The European Arrest Warrant
Briefing and Suggested Amendments

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. This paper aims to provide a critical analysis of the European Arrest Warrant (EAW) scheme from a defence focussed, practical perspective. In doing so we set out the origins to action in this field and the shortcomings to the scheme that we have identified.[1]

3. The opportunity to review and implement meaningful and necessary amendments and additions to the EAW Scheme is imminent with the future Justice and Home Affairs programme (the Stockholm Programme) currently under consideration in the Justice and Home Affairs Council. We noted in our briefing on the Commission 'Communication on an area of freedom, security and justice: serving the citizen' that there must be implementation and evaluation of all mutual recognition framework decisions that have been adopted prior to the development of additional prosecution focussed instruments.[2] Where evaluation has taken place in which deficiencies are identified, these must be addressed.

4. We consider that the Stockholm Programme is an opportunity to ensure necessary amendments to the EAW scheme and the adoption of consequential instruments in the areas highlighted below are pursued as a matter of priority. We call for these areas to be included in the Programme, as we call for the inclusion of the Swedish Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. In particular we seek:

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[1] This paper is soon to be published in Volume 1 Issue 1 of the New Journal of European Criminal Law. It should be read in conjunction with the article *Four Years of the European Arrest Warrant: what lessons are there for the future?* J. Blackstock, JUSTICE Journal [2009] 1, 28.

[2] http://www.justice.org.uk/images/pdfs/Response%20to%20the%20European%20Commission%20Communication%20on%20an%20ar%85.pdf

- **Amendment of the framework decision on the EAW to incorporate a public interest test prior to issuing a warrant;**
- **Urgent reform of the system of challenge to Schengen Information System EAW alerts and/or early implementation of the Council Decision on SIS II, Art 59 to afford the opportunity of challenge;**
- **A Commission Green Paper on pre-trial detention and a speedy consultation process to identify areas where uniformity can be reached;**
- **A new framework decision to approximate post-EAW surrender procedure: fast track trial/ requirement to take account of treatment of suspect by executing state;**
- **Adoption of the proposed framework decision on supervision measures as an alternative to pre-trial detention;**
- **The development of a defence network and amendment of the framework decision on the EAW to require dual representation (in the issuing and executing states) in an EAW case.**

Mutual Recognition in practice: failings and absent accompanying instruments

5. Milestone 6 of the specially convened Tampere European Council declared Mutual Recognition to be the cornerstone of judicial cooperation within the Union. "*Enhanced Mutual Recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.*"

6. The 2004 Hague Programme advocated the following to achieve these aims:

- approximation and the establishment of minimum standards of several aspects of procedural law (such as ne bis in idem, handling evidence or judgments in absentia) as instrumental in building mutual confidence and pursuing mutual recognition;
- measures for efficient and timely action by law enforcement authorities (such as mutual recognition of non-custodial pre-trial supervision measures, or recognition and execution of prison sentences) and, more generally, to replace traditional mutual assistance with new instruments based on mutual recognition.
- Eurojust as the key actor for developing European judicial cooperation in criminal matters.

7. Ten Mutual Recognition instruments have now been adopted:

1. European arrest warrant OJ L 190, 18.07.2002, p. 1 – implemented in all 27 MSs;
2. Freezing of assets OJ L 196, 02.08.2003, 045 – not fully implemented;
3. Financial penalties OJ L 076, 22.03.2005, p. 16 – not fully implemented;
4. Exchange of information extracted from the criminal record OJ L 322, 9.12.2005, p. 33 – not fully implemented;
5. Confiscation orders OJ L 328, 24.11.2006, p. 59 – not fully implemented;
6. Taking account of convictions OJ L 220, 15.08.2008, p. 32 – to be implemented by 2010;
7. Enforcement of custodial sentences OJ L 327, 5.12.2008, p. 27- to be implemented by 2010;

8. Supervision of probation decisions and alternative sanctions OJ L 337, 16.12.2008, p. 102 – to be implemented by 2010;
9. European evidence warrant OJ L 350, 30.12.2008, p. 72 – to be implemented by 2011;
10. In absentia judgments OJ L 81, 27.03.2009, p. 24 – to be implemented by 2011.

