



CENTRE FOR
EUROPEAN
POLICY
STUDIES

CEPS POLICY BRIEF NO. 46

FEBRUARY 2004

JUDICIAL COOPERATION IN CRIMINAL MATTERS

EUROPEAN ARREST WARRANT A GOOD TESTING GROUND FOR MUTUAL RECOGNITION IN THE ENLARGED EU?

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ABSTRACT

This paper reviews the extent to which the development of instruments that implement the principle of mutual recognition of judicial decisions in criminal matters, particularly the European arrest warrant (EAW), may be considered valuable tools for effectively combating cross-border crime in the European Union. In addition, we assess how these policy orientations may or may not overcome the persistent mistrust and lack of confidence among the member states, while at the same time respecting human rights and civil liberties. In particular, this paper analyses:

1. EU judicial cooperation in criminal matters: does it fight and prevent cross-border crime effectively in the EU?
2. The European arrest warrant – is it an improved method to replace extradition? Does the EAW provide a better solution to the practical complexities and difficulties that characterise the current extradition system? What are the inherent gaps in the proposed new surrender procedure under the EAW?
3. Does the EAW guarantee a good balance between efficiency and judicial protection of the individual's fundamental rights? Does the Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU provide the right way forward? Does the EAW involve a real risk to the legal position and human rights of suspected individuals?
4. What is the added value of EU judicial cooperation against cross-border crime?

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1. Introduction: EU judicial cooperation in criminal matters – fighting and preventing cross-border crime effectively in the EU?

Justice and Home Affairs has clearly become a top policy priority in a rather broad EU agenda looking ahead at enlargement. Building an Area of Freedom, Security and Justice (AFSJ), where there is no trade-off between the freedom and justice dimensions on the one hand, and the security rationale on the other, is indeed essential for the European Union. The fight against the newly labelled ‘global threats’, such as terrorism and cross-border crime, along with the consequent development of the principle of mutual recognition of judicial decisions in criminal matters, need to be carefully assessed in view of human rights and civil liberties.

The EU provisions on Police and Judicial Cooperation Criminal Matters, Arts. 29–42 of the Title VI of the Treaty on the European Union (TEU), provide the legal foundation and intergovernmental tools for the programme to fight cross-border crime in the aftermath of 11 September 2001.

This paper considers the extent to which the general development of the principle of mutual recognition of judicial decisions in criminal matters as part of the EU agenda, and the European arrest warrant (EAW) in particular, may be considered valuable tools for efficiently combating cross-border crime. We also assess how these policy orientations may or may not overcome the ongoing national divergences and complexities in the EU extradition system, which still seems locked in a rather high level of mistrust and lack of confidence among the current EU member and acceding states.

Moreover, the principle of mutual recognition is envisaged not only to achieve an improvement in the level of trust and cooperation in the EU, but also to considerably enhance the protection of individual fundamental rights. Does an efficient EU framework exist that safeguards the suspected individual’s human rights while tools such as the EAW are being executed? Although the EAW also intends to improve the safeguards and rights for suspects in the EU, many concerns have been raised, however, about whether it really guarantees an efficient judicial protection for the suspect’s civil liberties. The Green Paper on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU* may provide crucial guidelines to follow in that concern. It will also be very important to evaluate, as time goes by, the extent to which the EAW, and more importantly the ‘freedom rationale’ underlying judicial cooperation, may be dramatically watered down by the bilateral agreements on extradition between some EU member states and other third countries, particularly the US.

Finally, looking at the divergent member states' attitudes, interests and tensions when implementing judicial cooperation instruments such as the EAW at the national level, we need to address whether the principle of mutual recognition in criminal matters is an interim method, pending harmonisation. Further, there are serious doubts about whether the system proposed by the EAW will lead to a real improvement in the level of trust and confidence among the EU member states and each others' judicial and legal systems.

2. The European arrest warrant: An improved method to replace extradition?

The events of 11 September 2001 continue to influence political discourse in a rather decisive manner, which calls for the urgent redefinition of our security framework.¹ This challenge is at times justified by the exceptional character of the global environment, the existence of new threats and the internationalisation of crime, which create a permanent state of emergency and fear, at national, EU and international levels.² At the EU level, the legally obscure and rather opaque EU third-pillar structure and instruments have become the more appropriate tool used to quickly develop the mechanisms to fight these new threats, i.e. terrorism and cross-border crime.

After the Amsterdam Treaty entered into force on 1 May 1999, police and judicial cooperation in criminal matters remained in the intergovernmental, third-pillar domain, and thus was not covered by European Community methods. The adoption of major legal measures in these policy areas, such as common positions, framework decisions, decisions taken by the Council and conventions³ continues to be by unanimous vote, on the initiative of the member states and the Commission. Also, the EU third-pillar machinery seems to be characterised by an inherent democratic deficit, owing to the often-criticised lack of transparency and parliamentary and judicial accountability (both at EU and national levels), on numerous sensitive policies.⁴

Title VI of the TEU, Arts. 29–42, presents the EU's main objective, “to provide citizens with a **high level of safety** within an area of freedom, security and justice by developing common action among the Member States...by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud...” (emphasis added). The Tampere European Council of 15–16 October 1999 reaffirmed this statement by highlighting in point 6 of the Presidency Conclusions that “People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union.”⁵

¹ See M. Anderson & J. Apap (2002a).

² For an analysis of some key restrictive measures and practices implemented after 11 September 2001 and how security has taken precedence on the EU agenda, see J. Apap & S. Carrera (2003b).

³ Art. 34.2 of the Treaty on the European Union (TEU), Title VI, Provisions on Police and Judicial Cooperation in Criminal Matters, provides that “To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: (a) adopt common positions defining the approach of the Union to a particular matter; (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States...(c) adopt decisions for any other purpose consistent with the objectives of this title...(d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements”.

⁴ See Arts. 39 and 35 of the TEU; see also M. Anderson & J. Apap (2002b), pp. 62–70.

⁵ See Editorial Comments, *Common Market Law Review*, Vol. 36, No. 3, June 1999, p. 1119–1126.

It is striking to see how the achievement of a “high level of safety”, considered to be a public good for all citizens and one of the core elements of the AFSJ, has acquired a prominent role as a policy priority in political discourse after 11 September, putting aside the dimension of human rights and fundamental freedoms. A decisive boost for the development of some JHA security initiatives may be found in the political agreement to establish a genuine EU security strategy or security roadmap to fight everything broadly falling within the so-called ‘internal and external threats to our European societies’.⁶ Instruments such as the European arrest warrant would thus directly help to tackle the imminent new threats and forms of violence that Europe seems to be facing.

