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Til underretning for Folketingets Europaudvalg vedlægges i forlængelse af justitsministerens forelæggelse d.d. på mødet i Folketingets Europaudvalg Kommissionens meddelelser om henholdsvis bekæmpelse af terrorisme og om den europæiske anholdelsesordre og udleveringsprocedurerne mellem medlemsstaterne.

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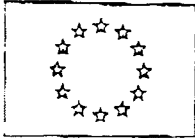

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.9.2001
COM(2001) 521 final

2001/0217 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating terrorism

(presented by the Commission)

COM(2001) 521 final

EN

EXPLANATORY MEMORANDUM

1. INTRODUCTION

Terrorism constitutes one of the most serious threats to democracy, to the free exercise of human rights and to economic and social development. Terrorism can never be justified, whatever the target and the place where the offence is prepared or committed.

This has never been clearer than in the terrible aftermath of the unprecedented, tragic and murderous terrorist attacks against the people of the United States of America on 11 September 2001. These cowardly attacks highlight the need for an effective response to terrorism at the level of the European Union.

The European Union has set itself an objective in the Treaty on European Union to provide citizens with a high level of safety within an Area of Freedom, Security and Justice. This proposal, combined with the proposal to replace extradition within the European Union with a European Arrest Warrant, is a key element of the Commission's contribution to achieving this objective in the context of the fight against terrorism. It is vitally important that Member States of the European Union have effective criminal laws in place to tackle terrorism, and that measures are taken to enhance international co-operation against terrorism.

This proposal does not relate only to acts of terrorism directed at Member States. It also applies to conduct on the territory of the European Union which can contribute to acts of terrorism in third countries. This reflects the Commission's commitment to tackle terrorism at a global as well as European Union level. Indeed, the Commission is working closely with Member States and third countries to combat international terrorism within the framework of international organisations and existing international co-operation mechanisms, particularly the United Nations and the G8, with a view to ensuring the full implementation of all relevant international instruments.

The European Union and its Member States are founded on respect for human rights, fundamental freedoms, the guarantee of the dignity of the human being, and the protection of the these rights, both as regards individuals and institutions. Furthermore, the right to life, the right to physical integrity, the right to liberty and security and the right to freedom of thought, of expression and information are included in Articles 2, 3, 6, 10 and 11 of the Charter of Fundamentals Right of the European Union[1] (Nice, 7 December 2000).

Terrorism threatens these fundamental rights. There is hardly a country in Europe which has not been affected, either directly or indirectly, by terrorism. Terrorist actions are liable to undermine the rule of law and the fundamental principles on which the constitutional traditions and legislation of Member States' democracies are based. They are committed against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic or social structures of those countries.

Terrorism takes different forms, ranging from murder, through bodily harm and threats to people's lives and kidnappings and on to destruction of property and damage to public or private facilities. Terrorism causes suffering to the victims and those around them. It destroys

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[1] OJ C 364, 18.12.2000, p.1.

their personal hopes and expectations and the material basis of their livelihood, injuring them, inflicting psychological torture and causing death.

Terrorism has a long history behind it, but what makes modern-day terrorism particularly dangerous is that, unlike terrorist acts in the past, the actual or potential impact of armed attacks is increasingly devastating and lethal. This can result from the growing sophistication and ruthless ambition of the terrorists themselves, as demonstrated most recently by the horrific events in the United States on 11 September. Alternatively, it can result from technological developments (and easy access to information about these developments), whether in the traditional arms and explosives areas or in the even more terrifying fields of chemical, biological and nuclear weapons. In addition, new forms of terrorism are emerging. There have been several recent occasions where tensions in international relations have led to a spate of attacks against information systems. More serious attacks could lead not only to serious damage but even, in some cases, to loss of life.

The profound changes in the nature of terrorist offences highlight the inadequacy of traditional forms of judicial and police cooperation in combating it. Increasingly, terrorism stems from the activities of networks operating at international level, which are based in several countries and exploit legal loopholes arising from the geographical limits of investigations, sometimes enjoying extensive logistical and financial support. Given that there are no borders within the European Union and that the right of free movements of people is guaranteed, new measures in the fight against terrorism must be taken.

Terrorists might otherwise take advantage of any differences in legal treatment in the different Member States. Today, more than ever, steps are needed to combat terrorism by drawing up legislative proposals aimed at punishing such acts and strengthening police and judicial cooperation.

The objective of this Communication is to reinforce criminal law measures to combat terrorism. For that purpose, a proposal for a Framework Decision is submitted. Its objective is the approximation of the laws of the Member States regarding terrorist offences in accordance with Article 34(2)(b) of the Treaty on European Union (TEU).

2. INTERNATIONAL AND EU LEGAL INSTRUMENTS

The first steps in the fight against terrorism were made under the auspices of the **United Nations**, which promoted the Convention on offences and certain other acts committed on board aircraft (Tokyo, 14-9-1963). After this Convention some other conventions and protocols relating to terrorist acts were promulgated. The following are worth mentioning:

- Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (The Hague, 16-12-1970);
- Convention for the Suppression of Unlawful Acts against the Safety of Aircraft (Montreal, 23-9-1971);
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14-12-1973);
- Convention against the Taking of Hostages (New York, 17-12-1979);
- Convention on the Physical Protection of Nuclear Materials (Vienna, 3-3-1980);

- Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Aviation, complementary to the Convention for the Suppression of Unlawful Acts against the Safety of Aircraft (Montreal, 24-2-1988);

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10-3-1988);

- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10-3-1988);

- UN Convention for the Suppression of Terrorist Bombings (New York, 15-12-1997);

- UN Convention for the Suppression of Financing Terrorism (New York, 9-12-1999).

These two last Conventions are particularly important. Article 2 of the Convention for the Suppression of Terrorist Bombings provides that any person commits an offence if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injuries; or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. The Convention for the Suppression of Financing Terrorism states that is an offence to provide or collect funds, directly or indirectly, unlawfully and intentionally, with the intent to use them or knowing that they will be used to commit any act included within the scope of the previously mentioned Conventions (apart from the Convention on offences and certain other offences committed on board aircraft, which is not included). This means that, even though in most of those conventions the words "terrorism" or "terrorist acts" are not mentioned, they are related to terrorist offences .

However, with regard to existing international Conventions, the most significant effort in the fight against terrorism, has been the European Convention on the Suppression of Terrorism (Strasbourg, 27-1-1977) under the mandate of the **Council of Europe.**[2] This is the first Convention in which terrorism is treated generically, at least in the sense that it gives a list of terrorist acts. This convention does not consider this kind of offence as political offences, or as offences connected with a political offence, or as offences inspired by political motives. This is important for the purpose of the application of the conventions on extradition.