(our abbreviated titles)

8. The *Analysis of the future of Mutual Recognition in criminal matters in the European Union,* final report, G. Vernimmenen-Van Tiggelen and L., Institute for European Studies, Universite Libre de Bruxelles, European Criminal Law Academic Network, 20 November 2008 (ECLAN Study), p. 9[3] came to these conclusions:

> *It has not yet been possible to establish the desired Area of Justice in the EU based on Mutual Recognition of decisions and on the mutual trust which underpins it; attempts to do so appear increasingly chaotic, certainly not smooth. Practitioners can be heard decrying the ever-expanding gulf between rhetoric and reality: declared policy goals are reflected neither in the legal texts themselves nor in their transposition in national law.*

9. The ECLAN Study found there to be a complex array of different instruments, which in fact required harmonisation of substantive law through the abolition of the dual criminality requirement, a minority of Member States continued to have reservations about the need for approximation of procedural law, there was greater willingness to recognise final decisions compared to pre-trial decisions since these were taken by a judicial body; Common law countries were reluctant to recognise pre-trial decisions/requests where no formal charge had been laid.

10. It is telling that the majority of Member States in their transposing legislation have limited the reach of the EU instruments, and in varying ways. Some continue to carry out dual criminality checks, notwithstanding the framework list, some impose territoriality or nationality limits, and many created a non-recognition clause where fundamental rights were concerned.

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[3] http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf

11. The study identified practical failings in the development of mutual recognition:

- Absence of mutual confidence;
- Absence of training for all practitioners;
- Absence of evaluation of implementation and where carried out by the Commission, no jurisdiction to bring reference before the ECJ (Art 35 TEU);
- Limited cooperation notwithstanding the networks created (EJN, Eurojust, Joint Investigation Teams. No defence network).

The European Arrest Warrant

12. Against this background, the EAW is the only instrument to be fully implemented and regularly in use. To this end it has been hailed as a success. The most recent Commission report identified failings across the Member States, but this focussed on adherence to the framework decision as a measure of successful implementation only.

13. We consider there to be more systemic failings within the EAW Scheme, the most important of which relate to the impunity with which Member States can seek surrender.

Proportionality

14. The framework decision on the EAW passed very quickly through the legislative process in the wake of the 9/11 attacks in the United States. It clearly intended to ensure that the perpetrators of such heinous acts would not escape prosecution in what suddenly became a global fight against terrorism.

15. However, as more Member States fully implemented the Scheme, the increasing numbers of requests have highlighted the lack of a prosecutorial discretion in a significant number of Member States to consider whether seeking surrender is in the public interest. In Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad,* [2007] ECR I-03633, the European Court of Justice (ECJ) considered whether the Framework Decision was in conformity with the TEU and confirmed that

it infringed neither the principle of legality in criminal matters nor the principle of equality and non-discrimination. Significantly, with respect to the challenge to the framework list, the Court looked at the basis of the principle of mutual recognition in the light of the high degree of trust and solidarity between the Member States. It held that whether by reason of their inherent nature or the punishment incurred of a maximum of at least three years' imprisonment, the categories of offences in question are sufficiently serious, in terms of adversely affecting public order and public safety, to justify dispensing with the verification of dual criminality, and are therefore 'objectively justified'. It is clear that, in order to justify the interference, the Court favoured an interpretation identifying the object of the legislation as the prosecution of serious crime.

16. Its use therefore in matters such as mobile phone theft and other similarly minor offences (see 'Door Thief, Piglet Rustler, Pudding Snatcher: British Courts Despair at Extradition Requests', *Guardian*, 20 October 2008) is arguably unjustifiable.

17. The consequences of a lack of prosecutorial discretion are, certainly in the UK, a massive increase in extradition requests. 3,526 requests were received in the fiscal year 2008/2009 by the UK Serious Organised Crime Agency, a two fold increase on the previous year. This resulted in 516 surrenders.[4] Such requests cannot in turn be subjected to scrutiny by the executing courts using any form of domestic public interest test, as a result of the removal of the prima facie case requirement, unless evidence can show an infringement of the European Convention on Human Rights and Fundamental Freedoms (ECHR) or another legitimate bar to surrender. Generally, unless a 'flagrant denial of justice' (see *Soering v UK*, Judgment of 7th July 1989, Series A, No. 161 and the subsequent line of authorities) can be shown to have taken place or be likely to take place upon surrender, the courts will not be convinced that a request should be refused.

18. The UK courts have attempted to consistently adhere to the intention and purpose of the instrument, as required by the ECJ in *Criminal proceedings against Pupino* (Case C – 105/03) [2006] 1 QB 83, pp109-110 and applied by the House of Lords in *Dabas v Spain* [2007] UKHL 6:

[4] Information provided directly from SOCA, which is one of the two Central Authorities in the UK, the other being the Crown Office in Scotland. It is not known how many arrests were carried out as a result of the alerts received, in order to draw any conclusion from the amount of surrenders made.