At its extraordinary meeting on 21 September 2001, the European Council stated that terrorism is a real challenge to the world and to Europe, and that the fight against terrorism will be a priority objective of the European Union. Within ten days, the JHA Council agreed on a package of proactive anti-terrorist and organised crime strategies. This programme of measures was unsurprisingly subject to less controversy, and agreed more quickly by the EU member states, than could have conceivably been the case without the political momentum that arose after the attacks of 11 September.

Among the numerous (pro)security policies deemed necessary to implement the EU Strategy for the Beginning of the New Millennium on organised crime – such as terrorism, money laundering, drug trafficking, smuggling, illegal immigration and the trafficking of human beings – the Council reached political agreement on the European arrest warrant, which was formally adopted in June 2002.

The new system provided by the EAW has replaced the traditional extradition procedures between the member states from 1 January 2004, with a few exceptions. Since then, however, only eight member states have applied the new extradition regime, which are Belgium, Denmark, Ireland, Finland, Spain, Sweden, Portugal and the UK. Thus the real added value of instruments on mutual recognition of judicial decisions, such as the EAW, needs to be seriously questioned. Further, as revealed through the analysis of some of its key features, it is not clear whether this system ensures the right balance between technical and procedural efficiency or adequate protection of the suspected person’s fundamental rights and freedoms.

2.1 *Some initial remarks about the national implementation of the EAW*

The Framework Decision on the EAW⁷ is a positive step towards the realisation of an Area of Freedom, Security and Justice as highlighted at Tampere.⁸ It represents one of the first legal

⁶ See Solana, J. (2003), *A Secure Europe in a Better World, European Security Strategy*, submitted to the European Council, Brussels, 11–12 December.

⁷ See the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18.07.2002.

⁸ The point of departure at the EU level for cooperation on this policy goal may be found in the Cardiff European Council Presidency Conclusions of 15–16 June 1998, point 39, which states that, “The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others’ courts.” As early as 1997 the European Court of Justice ruled in Case C-227/97, *Criminal proceedings against Johannes Martinus Lemmens*, [1998] ECR I-3711, para. 19, that “Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, it does not follow that this branch of the law cannot be affected by Community Law...”; see also the recent Commission Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, Brussels, 14.11.2003, COM(2003) 688 final, 2003/0270 CNS.

instruments on mutual recognition formally agreed and adopted from the Council's programme of measures to implement the principle of mutual recognition of decisions in criminal matters.⁹ It is also an important part of the EU security package of measures against acts of political violence, commonly labelled as 'terrorism'. Yet it seems that the political convergence on the adoption of measures to fight terrorism after 11 September 2001 blinded some EU leaders about the real consequences of the instruments when implemented nationally. Thus, as we can currently see, serious concerns have been raised by some EU member state governments, such as Germany and Italy, while attempting to transpose the EAW.¹⁰

As previously stated, as of 1 January 2004, only eight member states have begun to implement the new regime.¹¹ The other member states have clearly failed to take the necessary measures to integrate the Framework Decision into their national legal systems. They have declared, however, that the implementation will certainly take place before May 2004. Furthermore, three member states will apply it non-retroactively, thus the extradition system that has been negatively described as 'old-fashioned, outdated and bureaucratic' will still apply for those acts committed before 1 November 1993 (France), or before the date of entry into force of the Framework Decision, i.e. 7 August 2002 (Italy and Austria).¹² This may be considered an unfortunate political arrangement indeed. It shows the persistence of an embedded mistrust¹³ and a lack of mutual confidence between the member states' intentions and their judicial systems. Trust is indeed essential for the development of an efficient cooperation in JHA. For an overview of the procedures applied until full implementation of the Framework Decision by all member states, see Annex 1.

One of the main reasons given by some of the national governments to justify their failure to meet the deadline stipulated by the Framework Decision has been the need to amend their constitutions, in order to transfer another little piece of their precious national sovereignty. This has been the case, for instance, in France, where a brand new constitutional law on the European arrest warrant was enacted on 25 March 2003.¹⁴

⁹ See the Council and European Commission, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C12, 15.1.2001, p. 10.

¹⁰ The Italian Prime Minister, Silvio Berlusconi, clearly stated his opposition to the introduction of the European arrest warrant as early as December 2001, by insisting that the measure should not include financial crimes in the list of offences that may lead to surrender – see *Guardian Unlimited*, "Berlusconi urged to support Europe-wide arrest warrant", Rome, Sunday, 9 December 2001.

¹¹ See Art. 34.4 of the Framework Decision on the European arrest warrant, Council of the European Union, 15009/03, COPEN 115, SIRIS 100, Brussels, 19 November 2003; see also the UK implementation of the European arrest warrant, Council of the European Union, 16352/03, Brussels, 22 December 2003; and also the Application of the Framework Decision on the European arrest warrant by Spain, Council of the European Union, 16232/03, Brussels, 17 December 2003; also the Implementation of the European arrest warrant by Ireland, Council of the European Union, 16378/03, Brussels, 23 December 2003; and the Notification to the General Secretariat of the Council of the transposition into Danish law of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Council of the European Union, Brussels, 16 January 2004, 5348/04.

¹² See the Framework Decision on the European arrest warrant – state of implementation by Member States, General Secretariat of the Council, 16287/03, COPEN 131, Brussels, 22 December 2003.

¹³ See M. Anderson (2002), pp. 35–46.

¹⁴ See the Loi constitutionnelle no. 2003–267 du 25 mars 2003 relative au mandat d'arrêt européen, NOR: JUSX0200149L, J.O. no. 72, du 26 mars 2003, p. 5344.

Nevertheless, further reasons for this delay may be some of the new controversial features inherent to the new system under the European arrest warrant, such as

- the holding a political post will no longer be an exception to extradition;
- the non-existence of any political involvement in the whole procedure that is now intended to be a judge-to-judge procedure;
- the abolition of the rule on the prohibition of the extradition of their own nationals (based on the concept of EU citizenship); and
- the final decision to include financial crimes in the agreed list of offences within the legal measure.

In fact, there are serious doubts about the immediate future of the EAW. It is not clear that all member states are ready to face the uncertain consequences of the full application of a harmonised system. Even though the ‘Euro-warrant’ has already been used by Spain,¹⁵ it is clear in our view that there are significant gaps and difficulties, that may lead to conflicts with national principles and safeguards in both criminal and procedural law, as well as at a more technical level.