Articles 1 and 2 contain a list of offences considered to be terrorist acts. Article 1 refers to offences within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971), which refer to certain terrorist acts. Furthermore, offences involving an attack against the life, physical integrity or liberty of internationally protected persons (including diplomatic agents), offences involving kidnapping, taking of a hostage, serious unlawful detention, use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb, if this use endangers persons appear in the same list. Article 2 extends the concept of terrorist act to other offences such as those which involve an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person (paragraph 1); and against property if the act created a collective danger for persons (paragraph 2).

2 STE n° 90.

Most of these conventions have been signed and ratified by the majority of Member States, which means that they have to apply them. This proposal will facilitate the implementation of those conventions as far as they concern penal law since they refer to the same issue: terrorist offences .

At European Union level, Article 29 of the Treaty on European Union specifically refers to terrorism as one of the serious forms of crime to be prevented and combated by developing common action in three different ways: closer cooperation between police forces, customs authorities and other competent authorities, including Europol; closer cooperation between judicial and other competent authorities of the Member States; approximation, where necessary, of rules on criminal matters.

Regarding police cooperation (Article 30 of the TEU), it is worth mentioning Article 2 (1) of the Convention on the establishment of a European Police Office,[3] in which terrorism is included within its field of competence, and the Council Decision of 3 December 1998[4] instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property, which implements Article 2 (2) of that Convention. Furthermore, the Council Joint Action of 15 October 1996[5] decided the creation and maintenance of a Directory of specialised counter-terrorism competences, skills and expertise to facilitate counter-terrorism cooperation between the MS of the EU.

Concerning judicial cooperation Article 31 of the TUE states that common action on judicial cooperation is to include facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions (Paragraph A) and facilitating extradition between Member States (Paragraph B). In this field there are two important legal instruments: the Convention on simplified extradition procedure between the Member States of the EU[6] (10 March 1995) and the Convention relating to extradition between Member States of the EU[7] (27 September 1996), where Article 1 establishes that one of the purposes of that Convention is to facilitate the application between the Member States of the EU of the European Convention on the Suppression of Terrorism. Furthermore, the Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the EU[8] refers to terrorist offences in Article 2 (2).

However, it seemed necessary to improve these legal instruments in order to fight against terrorism in a more effective and efficient way. The conclusions of the Tampere European Council[9] meeting of 15 and 16 October 1999 therefore established that formal extradition procedures should be abolished among the Member States as regards persons who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons (Conclusion 35).

The European Parliament adopted (5 September 2001) a resolution concerning the role of the EU in combating terrorism, calling on the Council to adopt a framework decision to abolish formal extradition procedures, to adopt the principle of mutual recognition of decisions on

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3 OJ C 316, 27.11.1995, p.1.
4 OJ C 26, 30.01.1999, p.22.
5 OJ L 273, 25.10.1996, p.1.
6 OJ C 78, 30.03.1995, p.1.
7 OJ C 373, 23.10.1996, p.11.
8 OJ L 351, 29.12.1998, p.1.
9 http://ue.eu.int/en/Info/eurocouncil/index.htm

criminal matters including pre-judgement decisions in criminal matters relating to terrorist offences and the implementation of the "European search and arrest warrant", and to approximate legislative provisions establishing minimum rules at European level relating to the constituent elements and penalties in the field of terrorism.

Finally, regarding approximation of rules on criminal matters in the Member States, Article 31 (e)[10] of the TEU calls for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of terrorism, which is also mentioned in Paragraph 46 of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice[11] (3 December 1998). This is the aim of this Framework Decision: implementing Article 31 (e) of the TEU by approximating Member States' legislation concerning terrorist offences .

Additionally to Title IV of the TEU establishing the appropriate instruments for the fighting of terrorism at the Union's level and to coordinate action on an international level, the Union's commitment to contribute towards the emergence of a strong, sustained and global action against terrorism may require a political dialogue with or an action in relation to a non-member State as well as co-ordination of Member States in international organisations and on international conferences. Without prejudice to the measures undertaken in the field of police and judicial cooperation, the addressing of all security aspects may call for complementary actions under, for example, the Common Foreign and Security Policy in order to enhance impact and ensure consistency of the Union's external relations.

3. MEMBER STATES LEGISLATION CONCERNING TERRORISM

In the European Union there are different situations in Member States in relation to legislation related to terrorism. Some have no specific regulations on terrorism. In these states, terrorist actions are punished as common offences. In other member States there are specific laws or legal instruments concerning terrorism where the words "terrorism" or "terrorist" are expressly mentioned and where some terrorist offences are expressly typified. This is the case in France, Germany, Italy, Portugal, Spain and the United Kingdom.

Most terrorist acts are basically ordinary offences which become terrorist offences because of the motivations of the offender. If the motivation is to alter seriously or to destroy the fundamental principles and pillars of the state, intimidating people, there is a terrorist offence. This point of view has been incorporated in Member States legislation concerning terrorism. Although the wording is different, they are essentially synonymous with each other.

The Criminal Code and the Code of Criminal Procedure in Greece have been substantially reshaped following the recent adoption of law no. 2928 of 27 June 2001. The French

[10] In this Article organised crime and illicit drug trafficking are also mentioned and the Union is dealing with both of them. Concerning organised crime we should take into account the Joint Action 21 December 1998 on making it a criminal offences to participate in a criminal organisation in the MS of the EU. Regarding illicit drug trafficking the Commission presented a proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (COM (2001) 259 final, 23 May 2001).

[11] OJ C 19, 23.01.1999, p.1.

Criminal Code[12] refers to terrorist acts as those that can alter seriously public order through threat or terror. The Portuguese Criminal Code[13] mentions prejudice to national interests, to alter or to disturb State's institutions, to force public authorities to do or not to do something, and to threaten individuals or groups. The Spanish Criminal Code[14], as in France and Portugal, alludes to the aim of subverting the constitutional order and altering seriously public peace. A similar statement, to subvert the democratic order, is also mentioned in the Italian Criminal Code[15].

The UK legislation, Terrorism Act 2000,[16] is the largest piece of terrorist legislation in the EU Member States. Terrorism is defined as meaning the use or threat of action where "the use or threat is designed to influence the government or to intimidate the public or a section of the public" and "the use or threat is made for the purpose of advancing a political, religious or ideological cause"; and that the action includes, among others, "serious violence against a person", "serious damage to property" or "creating a serious risk to the health or safety of the public or a section of the public".

4. A PROPOSAL FOR A FRAMEWORK DECISION

In view of Article 31 (e) of the TEU, the legal background previously mentioned, and the fact that only six Member States have legal instruments covering terrorism, the present proposal for a Framework Decision for the approximation of the substantive laws of the Member States is clearly necessary. It concerns constituent elements and penalties in the field of terrorism, ensuring that terrorist offences will be punished by effective, proportionate and dissuasive criminal penalties. As a direct result, it will also facilitate police and judicial cooperation, since common definitions of offences should overcome the obstacles of double criminality requirement as long as it is a prerequisite for certain forms of judicial assistance. Furthermore, the existence of a common framework in the fight against terrorism in the EU will facilitate closer cooperation with third countries.

