the guidelines of the framework decision? In practice is it sufficiently effective to fight on an equal footing across the entire European Union against organised crime?

The European Arrest Warrant comprises a remarkable step forwards towards a European law-enforcement area. It incorporates all of the principles of European integration in a domain that until now was the sole reserve of national sovereignty. With regard to this, the transposal of this new tool by Member States into their judicial arsenal appears to be in line with the idea and requirements of the European Union. However the European Arrest Warrant is still a difficult tool to launch. It suffers the inadequacies of European construction in the penal domain. The Union still has not succeeded in providing the correct conditions for the development of unfailingly

reciprocal confidence between Member States. The result of this is criticism[2] of the way some States, including France[3], have decided to transpose the framework decision into their internal judicial system.

I – The positive influence of the European Arrest Warrant: application by the States in line with the main principles launched by the framework decision of 13th June 2002

The main founding principles of the European Arrest Warrant are extensively adopted by the Member States in spite of some liberty taken in transposal. Two main features arise with regard to this.

1 – The European Arrest Warrant: an original application of the principles of European integration in the law-enforcement domain.

The foundations of the European Arrest Warrant bear witness to a certain imitation of the procedures taken to set down and finalise the internal market, as shown by the three main principles of this new tool.

- The primacy of the principle of European citizenship: the surrender of nationals

The possibility of refusing the extradition of nationals is considered a general rule of extradition law. With the development of the principle of European citizenship the framework decision has thrown over this reason for non-execution: the European Arrest Warrant is applicable to nationals of the State of execution. The practical interest of this is considerable: confronted by trans-border crime it will now be possible to judge all players in an affair simultaneously whatever their nationality. However and in line with the power allowed them by the framework decision Member States have accepted the surrender of their citizens on condition that the sentence is executed on their territory[4]. In applying the grounds of conditional surrender most Member States have opted for the criteria of main place of domicile hence ensuring an equal treatment of their nationals and their residents. We should note that French transposition law diverges from this trend since it only targets its own nationals to the exclusion of its residents.

- The surrender procedure between Member States is now under judicial control

The depoliticisation of the European Arrest Warrant comprises two aspects: the confirmed renunciation of the exception for a political crime and the establishment of an exclusively judicial procedure. The second aspect heralds a considerable qualitative step forwards. In effect it invalidates all political authority and removes all diplomatic dimensions from the procedure. In addition to this the judicial nature of the procedure now affects the competent authorities during the issue of the warrant: only the “judicial authorities themselves and the public prosecutor, to the exclusion of the police authorities”[5] will be involved in the procedure. The framework decision also (article 7) includes the facultative use of “central authorities” to help the competent judicial authorities. The central authority which is often the Ministry for Justice has lost its power of decision to extradite and now plays a role of co-ordinator. Nevertheless some States do not respect the guidelines: whilst some have appointed an executive organ in the guise of competent authorities in all matters (Denmark) or in part (Estonia, Latvia, Lithuania, Finland, Sweden), others have granted the central authorities with decisional powers (Estonia, Ireland).

- The principle of mutual recognition, the cornerstone of the European judicial co-operation: the partial abolition of the principle of double criminality.

The European Arrest Warrant comprises a radical change in view since it is the “first concrete measure in the field of criminal law of the principle of mutual recognition.”[6] In real terms this principle comprises the establishment of the free circulation of judicial decisions that have full and direct affect across the entire European Union. It is therefore founded on the idea of equivalence between the decision of the issuing State and those of the executing State and reciprocal confidence between Member States in the quality of their respective judicial procedures, a guarantee of judicial security. There are several practical consequences as a result of this. In effect the mandate is subject to a simple control of legality in all Member States without being

subject to additional terms of conformity with the judicial system of the executing State. This is why the framework decision enumerates a limitative list of mandatory and facultative grounds for the non-execution of the warrant in articles 3 and 4. The principle of mutual recognition also implies the abolition of the double criminality rule.[7] The long negotiations on this point led to an overall compromise. The rule of double criminality was abolished in terms of the sentence and only the sentence as defined by the domestic law of the issuing State is now taken into account. In addition to this the verification of double criminality will be abolished for a list of 32 infractions defined on a limited basis corresponding to a prison sentence of a maximum of three years.