[A] national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on Member States under article 10 of the EC Treaty. Thus while a national court may not interpret a national law contra legem, it must "do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU.'

19. In the recent decision of *Kadi*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 p 00000 the ECJ considered whether freezing measures imposed on the Appellants were a disproportionate and intolerable infringement of their fundamental right to property. The Court was assisted by the development of the law in Strasbourg and set out a proportionality test which we consider must implicitly indicate its application across not only the Member States of the Council of Europe, but also the Member States of the EU, through their adherence to the ECHR:

In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question (at para. 360).

20. The fundamental rights affected by an EAW are habeas corpus, the right to liberty unless prescribed by law (see Art 5 ECHR) and the right to a private life (Art 8 ECHR), and equality of treatment (Art 14 ECHR and Art 12 EC). It is our view that the above ECJ led jurisprudence demonstrates strong argument for the development of a proportionality test in the application of the EAW.

21. Indeed, the Justice and Home Affairs (JHA) Working Group Final report on the fourth round of mutual evaluations – *The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States*, COPEN

68, 8302/2/09, 18.05.2009 (the Fourth Round Report), p 15 identified proportionality as an issue for the Member States to address:

> *The expert teams widely considered that, in principle, the proportionality test was the right approach and that some provisions, guidelines or other measures should be put in place at European level to ensure coherent and proportionate use of the EAW. There seemed to be a wide consensus (although not unanimity) that no proportionality check should be carried out at the level of the executing authorities.*

22. The recommendation made by the Working Group was for the issue of proportionality to be addressed in the Council preparatory bodies as a matter of priority. We support the development of such a test so that the use of the EAW scheme, with its fetter upon judicial scrutiny and reliance upon mutual recognition, can be justified in accordance with the clear intention of prosecuting serious crime. A proportionality test as to whether a request for surrender is in the public interest should be included in the initial request to the issuing judicial authority, which will be evidenced by entry on the EAW request itself.

Alerts

23. Many EAWs are transmitted through Interpol, Europol and the Schengen Information System (SIS). These resources rely upon the issuing Member State to update and remove alerts where appropriate. Whilst Member States can add flags to an alert (and the Fourth Round Report considered this practice problematic due to the ad hoc nature of the mechanism), they do not afford the judicial authority of a Member State that has refused a surrender to remove the alert.

24. The case of Deborah Dark has been recently reported in the British media and well illustrates the problem.[5] Having had her acquittal for drugs related offences overturned during an *in absentia* appeal in 1990, Ms Dark has been the subject of a French EAW alert since 2005. The issue came to light when she was arrested having visited Turkey on holiday in 2007, Spain in 2008 and on return from Spain to the UK.

[5] See Fair Trials International http://www.fairtrials.net/cases/

Each court accepted that passage of time was a bar to her extradition, yet she cannot travel because France persists in maintaining the alert.

25. The Fourth Round Report recommends implementation of Art 25 Council Decision 2007/533/JHA of 12 June 2007 on the Schengen Information System II (SIS II) (the Council Decision) which aims to create a uniform flagging mechanism[6] notwithstanding SIS II not yet being in place. This would go someway to alleviate the problem, although the alert would still remain and a flag may be ignored.

26. However, the Convention Implementing the Schengen Agreement (CISA) provides an application procedure under Art 111 for an individual to apply to a court in *the territory of each Contracting Party to the agreement* to amend or review an alert. Art 111(2) requires each Contracting Party to undertake to enforce the final decision on the application. The Fourth Round Report highlighted that in most Member States there was no clear procedure for invoking Article 111. A similar provision is included in the Council Decision at Art 59. The recommendation in the Fourth Round Report was for the issue to be addressed in the preparatory bodies of the JHA Council.

27. Whilst there have been no applications to the ECJ upon the interpretation of Art 111 of the CISA, in *Kadi*, the ECJ found that the regulation imposing the freezing measure was an unjustified restriction on the right to liberty because it was adopted without creating a procedure through which the subject could put his case to the relevant authorities, a necessity given the significant restriction on his property rights through the continuance of the freezing measures affecting him (see paras 369 and 370). The Court found it implicit in Art 1 P1 ECHR (following *Jokela* v. *Finland* (2003) 37 EHRR 26, p. 581, 593 (para. 45) that the applicable procedures must afford the person concerned a reasonable opportunity of putting his case to the competent authorities.