The key concept on which this proposal is based is the concept of a terrorist offence. Terrorist offences can be defined as offences intentionally committed by an individual or a group against one or more countries, their institutions or people, with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country. The implication is that legal rights affected by this kind of offence are not the same as legal rights affected by common offences. The reasoning here is that the motivation of the offender is different, even though terrorist offences can usually be equated in terms of their practical effect with ordinary criminal offences and, consequently, other legal rights are also affected. In fact, terrorist acts usually damage the physical or psychological integrity of individuals or groups, their property or their freedom, in the same way that ordinary offences do, but terrorist offences go further in undermining the structures previously mentioned. For

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12 Art. 421-1 : « Constituent des acts de terrorism, lorsqu'elles sont intentionnellement en relation avec une enterprise individuelle ou collective ayant pour but the troubler gravement l'ordre public par l'intimidation ou la terreur… ».

13 Art. 300 : « …visem prejudicar a integridade ou a independência nacionais, impedir, alterar ou subverter o funcionamiento das instituções do Estado previstas na Constituição, forçar a autoridade pública a praticar um acto, a abster-se de o praticar ou a tolerar que se pratique, ou ainda intimidar certas pessoas, grupo de pessoas ou a população em geral… ».

14 Art. 571 : « …cuya finalidad sea la de subvertir el orden constitucional o alterar gravemente la paz pública… ».

15 Arts. 270 bis, 280, 289 bis : « eversione dell'ordine democratico ».

16 Terrorism Act 2000 : www.uk-legislation.hmso.gov.uk/acts/acts2000/20000011.htm

this reason, terrorist offences and ordinary offences are different and affect different legal rights. Therefore it seems appropriate to have different and specific constituent elements and penalties for such particularly serious offences.

On the other hand, directing, creating, supporting or participating to a terrorist group must be considered independent criminal acts and must be dealt with as terrorist offences. In order to define the concept of a terrorist group we have to take into account the Joint Action of 21.12.1998 making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, where terrorism is expressly mentioned.[17] Article 1 defines the criminal organisation as a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing certain types of offence, which are subject to the penalties specified in the mentioned article. Consequently, and following that definition, we can say that a terrorist group is a structured organisation, established over a period of time, of more than two persons acting in concert to commit terrorist acts.

This Framework Decision covers all terrorist offences prepared or committed within the borders of the European Union, whatever their target, including terrorist acts against interests of non EU Member States located in the EU.

Common definitions of offences and penalties are proposed. The proposal also contains provisions on liability and penalties for legal persons, jurisdiction, victims and exchange of information between Member States.

5. LEGAL BASIS

Article 29 of the TEU establishes that the Union's objective shall be to provide citizens with a level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation, and by preventing and combating terrorism. The same Article provides for approximation, where necessary, of rules on criminal matters in the Member States, in accordance with Article 31(e). This Article states that common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field, among other offences, of terrorism.

Article 34(2)(b) of the TEU refers to framework decisions as the instruments to be used for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are binding on the Member States as to the result to be achieved but leave to the national authorities the choice of the form and methods. This proposal will not entail financial implications for the budget of the European Community.

6. THE FRAMEWORK DECISION: ARTICLES

Article 1 (Subject matter)

[17] OJ L 351, 29.12.1998, p.1: "Whereas the Council considers that the seriousness and development of certain forms of organised crime require strengthening of cooperation between the MS of the EU, particularly as regards the following offences: drug trafficking, trafficking in human beings, terrorism..."

The subject of this Framework Decision is to implement Article 31(e) TEU, which provides that common action on judicial cooperation in criminal matters shall include adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of terrorism.

This will help to achieve the Union's objective, expressed in Article 29 TEU, of providing citizens with a high level of safety within an area of freedom, security and justice.

Article 2 (Scope)

Article 2 provides four criteria to limit the scope of this Framework Decision. Apart from the territoriality principle (the offence is committed or prepared in whole or in part within a Member State) and active personality principle (the offence is committed by a national of a Member State or for the benefit of a legal person established in a Member State), offences also fall under this Framework Decision when they are committed against institutions or people of a Member State.

Article 3 (Terrorist Offences)

Article 3 provides a broad list of terrorist offences, indicating when they are to be regarded as terrorist offences and terrorist offences related to terrorist groups. Article 3 puts on the Member States an obligation to ensure that these offences will be punishable as terrorist offences .

Paragraph 1 contains a list of the most serious terroristoffences. Many of them will probably be regulated as common offences in the Member States' criminal codes. The Framework Decision requests that when they are intentionally committed by an individual or a group against one or more countries, their institutions or people (people refers to all persons, including minorities), with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of those countries; they must be qualified as terrorist offences. It is worth mentioning, among them, murder; bodily injuries; kidnapping; hostage taking; threats; extortion; theft; robbery; fabrication, possession, acquisition, transport or supply of weapons or explosives; unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property (both private and public). This could include, for instance, acts of urban violence.

Although terrorist offences committed by computer or electronic devices are apparently less violent they can be as threatening as the offences previously mentioned, endangering not only life, health or safety of people but the environment as well. Their main characteristic is that their effect is intentionally produced at a distance from the perpetrators, but their consequences may also be much more far reaching. Therefore, terrorist offences covering the release of contaminating substances or causing fires, floods or explosions; interfering with or disrupting the supply of water, power or other fundamental resource; and interference with an information system are included under paragraphs 1 (h),(i) and (j).

For the purpose of this Framework Decision, "means of public transport" shall mean all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons of cargo. This is also the definition of public transportation system in Article 1(6) of the 1998 UN Convention for the Suppression of Terrorist Bombing. "Information system" shall mean computers and

electronic communication networks, as well as computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance.

Finally, paragraphs 1(l) and (m) refer to those terrorist acts committed in relation to terrorist groups, such as directing, promoting of, supporting of and participating in a terrorist group which are considered terrorist offences.

Paragraph 2 contains the definition of "terrorist group" as a structured organisation, established over a period of time, of more than two persons, acting in concert to commit the terrorist offences referred to in paragraph 1 (a) to (k).

The wording of this Article allows Member States decide how to introduce the precise definition of the offences in order to implement this Framework Decision.

Article 4 (Instigating, aiding, abetting and attempting)

Article 4 puts an obligation on Member States to ensure that instigating, aiding, abetting and attempting to commit terrorist offences are punishable.

Article 5 (Penalties and sanctions)

Article 5 concerns penalties. Paragraph 1 indicates that the offences and conduct referred to in Articles 3 and 4 shall be punishable by effective, proportionate and dissuasive penalties.

The scope of the penalties (paragraph 2) is rather broad in view of the different terrorist offences and penalties for terrorism existing in the Member States. The highest penalty is a period of deprivation of liberty of no less than twenty years (murder) and the lowest is a period of no less than two years (extortion, theft, robbery and threatening to commit some offences) The possibility of imposing ancillary or alternative sanctions such as community service, limitation of certain civil or political rights or publication of all or part of a sentence as regards to offences and conduct referred to in Articles 3 and 4 is also made available in paragraph 3.