The acceding states will not have the possibility to ‘opt out’ of some of the provisions provided by the Framework Decision, as some current member states have freely decided to do. All of them are required to fully apply the new EU extradition system from 1 May 2004.¹⁶

The first specific reference to a mandate for developing an improved extradition procedure that would force suspected individuals to face justice may be found at the Tampere European Council Conclusions. Point 35 states the objective that “The formal extradition procedure should be abolished among the member states as far as persons are concerned...and replaced by a simple transfer of such persons, in compliance with Article 6 TEU”. In addition, in January 2001, the European Commission and the Council presented a programme of measures to implement the principle of mutual recognition of decisions in criminal matters. The programme highlighted, as a goal, the establishment of a single EU legal and judicial area of extradition.¹⁷ In this way, the door was officially open for the European Commission to start working towards the development of proactive judicial cooperation in criminal matters, which would play a key role in fighting threats such as cross-border crime across the EU.

As previously noted, the events of 11 September made a profound mark on the policy agenda in Justice and Home Affairs at the national, EU and international levels, and gave prominence to the development of the security rationale in the Area of Freedom, Security and Justice. It also gave the necessary impetus to an unquestionable political agreement at the Extraordinary

¹⁵ See the recent online news article “EU arrest warrant put into practice” at EUObserver.com (newsportal) (retrieved on 12 January 2004 at <http://euobserver.com/index/phtml?sid=22&aid=14072>).

¹⁶ See the 2002 Regular Reports prepared by the Commission of the European Communities, COM(2002) 700 final, 9.10.2002, which specifically look at the sections on the Cooperation in the field of justice and home affairs for the fight against organized crime (retrievable at <http://europa.eu.int/comm/enlargement/report2002>); see also “Monitoring the EU Accession Process: Judicial Independence”, Open Society Institute, EU Accession Monitoring Program, 2001; and also the *acquis* on Judicial Cooperation in Criminal Matters (retrievable from http://europa.eu.int/comm/justice_home/doc_centre/criminal/acquis/doc_criminal_acquis_en.htm).

¹⁷ See the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 2001/C12/02, 15.1.2001.

Meeting of the Council, to enhance police and judicial cooperation,¹⁸ to maintain EU security at the highest level, and to efficiently combat terrorism and cross-border crime. Among other measures, the meeting called for the urgent adoption of the EAW, which “would allow wanted persons to be handed over directly from one judicial authority to another”. Although different in substance, the EAW was psychologically linked to those legal instruments envisaged to fight terrorism.¹⁹ The final result of the political push and willingness to arrive at a more integrated and trust-based system on extradition is indeed much wider in scope and character than it was initially intended to be. Further, as widely noted by human rights organisations, civil society groups and academia,²⁰ while the new system was supposed to be fully operative by now, human rights and fundamental freedoms (particularly adequate protection of the rights to defence and fair trial provided by, for instance Art. 6.3 of the European Convention of Human Rights and Art. 48.2 of the European Charter of Fundamental Rights) have not been widely guaranteed in the Framework Decision. Thus, as we see later, there is an urgent need to develop more freedom of movement for judicial decisions (which may be seen as a positive and necessary step towards the achievement of an AFSJ and the abolition of safe havens for suspects), alongside an EU legal framework where procedural individual rights and the safeguards of defence are unconditionally protected.

2.2 *Analysis of some inherent issues in the EAW*

The EAW seeks, with a considerable number of exceptions, to abolish and supplant the traditional extradition procedures between member states²¹ and replace these with a system of surrender between judicial authorities for those acts categorised as offences, without control of double criminality. It intends to overcome the existing national frontiers in judicial matters, which may at times undermine the cornerstone of judicial cooperation (i.e. the principle of mutual recognition), by establishing a surrender system, based on a process that is completely controlled by the judiciary. It sets aside the political aspect built into the traditional extradition system.²² It also seeks to alleviate the apparent mistrust among the current and future EU member states in this sensitive policy area. Its main purpose is thus to simplify as well as speed up the surrender procedures, avoiding the delays the EU current extradition system. The deadline for implementation of the Framework Decision, as stated by Art. 34, was 31 December 2003. As of 1 July 2004, it should fully replace the following traditional EU legal instruments on extradition procedures:

- the European Convention on Extradition of 13 December 1957;

¹⁸ See the Conclusions adopted by the Council (Justice and Home Affairs), Brussels, 20 September 2001, SN 3926/6/01, REV 6; see also the Conclusions and Plan for action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01.

¹⁹ See also the Framework Decision on combating terrorism, 2002/475/JHA, of 13 June 2002; for an overview of the legislative developments on judicial cooperation in criminal matters, see J. Apap & S. Carrera (2003a).²⁰ See for instance the report by Amnesty International (2004), p. 6.

²¹ These traditional procedures include the provisions of Title III of the Convention implementing the Schengen Agreement.

²² The Pinochet case, on the initiative of Spanish judge Baltasar Garzón, showed how cumbersome the traditional extradition system was in the EU and how the political decision-making process to grant extradition is out of place for the achievement of ‘Euro-justice’ in the EU. For a specific study on the particular situation of Spain, see Reinares & Jaime-Jimenez (2000), pp. 119–46.

- the European Convention on the Suppression of Terrorism as regards extradition of 1978;
- the Agreement on simplifying the transmission of extradition requests of 26 May 1989;
- the Council Act of 10 March 1995, adopted on the basis of Art. K.3 of the TEU, drawing up the Convention on a simplified extradition procedure between the member states of the European Union; and
- the Council Act of 27 September 1996, adopted on the basis of Art. K.3 of the TEU, drawing up the Convention relating to Extradition between the member states of the European Union and all the relevant provisions set out in the Schengen agreement.

Starting with an analysis of some key provisions embedded in the Framework Decision, Art. 1 introduces a new, harmonised definition of the European arrest warrant, stating that it is a “**judicial decision** issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order” (emphasis added).

In contrast with the European Convention on Extradition (ECE),²³ which differentiates in Art. 16 (Provisional Arrest) between the request of the provisional arrest of the person sought and the request for extradition,²⁴ the EAW provides for the new possibility of issuing the arrest and surrender jointly. On the other hand, the Framework Decision also establishes, by way of definition, the need for the EAW to be a judicial decision, leaving aside those decisions that have an administrative character.

Art. 2 outlines the scope of the EAW, which equally deserves special attention. The EAW will be issued by a custodial sentence or a detention order against a ‘requested person’ or ‘*extraditurus*’ (traditionally called ‘fugitive’), for a crime whose punishment is at least of a period of one year, or four months when the person has been already convicted, the sentence has been passed or a detention has been made. This is a brand new possibility in comparison with the previous extradition system provided by the European Convention on Extradition and the 1996 EU Convention on Extradition (ECE).²⁵ In the latter, the contracting parties undertook to surrender to each other “all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order” only when the offence is punishable under the legislation of the executing state by a deprivation of liberty or under a detention order for a maximum period of one year (Art. 2 of the ECE) or six months (Art. 2.1, Extraditable offences, 1996 ECE). The innovative possibility provided by the EAW to carry out extradition for sentences of at least four months is indeed controversial.

