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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Council Framework Deciision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Discussion on recent case-law of the Court of Justice EU = Paper by the Commission (including questions for Member States)

Delegations will find in the Annex a paper by the Commission services on recent case law of the Court of Justice of the European Union (CJEU) concerning the European Arrest Warrant, including some questions for Member States.

ANNEX

Discussion paper by the Commission services on the recent case-law of the CJEU on European Arrest Warrant for the COPEN meeting on 18 December 2017

1) Time limits for surrender of the requested person and possibility of agreeing on a new surrender date in case of force majeure - follow-up to Vilkas (Case C-640/15)

A speedy procedure ensured by strict time limits is one of the major added values of the European arrest warrant (EAW) in comparison to the system of extradition with third countries.

According to Article 17 of the Framework Decision on EAW, in cases where the requested person consents to his surrender, the final decision on the execution of EAW should be taken within a period of 10 days after consent has been given. In other cases, such final decision should be taken within 60 days after the arrest of the requested person.

Article 23 of the Framework Decision on EAW states that the requested person shall be surrendered no later than 10 days after the final decision on the execution of EAW. In case of force majeure, the judicial authorities should contact each other to agree on a new surrender date, which must take place within 10 days of a new date.

According to statistics provided by Member States for 2015[1], the average time for surrendering the requested person with consent was 14 days and without consent less than 2 months. We have no statistical data for the average time needed for the execution of the surrender after the final decision.

In the Vilkas case, the CJEU recalled that "(…) *the mere expiry of the time limits prescribed in Article 23 of the Framework Decision cannot relieve the executing Member State of its obligation to carry on with the procedure for executing a European arrest warrant and to surrender the requested person, and the authorities concerned must agree, for that purpose, on a new surrender date*" (paragraph 72).

[1] Commission Staff Working Document, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015, SWD(2017) 320, 28.9.2017.

Regarding Article 23(3) of the Framework Decision, the CJEU found that *"(...) [it] does not expressly limit the number of new surrender dates that may be agreed on between the authorities concerned where the surrender of the requested person within the period laid down is prevented by circumstances beyond one of the Member States' control"* (*paragraph 25).*

The Court stressed that *(...) the concept of force majeure must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of exercise of all due care" (paragraph 53).*

Further, when it comes to the specific situation of interpretation of the concept of force majeure in the context of the Framework Decision on EAW*, "(...) it is necessary to take account of the general scheme and the purpose of the Framework Decision (...)."* (paragraph 55).

The CJEU concluded that "*it cannot be entirely ruled out that, on account of exceptional circumstances, it is objectively apparent that the resistance put up by the requested person to his surrender could not be foreseen by the authorities concerned and that the consequences of the resistance for the surrender could not be avoided in spite of the exercise of all due care by those authorities"* (paragraph 64). Nonetheless, *"it is thus for the referring court to ascertain whether the existence of such circumstances has been established in the main proceedings"* (paragraph 65).

In light of the above, the Commission services would like to ask Member States the following questions:

- ***What are the consequences for exceeding the time limits laid down in the Framework Decision on EAW under your national law?***
- ***Do you know the average time in your country to execute the surrender of a requested person in application of a EAW and how do you overcome possible obstacles related to the execution of the surrender?***

2) Transposition of grounds for optional non-execution of a EAW - follow-up to Poplawski (Case C-579/15)

The Framework Decision on the EAW lists, in Article 4, exhaustive grounds for optional non-execution of a EAW.

The Commission services would like to raise the attention of the Member States that optional grounds of refusal cannot be transposed into national law as mandatary grounds of refusal.

In Poplawski the CJEU clarified it as follows: *"(...) where a Member State chose to transpose provision of Article 4(6) into domestic law, the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW*" (paragraph 21).

According to the CJEU, *"(...) legislation of a Member State which implements Article 4(6) by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, cannot be regarded as compatible with that framework decision*" (paragraph 23).

In light of the above, the Commission services would like to ask Member States the following question:

- ***How is the margin of discretion ensured under your national law, in case of transposition of the optional grounds of refusal laid down in Article 4 of the Framework Decision?***

3. **Concept of "trial resulting in the decision" in the light of the right to defence - follow-up on case-law of Tupikas (Case C-270/17) and Zdziaszek (Case C-271/17) and– cases for information only**

On the CJEU cases of Tupikas and Zdziaszek, the Commission services will merely provide the following information:

In Tupikas, the CJEU found that *"where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) (...) must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case*" (paragraph 100).

In Zdziaszek, the CJEU found that *"'trial resulting in the decision', within the meaning of Article 4a(1) (...) must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard"* (paragraph 111).