Paragraph 4 indicates that fines could also be imposed.

Article 6 (Aggravating circumstances)

Article 6 establishes aggravating circumstances in case the offence is committed with particular ruthlessness, affects a large number of persons or is of a particular serious and persistent nature, or is committed against Heads of State, Government Ministers, any other internationally protected person, elected members of parliamentary chambers, members of regional or local governments, judges, magistrates, judicial or prison civil servants and police forces. Internationally protected persons shall have the same meaning as Article 1 of the 1973 Convention on the Prevenetion and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

Article 7 (Mitigating circumstances)

Article 7, taking into account the Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organised crime,[18]

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[18] OJ C 10, 11.01.1997, p.1.

refers to mitigating circumstances when the offender renounces his or her criminal activity and provides administrative or judicial authorities with information, helping them to prevent the effects of the offence in time, so that crime, the planning of which he is aware, may still be prevented; to identify or to bring to justice other terrorist offenders, to find evidence concerning terrorist crimes or to prevent further terrorist offences.

Article 8 (Liability of legal persons)

In line with the approach taken in a number of legal instruments adopted at EU level to combat different types of criminality, it is necessary also to cover the situation in which legal persons are involved in terrorist offences . Article 8 therefore contains provisions for holding a legal person liable for the offences or conduct envisaged by Articles 3 and 4, committed for their benefit by any person with certain leading positions, acting either individually or as a part of the organ of the legal person. The term liability should be construed so as to include either criminal or civil liability.

In addition, according to standard practice, paragraph 2 provides that a legal person can also be held liable when the lack of supervision or control by a person in a position to exercise control, has rendered possible the commission of the offences for its benefit. Paragraph 3 indicates that legal proceedings against a legal person do not preclude parallel legal proceedings against a natural person.

Article 9 (Sanctions for legal persons)

Article 9 sets out a requirement for penalties for legal persons held liable for the offences or conduct referred to in Articles 3 and 4. It requires effective, proportionate and dissuasive penalties, where the minimum obligation is to impose criminal or non-criminal fines. Other penalties that typically could apply to legal persons are also indicated.

Article 10 (Jurisdiction)

Article 10 contains procedural provisions on jurisdiction.

Paragraph 1 establishes a series of criteria conferring jurisdiction to prosecute and investigate cases involving the offences or conduct referred to in this Framework Decision. A Member State shall establish its jurisdiction in four situations:

a) where the offence is committed in whole or in part on its territory, irrespective of the status or the nationality of the person involved (territoriality principle),

b) where the offender is a national of that Member State (active personality principle),

c) where the offence is committed for the benefit of a legal person established in the territory of that Member State,

d) when the offence is committed against its institutions or people.

Given that not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offences, paragraph 2 allows them not to apply the rules on jurisdiction set out in paragraph 1 as regards the situations covered by paragraph 1(b), (c) and (d).

Paragraph 3 states that the Member States shall inform the Council's General Secretariat where they decide to apply Paragraph 2.

Article 11 (Extradition and prosecution)

This article shall no longer be applicable as soon as the Commission's proposal for a European arrest warrant is adopted, which will replace extradition within the EU. In particular, the European arrest warrant proposal does not foresee that nationality be a ground for refusal.

Article 11 takes account of the fact that some Member States do not extradite their own nationals and seeks to ensure that persons suspected of having committed terrorist offences do not evade prosecution because extradition is refused on the grounds that they are nationals of that State.

A Member State which does not extradite its own nationals must take the necessary measures to establish its jurisdiction over and, where appropriate, prosecute the offences concerned when committed by its own nationals on the territory of another Member State or against another Member State's institutions or people. This article does not regulate relations between Member States and third countries, which could be dealt with in international instruments.

Article 12 (Cooperation between Member States)

The purpose of Article 12 is to take advantage of the international instruments on judicial cooperation to which Member States are parties and which should apply to the matters covered in this Framework Decision. For instance, arrangements on mutual legal assistance and extradition are contained in a number of bilateral and multilateral agreements as well as conventions of the European Union.

Paragraph 1 requires the Member States to lend each other every possible assistance in matters of judicial and police procedure relating to offences covered by this Framework Decision. Paragraph 2 states that if several Member States have jurisdiction, they will consult one another with a view to coordinating action and, where appropriate, to bringing effective prosecutions. The paragraph also requires full use to be made of existing cooperation mechanisms, judicial or otherwise, such as Europol, the exchange of liaison magistrates, the European Judicial Network and the Provisional Judicial Cooperation Unit.

Article 13 (Exchange of information)

Article 13 (1) stresses the importance of having appointed points of contact for the purpose of exchanging information between Member States. Paragraph 2 provides for the circulation of information on which points of contact have been appointed for the purpose of exchanging information pertaining to these offences.

Paragraph 3 provides for the exchange of information between Member States relating to the future commission of a terrorist offence to enable the adoption of appropriate measures to prevent the commission of the offence.

Article 14 (Protection and assistance to victims)

In the European Union's approach against terrorism special importance has been attached to the protection of and assistance to the victims. A Framework Decision was adopted by the Council on 15 March 2001 on the standing of victims in criminal proceedings. In addition, the Commission is working on a Green Paper concerning compensation to crime victims.

Victims of certain kind of terrorist offences (e.g. threats, extortion) are vulnerable. Therefore, it is appropriate for each Member State to ensure that investigation or prosecution not be dependent of the report or accusation made by a person subject to the offence.

Article 15 (Implementation and reports)

Article 15 concerns the implementation and follow-up of this Framework Decision.

Paragraph 1 requires the Member States to take the necessary measures to comply with this Framework Decision by 31 December 2002.

Paragraph 2 requires the Member States to transmit by that date to the General Secretariat of the Council and to the Commission the provisions transposing the obligations imposed on them under this Framework Decision into national law. On that basis the Commission has to submit a report to the European Parliament and to the Council on the operation of this Framework Decision. Finally, the Council shall assess the extent to which Member States have complied with the obligations imposed by the Framework Decision.

Article 16 (Entry into force)

Article 16 provides that this Framework Decision will enter into force on the third day following that of its publication in the Official Journal of the European Communities.

2001/0217 (CNS)

Proposal for a

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on combating terrorism

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission,[1]

Having regard to the opinion of the European Parliament,[2]

Whereas:

(1) Terrorism constitutes one of the most serious violations of the principles of human dignity, liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles on which the European Union is founded and which are common to the Member States.

(2) All or some Member States are party to a number of conventions relating to terrorism. The European Convention on the Suppression of Terrorism[3] of 27 January 1977 establishes that terrorist offences cannot be regarded as a political offences or as offences connected with political offences or as offences inspired by political motives. That Convention was the subject of Recommendation 1170 (1991) adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, on 25 November 1991. The United Nations has adopted the Convention for the suppression of terrorist bombings of 15 December 1997 and the Convention for the suppression of financing terrorism of 9 December 1999.

