



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 16 March 2010**

**7361/10**

**COPEN 59  
EJN 4  
EUROJUST 31**

**NOTE**

---

from:	Presidency
to:	Co-operation in Criminal Matters (EAW experts) Working party
No. prev. doc.:	6891/10 COPEN 50
Subject:	Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant, during the Spanish Presidency of the Council of the European Union

---

The final report on the fourth round of mutual evaluations, as discussed in Council preparatory bodies<sup>1</sup>, sets out the recommendations made by the various evaluation teams in the fourth round of mutual evaluations, concerning the European arrest warrant.

In accordance with Article 8(5) of the Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, that report attempts to draw conclusions from the fourth round of evaluations, in order for the Council to take such decisions as it considers appropriate.

---

<sup>1</sup> At meetings of the Multidisciplinary Group on Organised Crime (MDG) on 24 April and 13 May 2009, a meeting of the Working Party on Cooperation in Criminal Matters on 6 May 2009, an Article 36 Committee meeting on 20 May 2009, a JHA Counsellors meeting on 25 May 2009 and a Coreper meeting on 27 May 2009.

The fourth round of mutual evaluations dealt with practical application of the European arrest warrant (EAW) between Member States. In particular, it set out to assess procedures carried out in practice and replies received by Member States, both when issuing and when executing EAWs, and to assess relevant training and provision for defence.

The final report is based on individual evaluation reports, a report on the first seven evaluation visits and comments made by various delegations on those reports in the Multidisciplinary Group on Organised Crime (MDG) and in the Co-operation in Criminal Matters (CCM) Working Party (experts on the European arrest warrant).

The recommendations of the final report are not ranked by importance. In drawing up the final report, it was felt that establishing any ranking of specific recommendations might be difficult and in some cases counterproductive, as they are all interrelated and mutually reinforcing in enabling the European arrest warrant to work properly. It is not the final report's purpose to reproduce the individual recommendations made to Member States or the content of individual evaluation reports. The final report's general aim is to identify particular difficulties and recommend ways of resolving them. With that end in view, as appropriate, the report's recommendations are in some cases addressed to Member States, while in others they involve the Council agreeing to a particular course of action (follow-up). They are couched in terms clearly expressing the importance attached to them.

The recommendations made in the final report on the fourth round fall into two groups: a first set addressed to Member States and a second set addressed to Council preparatory bodies. That second set was the focus of the CCM EAW experts meeting on 14 December 2009. It comprises recommendations 7, 9, 10, 12, 14, 15, 16 and 19, for which focused meetings of EAW experts are to be held over the period ahead in order to continue examining issues, with a view to specific action to ensure that the issues are dealt with promptly and effectively.

Under the Swedish Presidency two kinds of solutions were considered with regard to these recommendations:

- (a) For some recommendations, there is a need to consider **legislative action**, which could be taken in response to a Commission proposal or to an initiative, backed by at least seven Member States, for **amendment of the Framework Decision** of 13 June 2002 on the European arrest warrant. In either case, the ordinary legislative procedure, involving codecision with the European Parliament, would be applicable. Although this would be an effective way of bringing about a change in the working of the European arrest warrant, it would imply a mayor challenge that would not be fully justified at this moment.
- (b) **Non-legislative action** would also be possible, by way of best practice for inclusion in Council conclusions or incorporation into European arrest warrant handbook.

#### **1. Language requirements**

Relatively few Member States accept a European arrest warrant in any other than their official languages. The same also applies to requests for further information, although the Framework Decision does not make any specific provision in that regard. A more pragmatic approach to the matter is called for. Shortage of translation facilities in some Member States, cost, difficulty in producing translations into some of the less common languages within a short time and poor-quality translations are among the arguments often put forward. The disparity in time limits set by individual Member States for receipt of a European arrest warrant here gives rise to some confusion and increases the risk of delay preventing execution of a warrant.