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2 – The European Arrest Warrant: the achievement of a fine balance between freedom and security

Within the fight against international crime the European Union has always taken care to ensure a balance between freedom, security and justice. The European Arrest Warrant continues this line of thought.

- The demand for an effective, rapid tool, a guarantee of security

Article 17-1 of the framework decisions says that “A European arrest warrant shall be dealt with and executed as a matter of urgency”: the procedure must be rapid and effective. The only document transferred and retained within the procedure is the standard form that should enable simplified and reliable work on the part of working on the case via a harmonisation between Member States. Moreover the warrant must be translated into the official language(s) of the executing State. Then the issue of the European Arrest Warrant relies in the main on the most recent mechanisms established in Europe to aid judicial co-operation: the Schengen Information System that is designed to become the standard mode of transmission of the warrant but also the European judicial network. Finally the overriding concern for celerity within the context of the European Arrest Warrant led to confining the procedure to imperative deadlines. Following the arrest of the person the judicial authority of the executing State has 60 days to legislate on surrender with a possible extension of 30 additional days for serious grounds and a reduced period of 10 days in the case of the consent of the person to his/her surrender. It is regrettable that these periods are not supported by a judicial sanction if they are not respected; only a “political” process can be launched before Eurojust, then the Council fo Ministers of the EU. On all of these points some problems should be highlighted. Particularly the report by the Commission which reveals that the “Member States’ demands vary both in detail and in terms of the time to taken to accept the warrant from the time of arrest, to the translation and means of authentication.” However these problems are minor since the average time taken for execution has decreased from nine months to 43 days.

- A vital balance with the respect of freedom and fundamental rights

The respect of fundamental guarantees is applied on two levels: in advance of the terms of application of the warrant and during the roll out of the procedure. Preamble 12 and article 1-3 of the framework decision establish that the European Arrest Warrant is applied in the respect of article 6 of the Treaty on European Union. Some

States including France, the UK, Denmark and Cyprus have explicitly included this requirement via a non-discrimination clause, a mandatory reason for non-execution[8]. Then there is article 5 which states that the executing State can subordinate the execution of the warrant to the acquisition by the issuing State of guarantees, the final aim of which are to protect the person. This faculty includes cases of decisions in abstentia, of infractions punished by a life sentence, but above all the execution of a sentence issued in the State which the surrendered person is a national of in order to improve detention conditions or social re-insertion. With regard to the roll out of the procedure defence rights are reinforced during the appearance before the competent authorities[9]: this means that the person is informed of the existence and content of the warrant as well as the right to benefi from the services of a counsel and an interpreter. In practice all States seem to have transposed the measures included in the framework decision relative the rights of the person being prosecuted. Moreover the Commission is pleased with the speed with which the European Arrest Warrant is executed, the guarantee of a better respect of “reasonable time spans”.

II – The deficiencies of the measure: a geometrically variable launch by States of the incomplete European law-enforcement area.

In spite of considerable progress the European Arrest Warrant remains a necessary and less audacious compromise than the project set down by the Commission in the wake of the attacks of 11th September 2001. In the construction of the European law-enforcement area difficulties have arisen on two levels: work must continue both on the part of the Member States and the Union.

1 - the reappearance of the remains of national sovereignty in the application of the European Arrest Warrant.

The European Arrest Warrant is a flexible tool for the States since the framework decision only sketches the main guidelines. Its launch is therefore dependent on the behaviour of two players: the national legislators who are responsible for the successful transposal of the European text and the competent judicial authorities for the application of the warrant.

- Obstacles established by the national legislators via the strengthening of reasons for non-execution of the warrant.