(3) At Union level, on 3 December 1998 the Council adopted the Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice[4]. Terrorism was referred to in the conclusions of the Tampere European Council of 15 and 16 October 1999[5], and of the Santa María da Feira European Council if 19 and 20 June 2000[6]. It was also mentioned in the Commission's Communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union (second half of

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1 OJ C , , p. .
2 OJ C , , p. .
3 ETS No 90.
4 OJ C 19, 23.01.1999, p.1.
5 http://ue.eu.int/en/Info/eurocouncil/index.htm
6 http://ue.eu.int/en/Info/eurocouncil/index.htm

2000)[7]. The La Gomera Declaration adopted at the Informal Council Meeting of 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development.

(4) On 30 July 1996 twenty five measures to fight against terrorism were advocated by the leading industrialised countries (G7) and Russia meeting in Paris.

(5) The Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol convention)[8] refers in particular in Article 2 to improving the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism.

(6) Other measures having an impact on terrorism adopted by the European Union are as follows: the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against the life, limb, personal freedom or property[9]; Joint Action 96/610/JHA of 15 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorism-cooperation between the Member States of the European Union[10]; Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on the creation of a European Judicial Network[11], with responsibilities in terrorist offences, in particular Article 2; Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union[12]; and the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorism[13].

(7) The important work performed by international organisations, in particular the UN and the Council of Europe, must be complemented with a view to closer approximation within the European Union. The profound change in the nature of terrorism, the inadequacy of traditional forms of judicial and police cooperation in combating it and the existing legal loopholes must be combated with new measures, namely, establishing minimum rules relating to the constituent elements and penalties in the field of terrorism.

(8) Since these objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the EU Treaty and as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

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7 COM (2000) 782 final.
8 OJ C 316, 27.11.1995, p.1.
9 OJ C 26, 30.1.1999, p.22.
10 OJ L 273, 25.10.1996.
11 OJ L 191, 7.7.1998, p. 4.
12 OJ L 351, 29.12.1998, p.1.
13 OJ C 373, 23.12.1999, p.1.

(9) Measures should be adopted applying not only to terrorist acts committed within the Member States but also to those which otherwise affect Member States. While police and judicial cooperation measures are the appropriate way to combat terrorism in the Union and on an international level, complementary actions may be adopted in order to enhance the impact in the fight against terrorist acts and ensure consistency of the Union's external relations.

(10) It is necessary that the definition of the constituent elements of terrorism be common in all Member States, including those offences referred to terrorist groups. On the other hand, penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.

(11) The circumstances should be considered aggravated where the offence is committed with particular ruthlessness, affects a large number of persons or is of a particular serious and persistent nature; or committed against persons whose representative position, including internationally protected person, as members of an executive or legislature or their work, dealing with terrorists, makes them terrorist targets.

(12) The circumstances must be mitigating if terrorists, renouncing their terrorist activity, provide the administrative or judicial authorities with some relevant information helping them to fight against terrorism.

(13) Jurisdictional rules must be established to ensure that the offence may be prosecuted.

(14) The European Convention on Extradition of 13 December 1957 is taken into account in order to facilitate prosecution when the offence is committed in a Member State which does not extradite its own nationals.

(15) In order to improve cooperation and in compliance with data protection rules, and in particular the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data[14], Member States should afford each other the widest judicial mutual assistance. Operational contact points should be established for the exchange of information or adequate use should be made of existing cooperation mechanism for that purpose.

(16) Victims of certain kind of terrorist offences, such as threats, extortion, can be rather vulnerable. Each Member State should accordingly ensure that investigation or prosecution not be dependent on the report or accusation made by a person subject to the offence.

(17) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, and notably Chapter VI thereof.

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[14] ETS No 108.

HAS DECIDED AS FOLLOWS :

Article 1- Subject matter

The purpose of this Framework Decision is to establish minimum rules relating to the constituent elements of criminal acts and to penalties for natural and legal persons who have committed or are liable for terrorist offences which reflect the seriousness of such offences.

Article 2 – Scope

This Framework Decision shall apply to terrorist offences:

(a) committed or prepared in whole or in part within a Member State; or

(b) committed by a national of a Member State; or

(c) committed for the benefit of a legal person established in a Member State; or

(d) committed against the institutions or people of a Member State.

Article 3 – Terrorist Offences

1. Each Member State shall take the necessary measures to ensure that the following offences, defined according to its national law, which are intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country, will be punishable as terrorist offences :

(a) Murder;

(b) Bodily injuries;

(c) Kidnapping or hostage taking;

(d) Extortion;

(e) Theft or robbery;

(f) Unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property;

(g) Fabrication, possession, acquisition, transport or supply of weapons or explosives;

(h) Releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment;

(i) Interfering with or disrupting the supply of water, power, or other fundamental resource;

(j) Attacks through interference with an information system;

(k) Threatening to commit any of the offences listed above;

(l) Directing a terrorist group;

(m) Promoting of, supporting of or participating in a terrorist group.

2. For the purpose of this Framework Decision, terrorist group shall mean a structured organisation established over a period of time, of more than two persons, acting in concert to commit terrorist offences referred to in paragraph (1)(a) to (1)(k).

Article 4 - Instigating, aiding, abetting and attempting

Member States shall ensure that instigating, aiding, abetting or attempting to commit a terrorist offence is punishable.

Article 5 - Penalties and sanctions

1. Member States shall ensure that terrorist offences and conducts referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive penalties.

2. Member States shall ensure that terrorist offences referred to in Article 3 are punishable by terms of deprivation of liberty with a maximum penalty that is no less than the following:

(a) the offence referred to in Article 3(1)(a): Twenty years

(b) the offence referred to in Article 3(1)(l): Fifteen years

(c) the offences referred to in Article 3(1)(c), (g), (h) and (i): Ten years

(d) the offence referred to in Article 3(1)(m): Seven years

(e) the offences referred to in Article 3(1) (f)and (j): Five years

(f) the offence referred to in Article 3(1)(b): Four years

(g) the offences referred to in Article 3(1)(d), (e), and (k) : Two years.

3. Member States shall ensure that ancillary or alternative sanctions such as community service, limitation of certain civil or political rights or publication of all or part of a sentence may be imposed for terrorist offences and conduct referred to in Articles 3 and 4.

4. Member States shall ensure that fines can also be imposed for terrorist offences and conduct referred to in Articles 3 and 4.

Article 6 - Aggravating circumstances

Without prejudice to any other aggravating circumstances defined in their national legislation, Member States shall ensure that the penalties and sanctions referred to in Article 5 may be increased if the terrorist offence:

(a) is committed with particular ruthlessness; or

(b) affects a large number of persons or is of a particular serious and persistent nature; or

(c) is committed against Heads of State, Government Ministers, any other internationally protected person, elected members of parliamentary chambers, members of regional or local governments, judges, magistrates, judicial or prison civil servants and police forces.

