

**Memo on the European arrest warrant
as part of a move towards an area of
freedom, security and justice in the EU.**

A JUSTICE BRIEFING

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Introduction

1. JUSTICE welcomes the concept of a European arrest warrant as part of an EU wide move towards an area of freedom, security and justice. Clearly though, such a system requires a set of procedural safeguards for the rights of the Defendant to be in place which must be certain and workable. The current draft of the Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between Member States does not go far enough in providing procedural certainty and protecting the rights of the individual.

2. JUSTICE would urge the Member States to consider tightening certain provisions in the current draft of the Framework Decision in order to increase harmonisation while protecting the rights of the individual. In addition, JUSTICE would welcome a proposal for a “Framework Decision on the Rights of the Individual in International Co-operation in Criminal Justice” to work in tandem with the current Framework Decision ensuring that the “freedom” limb of the “area of freedom, security and justice” is protected.

The provisions that JUSTICE would like to see tightened affect the following areas:

Right to a Fair Trial

3. Paragraph 12a of the Preamble to the draft Framework Decision should contain an explicit reference to the possibility not to remove, expel or extradite to a State where there is likely to be a flagrant breach of the right to a fair trial according to Art. 6 ECHR in accordance with the judgment in *Soering*. While this matter is covered in domestic legislation in the UK by the Human Rights Act, it is important to ensure that there is explicit protection on an EU level.

Double Criminality

4. Article 2 defines the Scope of the European arrest warrant. Article 2.2 contains a list of offences which, if punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years and as they are defined by the law of the issuing Member State

would give rise to surrender pursuant to a European arrest warrant. Article 2.4 makes double criminality optional for offences falling outside the remit of Article 2.2.

5. JUSTICE is concerned about the loss of the principle of double criminality in general but has particular concerns about the lack of clarity in the list in Article 2.2. It is not clear, for example, which kind of dishonesty offences would be covered by the list. The Proceeds of Crime Bill in the UK, for example, could raise concerns in other jurisdictions due to the fact that it does not distinguish between laundering own money and laundering others' money. Similar concerns may come to light in legislation in other Member States.

6. Even if the list of offences in Article 2.2 is accepted as not being subject to the requirement of double criminality, a further concern arises from the optional nature of Article 2.4. JUSTICE believes that in the interests of certainty and harmonisation there should not be a possibility for Member States to opt out of the double criminality principle. Article 2.4. should be mandatory so that the double criminality principle is maintained in relation to offences falling outside of Article 2.2 in all Member States. This would prevent issues arising out of warrants in relation to offences in controversial areas such as abortion, euthanasia and freedom of expression.

Rule of Speciality

7. Article 22(1) of the draft Framework Decision allows Member States to opt out of the rule of speciality by way of a declaration of prior consent. This would mean that between Member States that have made such a declaration, the speciality principle would be abolished. This is of great concern as it leaves an individual in a state of complete uncertainty as to what charges they may in fact find themselves facing once they have been surrendered to the issuing state.

Conviction *in absentia*

8. JUSTICE shares the view expressed by the Lords EUC sub-committee E that the proposed Article 5 relating to cases of judgments *in absentia* affords less procedural protections to the individual than those already in place under the 2nd Protocol of the European Convention on Extradition.

9. The framework decision allows that a person may be surrendered when the issuing state offers sufficient guarantees of the right to appeal or opposition to the judgment on their

return. JUSTICE believes that as a minimum, this provision should refer to the right to opposition alone. It would be preferable if the provision could be redrafted to guarantee the “right to retrial which safeguards the rights of defence” as is the case with the 2nd Protocol of the ECE. The current draft of the Framework Decision would indicate that there is a two-tier system for the rights of the individual between the EU and the Council of Europe and that those rights are being eroded rather than strengthened within the EU. This is surely not the intention of the Framework Decision.

Surrender for the purposes of interrogation

10. Article 17 allows for the temporary transfer of an individual under a European arrest warrant. JUSTICE is concerned that this is not consistent with the general principle set out in Article 1(1) which states that the European arrest warrant shall be “for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”. It is difficult to understand how a temporary transfer could fit any of these purposes. There are clearly difficulties in drawing a line between ongoing investigation and the conduct of a criminal prosecution in Member States with a civil inquisitorial system and this issue needs to be addressed more thoroughly. An explicit block on the issue of a European arrest warrant for the purposes of an ongoing investigation could go some way to resolving this problem.

Certainty

11. Three particular points require clarification and definition in order for the system to be workable and clear:

- Clear definition of the list of offences in Art. 2.2
- Definition of the legal status of an arrest under a European arrest warrant – is such an arrest classified in the same way as a provisional arrest under the ECE (*R v Gove. Pentonville, Ex p. Sotiriadis* [1975] AC 1 at 11) or as detention under extradition proceedings (*Quinn Case* – Judgment of 22.3.95, No. 311)? This could affect the procedural safeguards available to a person under Article 5 ECHR.
- Definition of the procedure and the rights of the defence with regard to decisions taken under Art. 17.

Credibility

12. In order to ensure the credibility of this harmonisation, there must also be a harmonisation of safeguards and protections of the individual in criminal proceedings. This should include a move towards the harmonisation of expeditious trial procedures in all Member States. This was a point raised by the House of Lords EU Select Committee – sub-committee E to the Minister on 12th December 2001.

13. Given that Art. 10 of the draft Framework Decision allows for an alert on the Schengen Information System as a way of communicating a European arrest warrant where the location of the person is unknown, it is important that the SIS alert system be properly monitored and regularly updated to prevent a person being the subject of multiple arrests in different Member State due to the information on the SIS not being current.

14. In order to avoid the possibility of the Eurowarrant system being abused, the status of “court decisions” emanating from military or quasi-military courts (and our own courts martial) and as a result of private prosecutions needs to be clarified. JUSTICE would submit that it would be appropriate to introduce a formal bar on the use of a Eurowarrant request in these cases given the limited scope for judicial scrutiny in the requested State.

15. The White Paper on minimum standards currently being prepared by the European Commission does not address the issue of bail. Bail is an issue that must be addressed in the context of EU wide criminal justice as long remands in custody in locations which are remote from the person’s family could well lead to issues arising under Article 8 ECHR, the right to family life. The draft Framework Decision could be extended to allow for “through bail” under Article 17. If this matter is not addressed in this draft Framework Decision, it could form a key part of a Framework Decision on the rights of the individual in international criminal proceedings.

16. The protection afforded by the possibility of Member States being excluded from the scheme if they are found to be in breach of their obligations under the Framework Decision is limited. Disputes arising from the Framework Decision may be referred to the Council and then on to the ECJ, however such a reference can only be made by a Member State and not an individual. There should be increased judicial accountability to protect the rights of the defence in transnational judicial co-operation in criminal matters.