***Recommendation 7:** The Council agrees that the possibility of setting up common manageable time limits for the receipt of language-compliant EAWs be addressed by its appropriate preparatory bodies. This issue should be analysed in the context of the applicable language regime according to part 3.5 and corresponding recommendation 5<sup>1</sup>.*

At the CCM meeting of 14 December 2009 the Swedish Presidency concluded that the problems could be solved if those Member States could reconsider their position in order to accept EAWs drafted in other languages, at least under an initial period of the procedure. It was of the opinion that the imposition of one time period common to all Member States was not realistic but also thought a minimum period to be observed by all Member States, could be an avenue leading to a solution for the practical problems experienced in the past. It seemed advisable not to amend the Framework Decision, but rather to issue recommendations and relax time limits by extending them in Member States where they are too short.

**Presidency proposals:** the Presidency proposes to move towards an average time limit of six days for submission of a language-compliant European arrest warrant, by means of a recommendation to Member States to amend their domestic legislation.

## **2. Proportionality check**

Application of a proportionality check in issuing a European arrest warrant was a recurrent issue in the evaluation exercise. The proportionality check is basically to be seen as a further test in establishing whether the requisite threshold has been met, based on the appropriateness of issuing a European arrest warrant in the light of the circumstances of the case, or whether use could be made of less costly means (a summons to appear or the taking of a statement in another Member State).

---

<sup>1</sup> **Recommendation 5:** The Council encourages Member States that have not yet done so to consider adopting a flexible approach to language requirements in the light of Article 8(2) of the Framework Decision, so that EAWs and additional information in languages other than the Member State's own official language(s) are accepted.

The idea of appropriateness here covers a number of aspects, especially the seriousness of the offence, set against the implications of execution of a European arrest warrant for the individual concerned and for that person's dependants, the scope for achieving the purpose by other, less onerous means, both for the individual and for the executing authority, a cost-effectiveness assessment of execution of a European arrest warrant etc.

The evaluation findings show that how this issue is approached varies widely from one Member State to another. Some apply a proportionality check in every case, while others do not see any need for one. Even in those Member States which do use proportionality checks, they are often carried out unevenly as to the circumstances to be taken into account and the criteria to be considered.

The expert teams generally felt that a proportionality check was basically the right approach and that some provisions, guidelines or measures should be introduced at European level in order to ensure consistent, proportionate use of European arrest warrants. There seems to be broad (albeit not unanimous) agreement that proportionality checks should not be carried out by executing authorities.

Although the subject has been widely discussed in Council Working Party and at the expert meeting organised by the Commission on 5 November 2009, evaluation reports repeatedly called for further efforts to arrive at a uniform approach, in order to strengthen mutual trust between Member States. Active consideration should also be given here to alternatives to the European arrest warrant, such as simplified methods of hearing defendants living in another Member State.

***Recommendation 9:*** *the Council instructs its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any EAW with a view to reaching a coherent solution at European Union level. The issue of proportionality should be addressed as a matter of priority.*

At the CCM meeting of 14 December 2009, the Swedish Presidency concluded that there was a clear problem with proportionality and that alternatives to the EAW, such as forms of mutual assistance to interrogate witnesses, should be further explored, as well as clarification through the EAW Handbook: who was doing so and the points which needed to be assessed. The Swedish Presidency also suggested that the legislation of the Member States could be amended without any need to amend the Framework Decision, which should be seen as a last resort.

The Presidency fully grasps the complexity of this matter as some Member States are in fact introducing criteria of advisability rather than of proportionality. Proportionality is already reflected to a degree in the minimum penalty thresholds laid down in the Framework Decision, but it is clear that the differing penalties in the individual Member States introduce distortions. It is nevertheless desirable to make concrete proposals here in order to respond to the arguments most worthy of consideration. Various possibilities may be considered:

- To amend the Framework Decision by rising the minimum-penalty thresholds. This solution is not deemed appropriate for the reasons already mentioned.
- To amend the Annex to the Framework Decision in order to add a box to the EAW form in which the issuing body indicates that "all options provided for under the internal law and international conventions have been exhausted before issuing the EAW". To the extent that amending the form means altering the Framework Decision, here too there should be consideration of whether it is appropriate.
- To make a recommendation on the EAW Handbook on the need to issue EAW only as a very last resource, suggesting a list of alternatives that the issuing authority can take before issuing a EAW, in order to demonstrate that a proportionality check has been carried out,:
  1. Tracing through the Schengen Information System.
  2. Statement using videoconferencing (in those Member States in which this is possible for the accused).
  3. Transfer of proceedings.
  4. Appearances at consulates.