28. Equally, in *Gasparini* Case C-467/04, ECR 2006, pp I-09199 it was confirmed that where someone has been finally acquitted *at trial* before a court in a Contracting Party because the prosecution is time-barred, the *ne bis in idem* principle in Art 54 of CISA

[6] Article 25 - Flagging related to alerts for arrest for surrender purposes: "1. Where Framework Decision 2002/584/JHA applies, a flag preventing arrest shall only be added to an alert for arrest for surrender purposes where the competent judicial authority under national law for the execution of a European Arrest Warrant has refused its execution on the basis of a ground for non-execution and where the addition of the flag has been required.

(and as a ground of non-execution under Art 3(2) of the framework decision on the EAW) applies to prevent re-trial in another Member State. The Court found at paragraphs 27 and 28 that it was settled law that persons who, when prosecuted, have their cases finally disposed of, should be left undisturbed; They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State. It held that this principle must extend to G's circumstances otherwise the objective of the provision would be undermined.

29. We argue, taking into consideration the reasoning of the ECJ at paragraph 30:

> *It should be added that there is a necessary implication in the ne bis in idem principle, enshrined in Article 54 of the CISA, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied,*

that this principle should extend to the recognition of a final finding by the court of one Member State that *surrender* on an EAW request is time barred by all other Member States. Equally, the opportunity must be coherently and meaningfully provided to the suspect to challenge an alert.

30. A number of other areas arose for discussion in the Fourth Round Report and the overall conclusion included a suggestion that the EAW legislative framework be amended:

> *[A] number of visits pinpointed some lacunae in the Framework Decision and raised the question of the advisability of supplementary legislative action at European Union level at some appropriate moment in time.*

31. We support the recommendations for review of these aspects of the EAW scheme. It is only appropriate, given the extensive reach of the instrument and radical departure from mutual assistance, that it is subject to amendment to resolve the procedural irregularity and unintended consequences from its application.

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2. However, at the behest of a competent judicial authority under national law, either on the basis of a general instruction or in a specific case, a flag may also be required to be added to an alert for arrest for surrender purposes if it is obvious that the execution of the European Arrest Warrant will have to be refused.

32. The mechanism to amend framework decisions of course exists through the adoption of a subsequent amending framework decision. A recent example is that of 'Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of Mutual Recognition to decisions rendered in the absence of the person concerned at the trial'.

Extraneous Legislative Instruments

33. It was always envisaged that the EAW would be accompanied by a series of other instruments to ensure that the full process of surrender is effective. This has not yet occurred. The instrument has, however, been in force in the majority of Member States since 2004.

34. Courts are grappling daily with challenges to requests for surrender based on ECHR grounds. The uniform response is that unless evidence can be shown that a fair trial cannot be followed in the requesting country, any arguments with respect to the investigation and presentation of evidence can be pursued in the requesting Member State upon surrender. Once a person is surrendered to the requesting Member State, there is no further reach from the Member State which acceded to the request. Despite the impact upon the Art 8 ECHR right to private and family life that being sent to another Member State effects, this is deemed to be proportionate to the aim to be achieved. Yet,

- There is no uniform bail or pre-trial detention across the Member States;
- There are no uniform procedural safeguards;
- There has been no study of treatment of suspects upon surrender, in comparison to national suspects, and in comparison to the treatment of suspects in the Member States who surrendered them;
- There is no defence network that can be engaged when a lawyer is appointed on an EAW case in order to verify the law of the issuing state.

Pre-trial Detention

35. Pre-trial detention has been the subject of consideration by the Commission for some time, as a result of the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005). The European Parliament has repeatedly sought EU action on rights of prisoners.[7] It is through this process that the need for a Supervision Order was identified (see below). The Commission organised a meeting of experts on 9 February 2009 in Brussels to consider minimum standards in pre-trial detention.

36. At this meeting a comprehensive study, 'An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU', Tilburg/Griefswald, *Draft Introductory Summary*, EC DG JLS/D3/2007/01, January 2009 (the pre-trial detention study) reported its findings as to the wide variation in lengths, types and grounds of detention for suspects. It looked at the numbers in the pretrial detention population in each Member State, reasons for initial detention, grounds for continuing detention and length of detention amongst other observations. Referring to European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) reports, it observed that overall many Member States' pre-trial prison population is overcrowded, such that in a number of countries, long periods could be spent in police custody before transfer to remand accommodation. Consequent to this problem it was found that there was reduced availability to work or attend activities; unhygienic, cramped conditions; lack of privacy; burden on healthcare facilities; and increased tension leading to more violence amongst prisoners and staff. Remand prisoners could be in their cells for as much as 23 hours per day. The study noted with concern the possibility of being held incommunicado. Variation in treatment was particularly apparent with respect to juvenile and female prisoners. Pointedly, foreign prisoners were over represented in most Member States.