Some States have wasted no time in taking liberties and diverging from the text and even from the spirit of the framework decision, especially since the Commission has no means at its disposal if there is default within the context of the third pillar. And yet the scope of the mandate depends on the number of exceptions to the principle of the immediate enforceable effect of this tool. The framework decision includes two sets of grounds for non-execution of the surrender request that can be referred to by the executing State. Article 3 focuses on the grounds for mandatory non-execution: these are amnesty, the existence of a final decision pertaining to the same acts and not being of age. There is then article 4 which establishes a list of seven grounds for the optional non-execution of the European arrest warrant. What was the intended meaning in the framework decision of the notion of “optional grounds for non-execution”[10] ? In the eyes of most States this faculty addresses the legislators who can choose to retain only some of the reasons of optional non-execution. Hence the UK does not acknowledge the idea of a general amnesty, and has not accepted this reason for mandatory non-execution planned for by the framework decision. Other countries and like France[11], have transformed the optional grounds for non-execution into mandatory grounds. Finally some national legislations (Denmark, Malta, the Netherlands, Portugal, UK) have had no scruples in including non-execution clauses that were not part of the framework decision and that will certainly be the cause of many problems: British law says that after the decision to surrender on the part of the judge, the minister may decide not to execute if the person acted “in the interest of national security.” Italian legislation stipulates that the judge must not only check the conformity of the procedure with regard to the fundamental principles of Italian law but he must also check the grounds of the affair to ensure that there is sufficient evidence of proof. The Commission has denounced this state of affairs which is an element of discord between Member States and therefore a means to undermine the effectiveness of the European Arrest Warrant: “it believes that the introduction of grounds that were not planned for by the

framework decision is a source of concern."[12].

- The preponderant role of practice, key to the successful application of the European Arrest Warrant

The judge has become the central player in the application of the warrant. The judicial authorities in each Member State by means of their more or less restrictive jurisprudence will define the scope of this new tool. However the role of the national magistrates might cause some problems in that, and depending on the country, the judges will not provide the same scope to the European Arrest Warrant. Hence it also appears vital to encourage a rapprochement of national practices. It is within this context that the framework decision included in article 19 the option for the judicial authority of the executing State to authorise the issuing State to intervene in the hearing. The third party in the hearing might then assist the judge responsible for the surrender request and provide him with additional information if the case is a complex one. However the perpetuation of an in-depth examination of the request for surrender is likely to increase the influence of the national judicial authorities over the European Arrest Warrant: they will sometimes examine the request for surrender in detail since the grounds for non-execution provide plenty of room for discretion in their application. The grounds for non-execution due to the violation of fundamental rights (article 1) or for discrimination (preambles 12 and 13), for example were intentionally introduced in two thirds of national legislations, with some extending beyond the framework decision (Greece, Ireland, Cyprus). In its report the Commission says that "these grounds must only be referred to exceptionally within the Union." According to Isabelle Jégouzo, "care must be taken that under the guise of a guarantee of the respect of ECHR the judicial authority does not set up a judicial and procedural system of the executing State without applying its own rules"[13].

2 – Continued difficulties inherent to the construction of European with regard to law-enforcement.

The European Union must also be prepared to make more effort in that the construction of Europe with regard to criminal law also conceals its own deficiencies that are just as much an obstacle for the development of the European Arrest Warrant.

- The question of relations between harmonisation mutual recognition

The abolition of the check on double criminality for a list of 32 infractions reflects the tension that emerged between harmonisation and mutual recognition. Two problems must be examined. The application of the partial abolition of double criminality, a key part of mutual recognition might prove difficult. Indeed the list linked to the European Arrest Warrant refers rather to criminological categories than to the judicial definition of infractions. Hence it appears to leave a wide margin for manoeuvre on the part of the national judicial authorities in their appreciation of the cases in debate. It is limited to deciding upon the infractions that the new mechanism applies to without tackling the issue of convergence/divergence that subsists from one country to another, notably with regard to controversial, "periphery" behaviour. For example, euthanasia or abortion might be qualified as grievous bodily harm by the legislation in some States whilst Belgian legislation has purposely excluded this. The establishment of the European Arrest Warrant also presented the opportunity to examine the articulation of two paths in the construction of Europe: mutual recognition and harmonisation. The European Arrest Warrant bears witness to the primacy of the principle of mutual recognition in the building of a European law-enforcement area. However although the principle of mutual recognition is vital for the preservation of the very diversity of Member States' legislations it remains that some forms of criminality and the respect of fundamental rights and minimal procedural guarantees[14] call for a harmonised response across the whole of Europe. Far from being exclusive mutual recognition and harmonisation can only be conceived uniquely in a complementary manner within the context of the construction of a true European law-enforcement area.

- The reciprocal lack of confidence between Member States: the need for the Union to intervene.