5. Mutual legal assistance in criminal matters, summons or appearance before the judicial authority of the executing State.

- To consider the possibility of adopting a new legislative instrument on mutual recognition, (an appearance order) aimed at summoning the requested person as an accused first, rather than issuing an EAW, in those cases where the issuing authority deems it reasonable to give the requested person the opportunity of voluntarily appearing without being physically surrendered. This would be done through a summons, which would be accompanied where necessary by a tracing order, the purpose of which would be to obtain a statement from the accused before the executing authority (preferably that of the requested person's domicile). The executing authority would summons the person and, if need be, use the coercive measures (including arrest) provided for in its legislation in order to ensure the person's presence. The statement made in this way before the executing body would have full effect in the proceedings in the requesting country, leaving the way clear for continuation of the proceedings.

**Presidency proposal:** the Presidency proposes to modify point 3 of the EAW Handbook in order to make a general recommendation on the need to carry out a proportionality check by the issuing authority, suggesting alternatives to the arrest and surrender. The possible adoption of a so called “appearance order” could be considered as a less coercive alternative to surrender, ensuring the efficiency of the summons to an accused person in another Member State.

### 3. Accessory surrender

The European Convention on Extradition expressly establishes that the State which has received the extradition request may grant it for accessory offences (those which do not meet the minimum punishment threshold but are the subject of a joint request with other offences that do), whereas the Framework Decision contains no corresponding provision. This has given rise to divergences between the laws and practices of the Member States regarding execution of EAWs relating to such offences. Some Member States have incorporated specific provisions on this in their implementing rules, while others (the majority) have not. The latter include Member States in which the absence of relevant provisions does not necessarily prevent the executing judicial authorities from authorising such surrenders, whereas in others the absence of provision means that surrender in the case of accessory offences is not permitted.

**Recommendation 10:** *the Council agrees that its preparatory bodies should examine the issue of surrender in respect of accessory offences and submit proposals.*

At the CCM meeting of 14 December 2009 most Member States acknowledged that they did not have any domestic provisions on accessory surrender and the vast majority of them did not seem to have encountered any problems due to the lack of such provision. The Swedish Presidency therefore concluded that this recommendation was not the most urgent problem and could be resolved on a bilateral basis.

**Presidency proposals:** this legal lacuna is a drawback compared with the European Convention on Extradition, even though it is not a very important issue and is not creating too many problems in practice. The Presidency is therefore able to support the recommendation that it be addressed by each Member State.

#### **4. Speciality rule**

Numerous reports show that there are practical problems with the functioning of the speciality rule. The problems arise primarily from shortcomings in the regular flow of information and the absence of mechanisms making it possible for the authorities involved in criminal proceedings to check the conditions for the surrender at the appropriate time; some reports also point out that there is no reliable or standardised system of checking previous surrenders. Stress is also laid here on the potential impact of the absence of proper coordination between the authorities of the issuing Member State at the time of issuance of the EAW when those responsible for issuing an EAW are dealing with more than one case or when other warrants have already been issued for the same person.



However, along with the difficulties caused by practical implementation of the speciality rule, some have called into question further application of that rule within the European area of freedom, security and justice. In this connection, it should be remembered that, even though Article 27(1) of the Framework Decision allows Member States the option of renouncing the speciality rule subject to the conditions specified, to date only two Member States have availed themselves of this possibility; no country has given the notification provided for in Article 28(1) of the Framework Decision. The speciality rule is a delicate matter because it affects the position of individuals and procedural safeguards; any change to the system requires very careful consideration and prior analysis.

***Recommendation 12:*** *The Council agrees that the possibility of removing the speciality rule in relations between Member States be addressed in its appropriate preparatory bodies.*

At the CCM meeting of 14 December 2009 some Member States agreed that the specialty principle be removed as much as possible in the context of the EAW. Other Member States were opposed to this idea, arguing that it is for the individual concerned and not for the issuing Member States to renounce to the protection of the speciality rule. It was also argued that an abolition of the speciality rule might result in a reduction of the number of persons consenting to surrender in the first place. Reflection would have to continue and a detailed discussion should be held.