37. The Swedish Roadmap has identified this issue by including a call for a Green Paper on the Right to Review of the Grounds of Pre-Trial Detention as one of the rights to be addressed by the Union. Its short explanation is as follows:

[7] See for example, Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0094/2004), 25 February 2004.

The time that a person can spend in detention before being tried in court and during the court proceedings varies a lot between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can (…) prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. The possibility of establishing a periodical review for the justification of continued pre-trial detention should be examined.

38. The current Draft Resolution incorporating the Road Map invites the Commission to 'consider' presenting a green paper. This reflects the fact that some Member States do not wish for the issue of detention to be considered. The reasons for the proposed omission are not set out. There are of course extensive resource and sovereignty implications to a radical overhaul of pre-trial detention. It may be that some Member States are reluctant to engage with review for this reason. Some may consider there to be a competency issue. Whilst the Council of Europe European Prison Rules set out principles for the Council of Europe Member States to follow, in relation to pre-trial detention these are broad and non-binding, with little uniform implementation across the Member States. Given the extensive reach of the EAW scheme, the more evidence of the discrepancy between systems and length of detention, the greater strain is placed on mutual trust. The practical implication of this is an increase in refusal of requests for surrender under an EAW upon Art 3, 5, and 6 ECHR infringements, and Art 12 EC as to non-discrimination on the grounds of nationality, (due to non-nationals being refused bail in circumstances where nationals would be granted bail). This clearly engages Article 31(c) TEU.[8]

39. A potential reason to exclude the invitation for a Green Paper may be that the Roadmap envisages working through the Measures one-by-one, which would create a substantial period between the recent presentation of the Proposed Framework Decision on Interpretation and Translation in July this year and finally reaching an instrument on Detention. We urge the Member States to agree to the necessity of a Green Paper in this area, and for this to be presented as soon as possible, rather than awaiting consecutively the other measures to be completed. This will enable discussion and debate to commence as to which elements of procedure regarding detention can usefully be subjected to a uniform approach.

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[8] *Common action on judicial cooperation in criminal mattes shall include:*

(c) ensuring compatibility in rules applicable in the Member States as may be necessary to improve such cooperation.

40. It should be recalled that the number of foreign prisoners will increase exponentially when 'Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of Mutual Recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union,' OJ L 327, 5.12.2008, p 27 comes into force. This instrument will allow a Member State to seek to transfer a convicted person to another Member State to serve their sentence. Prison conditions and length of term (which will be governed by the law of the state in which the sentence is served) will quickly become comparable through this process. The actual length of sentence served before parole or release on license differs throughout the Member States, in addition to the prison conditions. Once in force, without minimum agreement on how sentences are served, there will be stark contrast in treatment of people dependant on where they are located, which may lead to challenges, again based on degrading and discriminatory treatment arguments (Art 12 EC and Arts 3 and 14 ECHR).

41. Whilst the pre-trial detention study shows wide disparity amongst the Member States, there has been no extensive empirical research actually tracking the treatment of suspects who have been surrendered under the EAW scheme.[9] All Commission funded projects and Working Group reports have focussed on implementation of the Framework Decision.

42. The case of Andrew Symeou[10] in the UK has raised fresh concerns with respect to treatment upon surrender. Following his surrender to Greece, in circumstances where the English authorities had been more than happy for Mr Symeou to remain on bail during the extradition process (which was extensive due to appellate proceedings), he was refused bail in Greece. This is notwithstanding his previous good character and the wealth of evidence casting doubt on his guilt.[11]

43. In addition to the necessity for the dialogue that a Green Paper will bring to this issue, we consider that distinct attention should be focussed upon the development of a fast track trial scheme where surrender following an EAW has taken place. The success

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[9] Though EuromoS has specifically set itself this aim. See *Dutch prisoners in Germany, France and other old EU Member States, First results of the EuroMoS Inquiry in the* 'Gezant', Scientific Research Unit EuroMoS, 15th September 2007, http://euromos.org/?p=83&language=en&country=en Further research on Dutch, English and Portuguese prisons is underway.