In the same vein, Art. 2 establishes a precise number of offences that shall lead to surrender *ipso facto*, pursuant to an EAW. These 32 serious offences need to be “punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years”. Further, it will not be necessary for these crimes to fall within the list agreed in the text in order to verify whether they constitute an offence or not, or are

²³ See the Council of Europe, European Convention on Extradition, Paris, ETS 024, 13.12.1957.

²⁴ Art. 16 on provisional arrest states, “In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought... 4) Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12.”

²⁵ See the Council Act of 27 September 1996, drawing up the Convention relating to extradition between the Member States of the European Union, Official Journal C 313, 23.10.1996.

punishable by both the issuing and the requested state. This provision thus abandons the principle of double or dual criminality, which means that the suspected crime needs to be considered ‘punishable’ in both the issuing and the executing state. The abandonment of the requirement to verify the double criminality rule, which used to be an essential part of the traditional extradition system, has led to much criticism because it is likely to increase the current lack of clarity across the whole system. It may also create serious conflicts at times of national implementation. Therefore, if a particular activity falls within the list of offences in the Framework Decision, and it is punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of three years, double criminality will not be checked. Nevertheless, Art. 2.4 provides for the double criminality option for those offences falling outside the scope of Art. 2.2, by stating that “For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State”.

The 32 concrete EU offences or ‘Euro-crimes’ that have been politically agreed within Art. 2.2 of the Framework Decision on the EAW can be summarised as follows:

- participation in a criminal organisation and terrorism
- trafficking in human beings and facilitation of unauthorised entry and residence
- sexual exploitation of children and child pornography
- illicit trafficking in
 - 1) narcotic drugs and psychotropic substances
 - 2) weapons, munitions and explosives
 - 3) hormonal substances and other growth promoters
 - 4) nuclear or radioactive materials
 - 5) human organs and tissue
 - 6) cultural goods, including antiques and works of art
 - 7) stolen vehicles
- corruption, fraud and counterfeiting currency
- laundering of the proceeds of crime
- computer-related crime
- environmental crime
- murder, grievous bodily injury, kidnapping, illegal restraint and hostage-taking, rape, arson, organised or armed robbery, swindling
- racism and xenophobia
- racketeering and extortion
- counterfeiting and piracy of products
- forgery of administrative documents and trafficking therein, and of means of payment
- crimes within the jurisdiction of the International Criminal Court
- unlawful seizure of aircraft/ships, sabotage.

Therefore, the European arrest warrant will not be exclusively limited to those offences falling within the rather flexible category of terrorism, but to a broader list of criminal activities having a potential transnational or cross-border element. Despite the previously mentioned political opposition by some state governments, the much-debated financial offences of corruption, fraud and counterfeiting currency have remained within the list of crimes. The listing, or rather labelling, of offences in the legislative tool may be criticised because, in our opinion, it lacks a rationale for choosing precisely which crimes fall within its scope. Also, it should be remembered that at present there is not an agreed, common definition of any criminal activity, either at EU or international levels. This may lead to undesirable situations that undermine the human rights and civil liberties of the targeted fugitive. Additionally, it is striking to see how point 3 of the same Art. Provides that “The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list [c]”.

One of the more difficult features that the Commission and the Council had to face in the ‘process of modernisation’ was the one concerning the grounds for refusal of the EAW. The Framework Decision provides a series of grounds for the non-execution of the suspect’s surrender, mostly based on the old-fashioned extradition system. These are divided between mandatory (Art. 3)²⁶ and optional grounds (Art. 4).²⁷

The fast-track surrender procedure may be found in Arts. 9–25, Chapter 2, of the Framework Decision. Within this chapter we may also find several innovative features that have not existed in any former extradition treaty. Moreover, as we show below, there are numerous gaps inherent to the system, which seriously throw its efficiency into question. If we look specifically at Art. 9, when the location of the requested person is known, the issuing judicial authority may directly transmit the EAW to the executing authority as well as issue an alert in accordance with Art. 95 of the Schengen Convention.²⁸ The procedure is thus highly simplified in comparison to the old-fashion one stated in the Schengen Convention as well as the European Convention on Extradition of 13 December 1957.²⁹ Art. 9 continues by stating

²⁶ Art. 3 states that, “The executing judicial authority of the member state of execution (hereinafter ‘executing judicial authority’) shall refuse to execute the European arrest warrant in the following cases: 1) if the offence of which the arrest warrant is based is covered by amnesty in the executing state, where that state had jurisdiction to prosecute the offence under its own criminal law; 2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing member state; 3) if the person who is subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing state”.

²⁷ Art. 4 of the Framework Decision provides for the following grounds of optional refusal to surrender: double criminality and, for those acts falling outside the list of offences stipulated in Art. 2.2, *lis pendens*, *res judicata*, etc.

²⁸ Art. 95 stipulates that “The Contracting Party issuing the alert shall send the requested Contracting Parties by the quickest means possible both the alert and the following essential information relating to the case: a) the authority which issued the request for arrest; b) whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment; c) the nature and legal classification of the offence; d) a description of the circumstances in which the offence was committed, including the time, place and the degree of participation in the offence by the person for whom the alert has been issued; e) in so far as is possible, the consequences of the offence”.

²⁹ See the Convention implementing the Schengen agreement, June 1990, Chapter IV, Extradition, Art. 65, which states that: “1) Without prejudice to the option of using the diplomatic channel, requests for extradition and transit shall be sent by the relevant Ministry of the requesting contracting party to the competent Ministry of

that “an alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8.1”.³⁰ Thus the alert will be equivalent to an EAW, pending the receipt of the original, until the second generation of the Schengen Information System (SIS II) is fully operative and all the necessary information necessary can be transmitted.³¹

In addition, as the Committee on Citizen’s Freedoms and Rights highlighted in the European Parliament recommendation to the Council on the SIS II,³² the limits of using the SIS and the future SIS II for the transmission of the European arrest warrant should really be stated clearly from the beginning. This lack of infrastructure represents a good example of a fundamental, technical gap that needs to be bridged as soon as possible for the effective implementation of the system at EU level, in order to avoid situations that lead to, for example, the violation of the principle of *ne bis in idem* or double jeopardy (no further trial on the same grounds). Indeed, concerns have been raised about the existing *lacuna* for the effective functioning of the EAW, suggesting that it is too premature and over-optimistic as a legal instrument, and that in terms of its practical operability, it may be ‘trying to run before it can walk’.³³