Article 7 - Mitigating Circumstances

Member States shall ensure that the penalties and sanctions referred to in Article 5 may be reduced if the offender:

(a) renounces terrorist activity, and

(b) provides the administrative or judicial authorities with information helping them to:

(i) prevent or mitigate the effects of the offence,

(ii) identify or bring to justice the other offenders,

(iii) find evidence, or

(iv) prevent further terrorist offences.

Article 8 - Liability of legal persons

1. Member States shall ensure that legal persons can be held liable for terrorist offences or conduct referred to in Articles 3 and 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

   (a) a power of representation of the legal person, or

   (b) an authority to take decisions on behalf of the legal person, or

   (c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, Member States shall ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of terrorist offences or conduct referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who committerrorist offences or engage in the conducts referred to in Articles 3 and 4.

Article 9 – Sanctions for legal persons

1. Member States shall ensure that a legal person held liable pursuant to Article 8(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

   (a) exclusion from entitlement to public benefits or aid,

   (b) temporary or permanent disqualification from the practice of commercial activities,

   (c) placing under judicial supervision,

   (d) a judicial winding-up order,

   (e) temporary or permanent closure of establishment which have been used for committing the offence.

2. Member States shall ensure that a legal person held liable pursuant to Article 8(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 10 - Jurisdiction

1. Member States shall establish its jurisdiction with regard to terrorist offences or conduct referred to in Articles 3 and 4 where the offence or conduct has been committed:

   (a) in whole or in part within its territory; or

   (b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or

   (c) for the benefit of a legal person that has its head office in the territory of that Member State; or

   (d) against its institutions or people.

2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, a jurisdiction rule set out in paragraph 1(b), (c) or (d).

3. Member States shall inform the General Secretariat of the Council and the Commission accordingly, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 11 - Extradition and prosecution

1. A Member State which, under its law, does not extradite its own nationals shall establish its jurisdiction over terrorist offences or conduct referred to in Articles 3 and 4 when committed by its own nationals on the territory of another Member State or against another Member State's institutions or people.

2. A Member State shall, when one of its nationals is alleged to have committed, in another Member State, an terrorist offence or conduct referred to in Articles 3 and 4, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate.

In order to enable prosecution to take place, the Member State in which the offence or conduct was committed shall forward to the competent authorities of the other State all the relevant files, information and exhibits in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the initiation and outcome of any prosecution.

3. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition.

Article 12 - Cooperation between Member States

1. In accordance with the applicable conventions, multilateral or bilateral agreements or arrangements, Member States shall afford each other the widest measure of mutual assistance in respect of proceedings relating to terrorist offences or conduct referred to in Articles 3 and 4.

2. Where several Member States have jurisdiction in respect of such offences, they shall consult one another with a view to coordinating their action in order to prosecute effectively. They shall make full use of judicial cooperation and other mechanisms.

Article 13 - Exchange of information

1. Each Member State shall designate operational contact points, which may be an existing operational structures or one newly established for this purpose, for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.

2. Each Member State shall inform the General Secretariat of the Council and the Commission of its operational contact point as referred to in paragraph 1. The General Secretariat shall notify that information to the other Member States.

3. Where a Member State has information relating to the future commission of a terrorist offence affecting another Member State, it shall provide that information to the other Member State. For that purpose operational contact points referred to in paragraph 1 may be used.

Article 14 - Protection and assistance to victims

Each Member State shall provide that investigations into or prosecution of terrorist offences over which it has jurisdiction shall not be dependent on the report or accusation made by a victim of the offence, at least in cases where Article 8(1)(a) applies.

Article 15 - Implementation and reports

Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2002.

They shall communicate to the General Secretariat of the Council and to the Commission the text of any provisions they adopt and information on any other measures they take to comply with this Framework Decision.

On that basis the Commission shall, by 31 December 2003, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals.

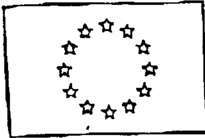
The Council shall assess the extent to which the Member States have complied with this Framework Decision.

Article 16 - Entry into force

This Framework Decision shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

For the Council
The President



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.9.2001
COM(2001) 522 final

2001/0215 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on the European arrest warrant and the surrender procedures between the Member States

(presented by the Commission)

COM (2001) 522 final

EN

EXPLANATORY MEMORANDUM

1. BACKGROUND TO EXTRADITION

Extradition came about as a means of arranging for a foreigner found in one State to be handed over to another State for prosecution or punishment in an often complicated context of political and diplomatic relations between States. It is often a slow and complex business, and it is not suited to a frontier-free area such as the European Union in which there is a high degree of trust and cooperation between States that share a sophisticated concept of the State based on the rule of law.

It is currently governed by the European Extradition Convention of 13 December 1957 ("the 1957 Convention"), the Additional Protocol to that Convention of 15 October 1975 ("the 1975 Protocol"), the second Additional Protocol of 17 March 1978 ("the 1978 Protocol") and the European Convention of 27 January 1977 on the suppression of terrorism ("the Terrorism Convention"). These instruments represented real progress at the time of their signature, but today they constitute a heavy and obsolete mechanism in view of what relations between the Member States of the European Union have now become.

The Convention Implementing the Schengen Agreement, by setting up the SIS, created a mechanism that will considerably improve practical information mechanisms between Member States relating to persons who are sought and facilitate contacts between national authorities at the time of the arrest of a person. Legally, however, the Schengen Convention adds nothing to the traditional extradition mechanisms laid down in the 1957 Convention.

The Convention on the simplified extradition procedure between the Member States of the European Union of 10 March 1995 ("the 1995 Convention") and the Convention on the extradition between the Member States of the European Union of 27 September 1996 ("the 1996 Convention") are intended to accelerate and simplify the mechanisms of the 1957 Convention and to remove most of the grounds for reservations with respect to it. But they do not break with the extradition mechanism that is by definition political and intergovernmental. And they have been ratified only by nine and eight Member States respectively.

2. THE IMPLICATIONS OF MUTUAL RECOGNITION

By entering the creation of space of freedom, of safety and of justice in the list of objectives of the Union, the Treaty of Amsterdam opens the door to a radical change of perspective. The Tampere European Council stated that "mutual recognition of judicial decisions and judgments ... should become the cornerstone of judicial cooperation in both civil and criminal matters". As regards extradition, the implementation of the principle of mutual recognition means that each national judicial authority should *ipso facto* recognise requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities.

3. THE NEW BILATERAL TREATIES

In parallel with work in hand in the Union, and in consideration of the urgent need to find effective responses to fight against the increasing internationalisation of crime, several Member States have started bilateral discussions on measures to replace the obsolete extradition mechanism by mechanisms of simple surrender to judicial authorities. Italy and

Spain, for instance, signed a Treaty last December. A corresponding Treaty is being prepared between Spain and the United Kingdom.