In virtue of the principle of mutual recognition "the mechanism of the European arrest warrant is based on a high level of confidence between Member States.[15]"In order for this declaration of will to become a reality Eurojust is to monitor the adequate application of the European Arrest Warrant; it may assist Member States in

the setting up of joint teams. It also seems that this new tool may benefit from the experience and support of the existing institutions within the European judicial area, ie the liaison magistrates and the European judicial network. Although it is sought after reciprocal confidence is not however always fully guaranteed in the present situation. Also in the absence of any appeal on the part of the Commission in the case of default by States who have not transposed the framework decision correctly does not really improve the situation. This is why the Commission pays attention to the degree of effective application of the instruments adopted and to the assessment of how they are used. Its report published in February 2005 bears witness to this with the first results of the European Arrest Warrant. Uncompromising with regard to unco-operative States it should create political pressure that is likely to change the sometimes nationalist attitude adopted by some States. Finally the Commission insists on the need to enhance mutual confidence by ensuring that all citizens can enjoy justice of quality founded on common values. To this end a series of measures should influence the definition of procedural guarantees.[16].

In order to improve the effectiveness of the European Arrest Warrant it would therefore appear appropriate to establish measures upstream to strengthen mutual confidence thanks to a harmonisation of procedural guarantees and a concerted action by the institutions within the European judicial area (Eurojust, the European Judicial Network) and measures downstream such as the follow-up and assessment of the tools created by the Commission.

The future of the European Arrest Warrant, the achievement of the principle of mutual recognition in terms of law enforcemen,t depends mainly on the reciprocal confidence of Member States. This is a guarantee of increased coherence and effectiveness of the European law enforcement policy. Although work by the Member States and the EU in this direction must continue with tenacity, the initial years of the European Arrest Warrant augur well “both in terms of judicial control, effectiveness as well as speed, while fundamental rights are equally observed[17]

[1]Framework decision 2002/584/JAI by the Council of 13th June 2002 relative to the European Arrest Warrant and surrender procedures between Member States, JOCE L 190 18th July 2002, p. 1 and s.

[2]See the Commission’s report of 23rd February 2005 based on article 34 of the framework decision by the Council of 13th June 2002 relative to the European Arrest Warrant and surrender procedures between Member States, COM (2005) 63 final.

[3] Transposal law n° 2004-204 9th March 2004, JORF 10th March 2004, integrated into articles 695-11 to 695-51 of the criminal procedure code.

[4] There are two situations here. On the one hand when the warrant is issued for criminal prosecution, the executing State can subordinate the surrender of its nationals to the condition that this person will be sent to the executing State to carry out the sentence that will possibly be passed by the issuing State (art 5, 3° framework decision). On the other hand when the warrant is issued for the execution of a sentence that has already been passed and involves a national or resident of the executing State, the latter can refuse the surrender of this person if it is committed to the execution of the sentence in line with its domestic law (art 4, 6° framework decision).

[5] Presentation of the grounds for article 3b) of the proposed framework decision presented by the Commission on 19th September, COM (2001) 522 final

[6] Preamble 6 of the framework decision 13th June 2002

[7] The rule of double criminality, principle of the extradition law implies that this is only granted is the alleged infraction is questioned by both the State summoning and the State being summoned.

[8] article 695-22, 5° of the criminal procedure code with regard to French criminal law.

[9] article 11 of the framework decision of 13th June 2002

[10] article 4 of the framework decision of 13th June 2002 relative to the European Arrest Warrant

[11] article 695-22, 4° of the criminal procedure code planning that the execution of the warrant is rejected “if the reasons for which it was issued might be prosecuted and judged by French jurisdiction and that the prescription of public action or the sentence is established.”

[12] The Commission’s report based on article 34 of the framework decision by the Council on 13th June 2002 relative to the European Arrest Warrant and the surrender procedures between Member States, point 2.2.1

[13] Isabelle Jégouzo, “Le mandat d’arrêt européen ou la première concrétisation de l’espace judiciaire européen”, Gazette du Palais, July-August 2004

[14]Commission Green Paper on the procedural guarantees for suspects and people under accusation in EU criminal procedures, 19.02.2003, COM (2003) 75 final

[15] preamble 10 of the framework decision of 13th June 2002

[16] As in its Green Paper of 19th February the Commission laid down a proposal for a framework decision on 29th April 2004 on the procedural guarantees in criminal matters.

[17] Conclusion of the Commission’s report based on article 34 of the framework decision by the Council of 13th June 2002 relative to the European Arrest Warrant and surrender procedures between States COM(2005) 63 final