Additionally, Art. 17 deals with the time limits and procedures to execute the EAW, by first stating that as a general rule, the issue of an EAW should be treated as a “matter of urgency”. In those cases where the person requested agrees to surrender, the final decision to execute the EAW needs to be taken by the issuing judicial authority after ten days. If there is no such agreement to surrender, the time limit will increase to 60 days.³⁴ Moreover, whether the individual agrees to surrender or not, following Art. 23, s/he shall be surrendered no later than ten days after the final decision to execute the EAW has been formally issued (unless serious humanitarian reasons apply).³⁵

The potential effects of the surrender are dealt with in Arts. 26–30, Chapter 3 of the Framework Decision. In the latter we may find another innovative element, which is the optional non-applicability of the so-called ‘principle of speciality’. This rule provides that a person cannot be prosecuted for any offence different from the one for which s/he was surrendered. Arts. 27 and 28 of the Framework Decision deal specifically with this issue. Looking in particular at Art. 27, entitled “Possible prosecution for other offences”,

the requested Contrasting state”; see also the European Convention on Extradition, Art. 12.1 on the request and supporting documents, which states that “1) The request shall be in writing and shall be communicated through the diplomatic channel”.

³⁰ Art. 8.1 of the Framework Decision lists the information that the European arrest warrant needs to contain, such as the identity and nationality of the requested person, evidence of an enforceable judgment, the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, etc.

³¹ See the Council of the European Union (2004), *Practical Implementation of the European Arrest Warrant – Flagging of Pending SIS Alerts*, Working Party on Cooperation in criminal matters (Experts on the European arrest warrant), Brussels, 5027/04, 5 January.

³² See the report by the EPP-ED Group, Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs (2003).

³³ See Alegre & Leaf (2003).

³⁴ Only in exceptional circumstances will the time limit be extended 30 more days (Art. 17.3 of the Framework Decision); also, when the requested state is not be able to fulfil the time limits established in this Art., it shall inform Eurojust about the specific reasons for the delay.

³⁵ See also Art. 17.4, which states that “Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for delay. In such case, the time limits may be extended by a further 30 days”.

Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out a **custodial sentence or detention order** for an offence committed prior to his or her surrender, **other than that for which he or she was surrendered**, unless in a particular case the executing judicial authority state otherwise in its decision on surrender (emphasis added).

Therefore, there is now a tacit consent to carry out a custodial sentence or a detention order for an offence different from the one for which the suspected person was surrendered. It should be recognised that a real danger could arise in the practical use, or rather potential abuse of this clause in the way that some member states may implement it. For example, a state may deliver an EAW based on an offence falling within those listed in Art. 2.2 of the Framework Decision, while the real grounds on which the judicial prosecution is going to take place are quite different in character and content. In that way, the issuing judicial authority may avoid a potential refusal by the executing judicial authority to implement the surrender. In practice, we believe that it will be quite complicated to control and restrict this sort of fraudulent use of the provisions stipulated within the EAW.

After having briefly explored some important features and technicalities that the EAW will bring to the table, we now provide an in-depth study of the legal position and human rights of suspected persons within the proposed EU system.

3. Does the EAW guarantee a good balance between efficiency and judicial protection of the individual's fundamental rights?

As a premise, judicial rapidity and simplicity should not be favoured to the detriment of human rights. The abolition of the principles of double criminality and speciality, as well as some other new features seeking to enhance the efficiency of the system, may indeed add positive improvements to hasten and simplify the extradition procedure. Nevertheless, we should not forget that the EAW also aims at protecting the fundamental rights and civil liberties of the person labelled as a 'fugitive', as well as respecting the member states' constitutional provisions on fair trial principles. A simpler transfer of persons fleeing from justice needs to be carried out along with the respect of human rights. The question as to what extent the EAW truly guarantees a good balance between efficiency and human rights seems far from having a positive answer. As a matter of fact, the EU still lacks a framework for homogeneously protecting the legal certainty of procedural rights for persons suspected of, accused of, prosecuted for and sentenced in respect of criminal offences. A standard set of safeguards should have already been in place by the time the EAW came into force on 1 January 2004. The existence of a legal domain for procedural safeguards may be viewed as being in the interest of justice; it is also crucial for the establishment of a genuine AFSJ – and for the ambition to give citizens a common sense of justice as well as safety in their exercise of their right of free movement throughout the Union.³⁶

The Tampere Presidency Conclusions are a milestone, in which the EU heads of state and government firmly endorsed the principle that enhanced mutual recognition of judicial decisions and judgements would facilitate cooperation between authorities and the judicial

³⁶ See the Commission Communication, *Towards an Area of Freedom, Security and Justice*, COM(1998) 459 final, 14 July 1998.

protection of individual rights.³⁷ In response to this official call for action to improve and enhance the judicial protection of human rights,³⁸ the European Commission adopted, after a lengthy consultation procedure with practitioners and governmental representatives,³⁹ a Green Paper on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU* in February 2003.⁴⁰ The Green Paper includes an overview of the judicial-related human rights existing under the European Convention of Human Rights and the EU Charter of Fundamental Rights. It also identifies a set of basic rights to ensure the fulfilment of the fair trial principle in any judicial procedure, which are: having access to legal assistance and representation as well as to an interpreter/translator; ensuring a proper protection for especially vulnerable suspects; having access to consular assistance; and ensuring that suspects or defendants are fully informed about their rights ('letter of rights'). The Green Paper is a positive path to follow in any future progress, but it is also true that it only constitutes one step forward towards the achievement of agreed, minimum common standards on procedural safeguards in criminal proceedings in the EU. Yet, we cannot forget that legally speaking, a green paper has no legal effects, and represents only a part of the often long consultation procedure.

It is thus unfortunate that a proper law on this subject has not yet been issued and submitted by the European Commission.⁴¹ An EU law safeguarding these rights would certainly be at the heart of the mutual recognition programme, preventing the possible emergence of human rights violations while instruments such as the EAW are being applied. It is quite uncertain, however, whether the member states would politically agree on the harmonisation of this human rights policy at the EU level as quickly or as easily as they did in relation to the settlement of the EAW.⁴²

Looking at the specific regime set out in the EAW, Art. 1 makes a direct reference to the obligation to respect fundamental rights and principles. In particular, Art. 1.3 states: "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on

³⁷ See point 33 of the Tampere European Council Presidency Conclusions, 15–16 October 1999; see also point 37 of the same Presidency Conclusions which states that, "The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States."

³⁸ As early as 26 July 2000, the European Commission started to move forward on this policy goal – see the Commission Communication to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, *Protection of individual rights*, COM(2000) 495 final, point 10.