These initiatives are to be welcomed, for they underscore the mutual confidence between Member States' legal systems. But they highlight the urgent need to reform existing multilateral mechanisms so as to avoid further complicating the existing abundance of extradition measures through the adoption of bilateral agreements between Member States.

4. THE EUROPEAN ARREST WARRANT

4.1. Context

The Vienna Action Plan called on the Member States to speedily ratify and implement the existing extradition instruments (item 45 c). The conclusions of the Tampere European Council state that "the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast-track extradition procedures, without prejudice to the principle of fair trial" (item 35). The Commission is invited "to make proposals on this matter in the light of the Schengen Implementing Agreement".

This mandate was recalled in Recommendation 28 of the strategy of the European Union for the next millennium as regards prevention and control of organised crime, which calls on the Commission "to make proposals for expedited extradition of convicted persons fleeing from justice as well as on fast-track extradition procedures". It further recommends that "consideration should be given to the long-term possibility of the creation of a single European legal area for extradition. The issue of extradition in relation to procedures *in absentia*, with full respect to fundamental rights granted by the European Convention on Human Rights, might also be examined in this context".

Recently again, following the unprecedented, tragic and murderous terrorist attacks against the people of the United States of America on 11 September 2001, the heads of State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy have called for "the creation of a European warrant for arrest and extradition in accordance with the Tampere conclusions, and the mutual recognition of legal decisions and verdicts".

4.2. Scope

In preparing this proposal, the Commission departments organised a series of interviews in the Member States with legal practitioners, judicial officers, lawyers, academics and ministry officials responsible for extradition in almost all the Member States. It emerged that there was no reason for distinguishing between situations in which extradition is requested at the pre-trial stage and those in which it is requested for the execution of an enforceable judgment. No bilateral or multilateral instrument makes this distinction, for which there is no justification in practice. Consequently, to simplify the existing legal order, the European arrest warrant must have the same scope as the extradition which it replaces and apply both before trial and afterwards.

4.3. Choice of the instrument

The same concern for effectiveness underlies the option in favour of a Framework Decision for the creation of the European arrest warrant. The many Conventions drawn up under the Council of Europe, in European political cooperation or in the European Union have had limited success, as progress in ratifications attests. Both the legal order flowing from the Amsterdam Treaty and the advanced state of judicial cooperation between Member States justify the creation of the European arrest warrant by a Framework Decision which, under Article 34 of the Union Treaty, would 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".

4.4. An instrument concerned to protect fundamental rights

The proposed system has a dual objective. First, in terms of the effectiveness of law-enforcement, it draws the conclusions of opening the borders within the European law-enforcement area by making it easier for justice to be administered across borders between Member States. In this respect, the mechanism is a major contribution to the fight against transnational organised crime. Moreover, this system addresses the European citizens' concerns for the protection of individual rights.

Several points must be made here:

1. provision is made for the presence of legal counsel and, if necessary, an interpreter as from the time of arrest under a European arrest warrant (Article 11);
2. where a person is arrested on the basis of a European arrest warrant the judicial authority in the issuing Member State will be under a duty to rule on the question of his maintenance in custody on the basis of the assurances he gives as to his subsequent appearance. If adequate assurances are given, a person arrested on the basis of a European arrest warrant may be released, conditionally if appropriate, in the executing State, pending presentation to the issuing authority at a date that is appropriate for the current procedure (Article 14). This mechanism is designed to avoid remanding people in custody for extended periods, sometimes merely because the person is geographically remote. Similarly, the issuing judicial authority may decide to suspend the execution of the European arrest warrant when the person arrested voluntarily undertakes to appear (Article 13 (3));
3. a person against whom a judgment has been given *in absentia* must be retried after lodging an opposition with the executing judicial authority (Article 35);
4. the number of cases where provisional detention is pronounced mainly to ensure that people reside in other Member States are amenable to the courts should be limited, because the effectiveness of the European arrest warrant improves the assurance that people will actually be surrendered to and appear before the issuing judicial authority (Article 17);
5. transfers that are neither useful nor necessary will be avoided by the use of videoconferencing (Article 34). Similarly the execution of a penalty in the place where the condemned person can best be reintegrated should be encouraged (Articles 33 and 36);
6. criminal proceedings will be accelerated, in particular because of the increased practice of temporary transfers from one State to another (Articles 39 and 40), which will contribute to enforcing litigants' right to have judgment given within a reasonable time. Set within a strict ninety-day limit (Article 20), the procedure for the European arrest warrant should make an important contribution to respect for the principle of the reasonable period;

7. the removal of the principle of double criminal liability is not at the expense of States with the most lenient legislation. The negative list mechanism allows Member States which choose to decriminalise certain acts to exclude them from the scope of the European arrest warrant (Article 27);
8. the possibility for a State of making the execution of a European arrest warrant conditional on a guarantee that life imprisonment will not be imposed is stated (Article 37).

Lastly, in the issuing and execution of European arrest warrants, the national courts will of course remain subject to the general norms relating to protection of fundamental rights, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union.

4.5. General presentation

The mechanism of the European arrest warrant has the following features:

1. the purpose of the European arrest warrant is the enforced transfer of a person from one Member State to another. The proposed procedure replaces the traditional extradition procedure. It is to be treated as equivalent to it for the interpretation of Article 5 of the European Convention of Human Rights relating to freedom and security;
2. it is a horizontal system replacing the current extradition system in all respects and, unlike the Treaty between Italy and Spain, not limited to certain offences;
3. the mechanism is based on the mutual recognition of court judgments. The basic idea is as follows: when a judicial authority of a Member State requests the surrender of a person, either because he has been convicted of an offence or because he is being prosecuted, its decision must be recognised and executed automatically throughout the Union. Refusal to execute a European arrest warrant must be confined to a limited number of hypotheses.

   The scope of the proposed text is almost identical to that of extradition:[1] the European arrest warrant allows a person to be arrested and surrendered if in one of Member States he has been convicted and sentenced to immediate imprisonment of four months or more or remanded in custody where the offence of which he is charged carries a term of more than a year.