**Proposals by the Presidency:** the Presidency acknowledges that the abolition of the rule would show increased mutual trust between the Member States. However, the execution procedure being relatively speedy, issuing supplementary EAWs is not too burdensome.

In the absence of a consensus between the Member States, one option might be a recommendation to move gradually towards abolishing the rule.

## 5. Article 111 of the Convention implementing the Schengen Agreement

In a number of reports the question was raised of how Article 111 of the Convention implementing the Schengen Agreement should be implemented in practice. The impact on the EAW underlying an Article 95 alert of the obligation imposed by paragraph 2 on the Parties to the Convention to enforce the final decision taken by the deciding court or authority in relation to the action envisaged in paragraph 1 should be further examined. This is in particular the case where the alert was entered by another Member State, because the deletion of the alert may undermine the efficacy of the EAW, hampering arrest in all Member States. In most of the cases the evaluating teams were not able to get a clear answer from the officials interviewed.

***Recommendation 14:** The Council agrees that the matter of the impact on the EAW underlying the respective SIS alert of the obligation imposed on Member States by Article 111(2) of the Convention implementing the Schengen Agreement/Article 59 of Council Decision 2007/533/JHA of 12 June 2007 on the SIS II be addressed in its appropriate preparatory bodies. The outcome of the evaluation of the domestic provisions on this subject to be carried out by the Commission shall be taken into account.*

At the CCM meeting of 14 December 2009 the Swedish Presidency drew no conclusions on this point but stressed again the need for an evaluation from the Commission.

**Proposals by the Presidency:** It would be advisable to adopt a measure or measures on the basis of this recommendation. It would be essential to arrive at a common interpretation throughout the European Union. The Presidency is of the opinion that a legal opinion on this question is needed.

## 6. "Provisional arrest" under the EAW

A mechanism for "provisional arrest" under the EAW is not envisaged in the Framework Decision. This question was raised in relation to instances in which a fugitive leaves the jurisdiction of a Member State immediately after having committed a crime (prior to the EAW) and is traced to a plane/ferry due to land in another Member State.

***Recommendation 15:** The Council agrees that the possibility of establishing a mechanism for provisional arrest under the EAW in cases of urgency be examined by its appropriate preparatory bodies.*

At the CCM meeting of 14 December 2009, the Swedish Presidency raised the practical question of what happens when a fugitive is about to leave another Member State and suggested that a legislative amendment could be made to apply preventive detention in cases where there was a particular level of suspicion.

**Proposals by the Presidency:** the matter is not a big priority and could be dealt with via a recommendation advising legislative provision at national level.

## 7. Information deficits

During the evaluation many of the authorities interviewed stressed the lack of appropriate communications with their foreign counterparts throughout the EAW procedure. Complaints were repeatedly recorded that the level of communication regarding the progress of EAW proceedings is unsatisfactory, and that information from the executing authorities concerning delays in the execution process is rarely provided spontaneously. According to some evaluation reports, these flaws often extend to the timely communication of the surrender dates, and to the requirement to provide, at the time of the surrender, precise information on the total period of detention served by the requested person in the executing Member State on the basis of the EAW.

**Recommendation 16:** *The Council calls on Member States to check their practice when acting as executing Member State and, where necessary, to take measures to ensure that the issuing authority is provided with timely and accurate information on the progress of the EAW procedure, in particular on the final - enforceable - decision, as well as on the period of detention of the requested person, bearing in mind that the length of the EAW procedure should not be extended. To that end, it agrees that the possibility of developing a standard form for providing information be examined by its preparatory bodies.*

**Proposal by the Presidency:** a standard form in relation to the EAW decision could be prepared and presented by means of a Council recommendation. This form would include the conditions of the decision, the period of detention and the decision itself. With regard to the progress of the procedure, information could be obtained through the judicial networks and contact points.

## **8. Seizure and handover of property**

**Recommendation 19:** *The Council agrees that the issue of the application of Article 29 of the Framework Decision be addressed in its appropriate preparatory bodies in order to analyse problems that could arise from different practices.*

**Proposal by the Presidency:** if appropriate, a questionnaire could be distributed on practice in each Member State to establish whether it is worth dealing with the matter in uniform fashion.