³⁹ On 16 June 2003, the European Commission organised a public hearing on procedural safeguards for suspects and defendants in criminal proceedings (see the article retrievable from http://europa.eu.int/comm/justice_home/news/consulting_public/wai/hearing_practical_info_en.htm); see also the Consultation Paper on Procedural Safeguards for suspects and defendants in criminal proceedings posted at Commission's DG JHA's official website (retrievable from http://europa.eu.int/comm/justice_home/index_en.htm).

⁴⁰ See the Green Paper from the Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, Brussels, 19.2.2003, COM(2003) 75 final.

⁴¹ It seems that the European Commission is planning to submit a proposal for a Framework Decision on procedural safeguards in early 2004.

⁴² This issue was discussed at the Informal Meeting of the Justice and Home Affairs Council in Veria, 28–29 March 2003, Justice Affairs Session 29/03.

European Union". Art. 6 of the TEU calls for the respect of fundamental rights as guaranteed by the European Convention of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR),⁴³ the EU Charter of Fundamental Rights⁴⁴ as well as from the constitutional traditions common to the member states.⁴⁵ In our opinion, the positive reference to Art. 6 is unfortunately not enough to fully guarantee the protection of the suspected person's rights. The full adherence by every member state to what is provided by Art. 6 of the TEU seems to be a rather difficult task indeed. The precise international and EU human rights obligations should have been included into the EAW wording without political fear, to avoid any ambiguity in interpretation. Furthermore, recital 12 of the Framework Decision states that,

[The measure] respects fundamental rights and observes the principles recognized by Article 6 of the TEU and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter IV 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 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 prejudice for any of these reasons.

This recital of intent, which has not been expressly included in the main body of the Framework Decision, has a non-binding character. Member states will have total discretion to transpose Art. 1.3 and recital 12 into their national legal systems as grounds for non-execution of the EAW.

Additionally, in the grounds for the mandatory refusal to execute an EAW, the EAW does not include all those cases for which the surrendering state would have responsibilities under the ECHR. As grounds for refusal to execute the EAW, Art. 3 of the Framework Decision only presents those cases covered by amnesty, when the person has already been judged in respect of the same offence as well as when the person may not, owing to his/her age, be held criminally responsible.⁴⁶ In our view, the EAW has, among other things, dangerously forgotten to include the essential obligation not to surrender an individual in the cases set forth in Art. 3 of the ECHR.⁴⁷ This provision may render the executing state liable under the Convention, when there are substantial grounds and evidence that the person genuinely risks being subject to ill-treatment (i.e. torture, inhumane or degrading treatment or punishment)

⁴³ See the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as amended by Protocols Nos. 3, 5, 8 and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively; for a study on the role of the ECHR in the EU, see H. Steiner & P. Alston (2000).

⁴⁴ See the Charter of Fundamental Rights of the European Union, 2000/C 364/01, 18.12.2000.

⁴⁵ Art. 6 of the TEU stipulates that "1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2) The Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of community law."

⁴⁶ See Art. 23.4 of the Framework Decision concerning time limits for surrender of the person, which states that, "The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist."

⁴⁷ Art. 3 of the ECHR stipulates that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

and s/he is surrendered anyway to the issuing state.⁴⁸ The European Court of Human Rights (ECtHR) has interpreted this legal clause in many instances, and has undoubtedly ruled that the obligation is on the contracting party not to surrender the individual under those circumstances.⁴⁹ Yet this is not expressly qualified as one of the mandatory grounds for a state's refusal to surrender an individual under the EAW's system. In the same vein, Art. 6 of the European Convention of Human Rights,⁵⁰ Art. 48.2 of the European Charter of Fundamental Rights⁵¹ and the case law of the European Court of Human Rights should have been specifically included as the point of departure for the applicability of the EAW.⁵² Even though the Court of Justice of the European Communities (ECJ) has also upheld the importance of respecting the rights provided by the ECHR,⁵³ EU member states' representatives tend to completely forget about their international obligations as signatories of the Convention, while sheltered in the EU. They are clearly bound to respect the package of rights established in these international and European instruments, but it appears to be rather uncertain whether these rights will be fully protected while the EAW is being applied. Moreover, the national implementation of the right to fair trial as enshrined in Art. 6 of the ECHR may vary substantially from one EU country to another. Looking at the ECtHR case law we can see, for example, how often state violations of Art. 6.1 (unreasonable length of proceedings) occur in practice. This fact, together with the abolition of the double criminality

⁴⁸ See the *Report on the situation of fundamental rights in the European Union and its member states in 2002*, prepared by the EU Network of independent experts in fundamental rights at the request of the European Commission, Unit A5, DG Justice and Home Affairs, 31 March 2003.

⁴⁹ See, for instance, ECHR *Soering v. the United Kingdom*, 7 July 1989, Series A, No. 161; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A, No. 215; *Chahal v. the United Kingdom*, 15 November 1996, Reports 1996-V; *Ahmed v. Austria*, 17 December 1996, Record 1996-VI, No. 26; *D. v. the United Kingdom*, 2 May 1997, Record 1997-III, No. 37; see also *Einhorn v. France*, 16 October 2001, Admissibility Decision; *Özbeý v. Turkey*, 31 January 2002, No. 31883/96; and also *Mouisel v. France*, 14 November 2002, Section I, No. 67263/01.

⁵⁰ Art. 6.1 states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3) Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

⁵¹ Art. 48, on the presumption of innocence and the right of defence states that, "1) Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

⁵² See the *Opinion of the Committee on Legal Affairs and the Internal Market for the Committee on Citizens Freedoms and Rights, Justice and Home Affairs on the Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, 2003/0075/INC, 15 September 2003.

⁵³ See for instance, Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v. Council* [1991] ECR I-3187, as well as Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859; see also Weiler & Lockhart (1995).

rule in the EAW may lead to ambiguous and vague circumstances that give rise to serious human rights concerns and violations.