[10] http://www.fairtrials.net/cases/spotlight/andrew_symeou/

[11] http://www.justice-for-symeou.com/

ascribed to the dramatic reduction in the time taken for extradition following the introduction of the scheme is rendered obsolete if, once in the requesting state the suspect languishes in pre-trial detention for months or years pending trial. We also see an important role for dialogue between Member States (with the assistance of Eurojust where necessary) as to their knowledge of the nature and conduct of a suspect and the treatment that was metered out in the requested state pending surrender. This communication should at least impact upon the treatment of that individual upon surrender, if an area of mutual trust is to fully develop. Such an instrument should be developed in framework decision form, identifying appropriate uniform criminal procedure post EAW surrender.

Bail/Pre-trial Supervision

44. The 'Proposal for a Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention' (previously referred to as the Supervision Order) was politically agreed in the 28 November 2008 JHA Council but is held for legislative scrutiny. The instrument would allow a person whose surrender is requested to remain in the Member State in which they are resident until trial/hearing, upon bail where bail would be granted in a domestic case. The clear advantage of this is that their lives are not disrupted nor are they held in unfamiliar custodial surroundings in the requesting Member State for an undetermined period of time. The instrument will also tackle the discriminatory treatment of non-nationals refused bail in the issuing state in circumstances where it would otherwise be granted to nationals, because the suspect is considered a flight risk. The instrument was returned to Parliament for consideration in December following the agreement of the text in Council. Parliament reported on 2nd April 2009 with suggested amendments. The Commission has offered partial agreement to these. There is no indication as to when the instrument may be finally adopted, and there will then be the usual period of approximately two years for its implementation.

45. We hope that the Council will make this outstanding legislation a priority of this Presidency, striving to adopt the instrument as soon as possible, and that Member States will endeavour to transpose it well in advance of the deadline, so as to afford meaningful assistance to those facing surrender.

Defence Network

46. There is no established network of defence practitioners through which a representative in one Member State can seek the assistance of a lawyer in an issuing Member State. It is inconceivable that the lawyer charged with representing the suspect in surrender proceedings will have full knowledge of the legal system of the other Member State. Only on an ad hoc basis is it possible to obtain assistance of a lawyer in another Member State.

47. In our view this is a fundamental flaw in the EAW scheme. We consider that in order to rectify this, appointment of a lawyer in each Member State affected by the warrant is necessary so that full scrutiny and argument can be made in relation to issues which may affect the return of the suspect; The representative must be able to ascertain if the correct procedure was followed in the issuing state upon instigating a criminal prosecution and seeking an EAW, together with likely treatment upon surrender. Recitals 12 and 13 of the Framework Decision provide:

> *(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof. Nothing in this 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. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.*
>
> *(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

48. Whilst the purpose of the Framework Decision was to improve mutual recognition of other Member States' decisions, thereby reducing the level of scrutiny afforded to the extraditing judicial authority, the insertion of these recitals indicates that it was never the intention of the Council to entirely ignore the process by which those decisions were reached, nor the likely treatment the suspect would receive upon surrender. In fact, seminal Strasbourg case law requires this consideration to be undertaken:

> *Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.*
> (*Soering v UK*, *op.cit.* p. 29, §91.)

49. In the UK, the Recitals are transposed by sections 13 and 21 of the Extradition Act 2003. Arguments based on the ECHR rarely succeed and section 13 has not been utilised at all in a reported case. In order to fully represent the interests of a suspect, the above considerations can only be addressed with an understanding of the legal process of the issuing Member State. We pose the question how are the interests of the suspect to be fully presented by a lawyer qualified only in the law of the executing state? How is a suspect to successfully communicate his knowledge of genuine failures in the requesting Member State's procedure, whether systemic or specific to his circumstances, without the legal armoury to defeat State counter-submissions?

50. Prosecuting authorities have a successful and open dialogue through Eurojust, judges can raise their queries through the European Judicial Network, even police officers communicate via Europol and are beginning to coordinate activity through Joint Investigation Teams. Yet defence practitioners are unable to take full advantage of arguments which may present justifiable refusal grounds because they are not afforded the same conjoined approach. Consequently, in our view, equality of arms, a fundamental rubric of natural justice enshrined in European Community and international law has been undermined by the failure to include this network in the EAW Scheme.

51. We consider that resources must be made available with expediency to develop such a network, and amendment to the EAW scheme must be pursued to afford dual representation in these matters.

JUSTICE

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