We also need to stress the existing, fundamental limitations of the ECJ in reviewing whether a member state has adhered to (or not) what has been politically agreed in Art. 1.3 of the Framework Decision. Art. 35 of the TEU shows the inherent weakness of the ECJ's role in assessing the validity and interpretation of a framework decision, as well as in determining the legality of a refusal by a member state to implement one of its particular clauses.⁵⁴ Framework decisions do not have direct effect and are binding only as to the result achieved, leaving the choice of form and methods to the member states' national authorities.⁵⁵ Art. 35.7 of the TEU provides that "The Court of Justice shall have jurisdiction to rule on any dispute between member states regarding the interpretation or the application of acts adopted under Art. 34.2 **whenever such disputes cannot be settled by the Council within six months** of its being referred to the Council by one of its members" (emphasis added). In our opinion, it is unlikely that these *disputes* will often arise. Further, if they do appear, it is quite likely that a peaceful settlement will be reached behind the closed doors of the Council. On the other hand, Art. 7 of the TEU, which deals with the procedures relating to serious and persistent breaches by a member state of the principles mentioned in Art. 6.1 of the TEU, leaves any decision-making exclusively in the hands of the Council, without any judicial review or involvement whatsoever.⁵⁶

As has been explained earlier, a key innovation featured by the EAW is established in Arts. 17 and 23. These two provisions provide the time limits and procedures deemed necessary to execute the EAW, as well as the effective, swift surrender procedure of the suspected individual. In relation to this new feature, some civil liberties groups maintain that the key purpose of the EAW may be to facilitate surrender procedures with only vestigial control and in an extremely fast period of time concerning the person detained in the territory of another member state. Also, national enforcement authorities will be the ones in charge of quickly arresting the suspect and carrying out the interrogation.⁵⁷ In our opinion, it is true that it may be quite difficult to guarantee the full protection of human rights and fundamental freedoms of the person targeted in this fast-track procedure of the EAW, which is centred on national law-enforcement agencies.

⁵⁴ Art. 35 of the TEU states: "1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them. 2. By way of declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any member state shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1."

⁵⁵ Art. 34.2 (b) states that "Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect." See also G. de Kerchove (2000).

⁵⁶ Art. 7 of the TEU stipulates that, "1) The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistence breach by a Member State of principles mentioned in Article 6.1, after inviting the government of the Member State in question to submit its observations".

⁵⁷ See the comments delivered by the ELISE Consortium (2003) *On the extent to which there is an emergence of a common set of European values in matters of security and civil liberties, comments on the Report on the situation of fundamental rights in the European Union and its Member States in 2002*, ELISE Consortium, CEPS, Brussels, 1 October (retrievable from www.eliseconsortium.org).

Finally, one may question the extent to which the current international and EU package of rights – as well as the (near?) future development of a framework of minimum standards on procedural safeguards and rights in the EU – may be dramatically watered down by bilateral agreements on extradition and mutual legal assistance⁵⁸ between the EU and/or some of its member states with the US.⁵⁹ These bilateral agreements may provoke even more concerns about whether the human rights dimension will be properly safeguarded. Human rights organisations such as Amnesty International and Statewatch have already warned about the incompatibility of these agreements with existing EU human rights standards. They may pose serious and dangerous threats to the human rights and fundamental freedoms embedded in the EU framework.⁶⁰ The future development of these rather sensitive agreements needs to be closely watched, as to whether the freedom rationale is fully respected.

We very much support the idea that any possible doubt or ambiguity in the new EU extradition system provided by the EAW could be substantially solved by setting up an EU framework, with a common set of minimum standards to protect procedural safeguards in criminal proceedings. Any development in the mutual recognition of judicial decisions in criminal matters needs to go along with the respect of human rights. Yet, as previously mentioned, in the short term member states may be reluctant to take steps towards harmonising at the supranational level such a sensitive matter of national sovereignty. Nevertheless, the presentation by the European Commission of such a legal instrument would give political momentum to debating the issue at the EU level.

4. Conclusion

The European arrest warrant is a core development in the fight against cross-border crime throughout the EU. Indeed, it represents a cornerstone for the establishment of a single EU legal and judicial area of extradition. While pursuing enhancements to the efficiency of the traditional, and often obsolete, EU extradition system, it offers innovative features to simplify and speed up procedures and thus prevent suspected criminals from evading justice. Moreover, while eroding the existence of safe havens for criminals within the EU, the Framework Decision does not really change the existing EU rules that protect the suspected criminal's human rights. In doing so, it could thus contribute greatly to ameliorating the mistrust and lack of confidence that remains among member states, which will certainly see a significant increase in an enlarged Europe. It would substantially strengthen EU cooperation by clarifying the present uncertainties. Trust is essential for maintaining stable relationships and it is particularly vital for effective cooperation in JHA. The establishment of a basic level of trust is closely intertwined with the building of an EU judicial area, as well as for the establishment of an Area of Freedom, Security and Justice.

Nevertheless, the system presented by the Framework Decision seems far from perfect. We have underlined and assessed a series of gaps that are inherent to its operability. It appears

⁵⁸ On mutual assistance in criminal matters, see E. Denza (2003).

⁵⁹ See the draft Agreements between the EU and the US on extradition and mutual legal assistance, Council of the European Union, Brussels, 02.05.2003, ST 8295/1/03, particularly Arts. 4 and 13; see also the Statewatch News online analysis of the Extradition Treaty between the UK and the USA, 31 March 2003 (retrievable from <http://www.statewatch.org/news/2004/jan/06extradition.htm>).

⁶⁰ See Amnesty International, "Flawed EU-USA extradition agreement threatens human rights", Amnesty International news release, 4 June 2004, (retrieved from <http://www.amnesty.org.uk/deliver/document/14573>); see also the article published on Statewatch News online "EU: Council capitulates and releases draft EU-US agreements", May 2003 (retrieved from <http://www.statewatch.org/news/2003/may/06useu.htm>).

that the newly proposed regime is over-ambitious. Substantial *lacuna* remain for its effective implementation and these need to be bridged as soon as possible in the interest of justice. Further, we have pointed out that the human rights protection envisaged in the Framework Decision is certainly not enough to fully guarantee procedural safeguards for the individual requested for extradition. The picture could be clarified enormously by urgent action from the Commission and subsequent adoption by the Council of a framework on minimum human rights standards for suspects and defendants in criminal proceedings. At this time, however, this is just a hope. In the short term, member states may be rather reluctant to take the step forward towards harmonising a matter this sensitive to national sovereignty as easily as they did with the EAW. As we have maintained in this paper, the EAW represents one of the essential ingredients in the EU security package of measures that aim at guaranteeing a high level of safety through fighting acts of political violence, commonly labelled as ‘terrorism’. It seems to us, however, that the urgent political push and paranoia motivated by the events of 11 September blinded some EU leaders to the real, practical consequences that the EAW was going to entail during implementation. Serious frictions in the transposition of the EAW at the national level seem yet to come in some member states. As a result, the desired, added value of this legal instrument, i.e. to increase the level of trust among member states by replacing the traditional, complex channels of extradition, may have been dramatically undermined by the battle among political interests. This situation is worrying in view of the upcoming enlargement.

The question of whether the EAW ensures a good balance between efficiency/procedural certainty (the security rationale) and civil liberties (the freedom rationale) remains open to debate. The proper implementation of the EAW along with the settlement of an EU framework of procedural safeguards would give a radical boost to mutual trust in an enlarged EU among the member states and each others’ legal systems. EU leaders should always keep in mind that the principle of mutual recognition of judicial decisions is envisaged not only to strengthen cooperation in the fight against the impunity of those labelled as criminals, but also to enhance the protection of individual rights in judicial proceedings. Ensuring this balance is crucial for a common sense of justice.

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Annex 1. Implementation of the EAW*

Member State	Applies extradition in relation to other Member States having implemented the EAW?	Applies extradition in relation to Member States having not yet implemented the EAW?	Authorities dealing with requests under extradition as requested State	Direct contact to the Member States' judicial authorities for supplementary information?	Authorities dealing with requests under the surrender procedure as executing State (authorities to which the EAW shall be sent)	Is able to conduct extradition procedures on the basis of an EAW?
Austria	Yes	Yes	Ministry of Justice	Yes: higher district courts (Landesgerichte) are authorised to communicate and receive such supplementary information.	The regional court (Landesgericht) with competence for the place where the persons sought is located in the absence of which the one with competence for the place where the person is found; in case the person is kept in detention ordered by a court, the regional court.	Yes
Belgium	No – applies EAW	Yes	Ministry of Justice	Yes: the public prosecutor's offices and the federal prosecutor's office are authorised to communicate and receive such supplementary information.	The investigating judge at the court of first instance examines whether the information given by the issuing State is sufficient; the council chamber (Chamber du Conseil) of the court of first instance decides on the execution of the EAWs; the public prosecutor takes the decision when an individual consents to surrender.	Does not come into play

Source: This table has been reprinted from the document produced by the General Secretariat for the Council of the European Union (2004), for the Working Party on cooperation in criminal matters (Experts on the European arrest warrant), *Implementation of the European arrest warrant – applied procedures until full implementation of the Framework Decision by all Member States*, Brussels, 12 January 2004, 5201/04. The table outlines the procedures applied by member states in their relations with each other as from 1 January 2004, along with the authorities competent to deal with requests under the procedure.

Germany	Yes	Yes	Federal Ministry of Justice, Justice Ministers and Senators of the Länder.	Yes: where the Federal Republic of Germany is the requested Member State, the public prosecutor's offices at the Higher Regional Courts, Oberlandesgerichten, will be responsible for requesting and receiving supplementary information. Where Germany is the requesting Member State, the responsibility for requesting and transmitting supplementary information will lie with the head of the prosecution department. [Generalbundesanwalt] at the Federal Supreme Court [Bundesgerichtshof], the public prosecutor's offices at the Higher Regional Courts [Oberlandesgerichten] and the public prosecutor's offices at the District Courts [Landgerichten]. Requests for information should be made directly to the prosecuting authority dealing with the particular extradition case.		
Denmark	No – applies EAW	No – applies the EAW	Ministry of Justice	Yes: courts and public prosecution authorities are authorised to request, communicate and receive the supplementary information; public-prosecution authorities comprise the Ministry of Justice, Director of Public Prosecutions, Public Prosecutors, Commissioner of the Copenhagen Police and Chief Constables.	Ministry of Justice	Does not come into play
Spain	No – applies EAW	Yes	Ministry of Justice	Requests for supplementary information may be made directly to the judicial body that requested extradition.	The Juzgados Centrales de Instrucción y la Sala de lo Penal de la Audiencia Nacional (magistrate attached to the Audiencia Nacional – a court with jurisdiction for the entire territory) will deal with the case; the decision on surrender will be taken by the Audiencia Nacional.	Does not come into play
France	Yes	Yes	Ministry of Foreign Affairs	No	The principal public prosecutor attached to the court of appeal deals with the request (in case of an arrest, at the place of arrest; in case the person's location is known, at the place of the person's location); the decision on surrender is taken by the Court of Appeal.	Yes

Finland	No – applies EAW	Yes	Ministry of Justice	Yes: e.g., competent prosecutors may be contacted directly.	Prosecutor is supposed to bring the surrender case before the court.	Does not come into play
Greece	Yes	Yes	Ministry of Justice	No	The presiding judge of the Court of Appeal deals with the request if the arrested person consents to surrender and the Judicial Council of the Court of Appeal deals with the case if the arrested person does not consent to surrender.	Yes
Italy	Yes	Yes	Ministry of Justice	No	Principal public prosecutor brings the case before the Court of Appeal (corte di appello); the latter takes the decision.	Yes
Ireland	No – applies EAW	?	Ministry of Justice	No	High Court will decide upon the request; communication occurs through the Irish Central Authority (Minister for Justice, Equality and Law Reform).	Does not come into play
Luxembourg	Yes	Yes	Ministry of Justice	Yes: judicial authorities or other competent authorities of other Member States may, where appropriate, make requests directly to the Principal Public Prosecutor of the State for supplementary information. Where Luxembourg is the requested State, the authority to request such supplementary information lies with the Ministry of Justice, the Principal Public Prosecutor (of the State) and the judicial authorities responsible for the extradition procedure.	?	?

The Netherlands	Yes	Yes	Ministry of Justice	<p>Yes; extradition requests emanating from the Netherlands: the authorities referred to in the declaration by the requested Member State may make requests directly to the judicial authority referred to in the Netherlands' extradition request, which may also provide the information requested directly.</p> <p>Extradition requests addressed to the Netherlands: the Netherlands judicial authorities who are responsible for dealing with the extradition request may, in urgent cases, make requests directly to the authorities referred to in the declaration by the requesting State. The Netherlands judicial authorities are the public prosecutor at the District Court who is responsible for dealing with the request for extradition and the Public Prosecutor's Office at the State Council of the Netherlands (Hoge Raad der Nederlanden).</p>	Public prosecutors and courts	?
Portugal	No – applies EAW	Yes	Procuradoria-Geral de República (Attorney General's Office)	No	The Tribunal da Relação (Court of Appeal) has competence for the place of residence of the person sought or the place where the person is found.	Does not come into play
Sweden	No – applies EAW	Yes	Ministry of Justice	Yes: the Prosecutor-General or any other prosecutors dealing with extradition cases are empowered to communicate directly with their counterparts in other countries.	The executing authorities are the public prosecutor and ordinary courts. The EAW is sent to the public prosecutor designated by the Office of the Prosecutor-General.	Does not come into play.
United Kingdom	No – applies EAW	Yes	Home Office and Scotland Office	No	EAWs shall be sent to the National Criminal Intelligence Service (or the Crown Office for Scotland); the executing judicial authority will be a District Judge in England and Wales, the sheriff of Lothian and Borders in Scotland and a county court judge or resident magistrate in Northern Ireland.	Does not come into play.

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