   Given that the mechanism is particularly binding for the person concerned, it is felt important to allow its use only in cases that are serious enough to justify it;
4. the procedure for executing the European arrest warrant is primarily judicial. The political phase inherent in the extradition procedure is abolished. Accordingly, the administrative redress phase following the political decision is also abolished. The removal of these two procedural levels should considerably improve the effectiveness and speed of the mechanism;
5. the European arrest warrant will take account of the principle of citizenship of the Union. The exception made for the nationals should no longer apply. The primary criterion is not nationality but the place of the person's main residence, in particular with regard to the execution of sentences. Provision is made for facilitating the execution of the sentence passed in the country of arrest when it is there that the person is the most likely to achieve

[1] The two conditions (penalty remaining to be executed and maximum penalty incurred) were cumulative in the extradition system. They are independent here (see infra, Article 2).

integration, and moreover, when a European arrest warrant is executed, for making it possible to make it conditional on the guarantee of the person's subsequent return for the execution of the sentence passed by the foreign authority;

6. the cases of refusal to execute the arrest warrant are limited and are listed in order to simplify and accelerate the procedure. The principle of double criminal liability is abolished, as is the principle of speciality. But Member States have the possibility, if they wish, of drawing up a negative list of offences for which they will state that they refuse to execute the European arrest warrant on their territory. Similarly, it is possible to restore the requirement of the double criminal liability for cases in which the issuing State exercises extraterritorial authority;

7. the elements appearing in the European arrest warrant are standardised at the level of the Union. They must, in all but exceptional cases, enable the authority of the executing country to surrender the person without other controls being carried out;

8. the mechanism of the European arrest warrant is intended to replace, as between the Member States, the 1957 Convention, its two protocols of 1975 and 1978, the provisions concerning extradition of the terrorism Convention and the two Union Conventions of 1995 and 1996. Certain provisions of the Schengen Implementing Convention are also replaced.

5. ARTICLE-BY-ARTICLE COMMENTARY

Chapter 1: General principles

Article 1 - Subject-matter

The principle underlying this Framework Decision is the mutual recognition of court judgments. Applying this principle, a European arrest warrant issued in one of the Member States must be executed in accordance with the Framework Decision throughout the Union.

Article 2 - Scope

A European arrest warrant may be issued both for the implementation of an enforceable judgment and at the pre-trial stage.

The scope provided for here differs little from that laid down in the European Extradition Convention 1957.

(a) With regard to the nature of the decisions which can give rise to a European arrest warrant, it is necessary that:
- if the case involves a judgment:
  - it be final; and
  - if it was given *in absentia*, it be capable of being opposed (Article 35);
- if the case involves a pre-trial order, that a custodial sentence have been passed. It is not necessary for a national arrest warrant to be formally issued beforehand by the national authority, but nothing prohibits it either.

(b) With regard to the amounts of the sentences potentially or actually ordered, allowing the issuance of a European arrest warrant, they do not differ from those provided for by the 1957 Convention. The previous practice, which appears satisfactory, will continue in this respect.

But as the principle of double criminal liability is abolished, it is not necessary to place a minimum limit on the penalty incurred in the Executing State. The European arrest warrant must be carried out whatever the amount of the penalty incurred in the executing State. This principle explains the absence of a reference to the situation referred to Article 2(2) of the 1996 Convention.

For the appraisal of the minimum sentence for the issuance of a European arrest warrant, judgments *in absentia* are treated as final judgments, as was already the case in the 1957 Convention (cf. Explanatory Report). But with regard to the execution of judgments imposing penalties of more than four months, the system of the 1957 Convention envisaged a cumulative condition with the legal maximum incurred for the same offence. This condition is abolished here since it is the judgment itself which is recognised, the penalty incurred no longer being a relevant element once sentence has been passed.

Likewise, the situation referred to in Article 2(2) of the 1957 Convention is no longer relevant since, subject to Article 41 of this Decision, the principle of speciality is abolished.

Certain Member States (including the Benelux and Nordic countries) have concluded agreements among themselves to extend the field of extradition below the minima laid down in the 1957 Convention. It will be for them to decide if they maintain the principle of extradition for these cases or are satisfied with extending the scope of the European arrest warrant among themselves.

Article 3 - Definitions

(a) The European arrest warrant is a warrant for search, arrest, detention and surrender to the judicial authority of the issuing country. In the previous system, under the 1957 Convention as implemented by the Schengen Convention, the provisional arrest warrant and the extradition request were two separate phases of the procedure. Pursuant to the principle of mutual recognition of court judgments, it is no longer necessary to distinguish the two phases. The arrest warrant thus operates not only as a conventional arrest warrant (search, arrest and detention) but also as a request for surrender to the authorities of the issuing State.

But the four obligations imposed on Member States by the European arrest warrant do not have the same legal status. The search and arrest functions are binding on the executing State even in the marginal exclusion situations (Articles 27, 28, 30 and 31). But the detention of the requested person will require a specific decision by a judicial authority (Article 14). In the absence of that person(s consent, a court order will also be required for surrender to the issuing judicial authority.

(b) The procedure of the European arrest warrant is based on the principle of mutual recognition of court judgments. State-to-State relations are therefore substantially replaced by court-to-court relations between judicial authorities. The term "judicial authority" corresponds, as in the 1957 Convention (cf. Explanatory Report, Article 1), to the judicial authorities as such and the prosecution services, but not to the authorities of police force. The issuing judicial authority will be the judicial authority which has authority to issue the European arrest warrant in the procedural system of the Member State (Article 4).

(c) With regard to the executing judicial authority, several procedural mechanisms are possible depending whether the simplified procedure applies or not (Article 16). It will be the prosecution service or a judge, depending on the procedure applicable in the Member State. The term "executing judicial authority" will cover one or the other, as the case requires. But it must always be the authority that takes the decision to execute the

warrant. Even if Article 5 enables the Member States to confer powers on a central authority in a series of circumstances, that authority will not be covered by this definition.

(d) The definition of the judgment "*in absentia*" is based partly on the Council of Europe Convention of 1970 on the International Validity of Criminal Judgments and partly on Resolution (75) 11 of the Committee of the Ministers of the Council of Europe. It corresponds in substance to Article 3(g) of the United Nations model extradition Treaty (Resolution 45/116, as amended by Resolution 52/88). It takes account of the voluminous case-law of the European Court of Human Rights. Judgments "*in absentia*" are those against which there must be a right of appeal to enable the person to be retried in his presence. But judgments "*in absentia*" do not include judgments given against a person who was actually summoned to appear within the time usually provided for by the legal system of the State in which the judgment was given and deliberately failed to discharge his obligation to appear, without seeking to be represented and without the absence being due to a cause beyond his control.

(e) The definition of detention order is taken from the 1957 Convention.

(f) The definition of the requested person is intended to allow harmonisation of the concepts throughout the body of the instrument.

Article 4 - Competent judicial authorities

The judicial authority having the power to issue a European arrest warrant is designated in accordance with the national legislation of the Member States. They will be able to entrust the decision either to the same authority as gave the judgment or the judgment referred to in Article 2 or to another authority.

The same applies to the authority having power to execute the European arrest warrant. It must be stressed that the authority referred to in Article 4 is the one which, subject to the points which might fall within the powers of the central authority (Article 5), has the power to decide on the validity and execution of the European arrest warrant and therefore on surrender to the judicial authorities of the other Member State. The political and administrative phase that typifies the extradition system is abolished.

Article 5 - Central authority

Paragraph 1 of this Article is inspired by the 1996 Convention and the European Union Convention of 2000 on mutual judicial assistance in criminal matters. It is a practical provision to facilitate the transmission of information between Member States, and the current system must be maintained. The role of these central authorities must be to facilitate the distribution and execution of European arrest warrants as between Member States. They are to deal in particular with translation and with administrative support for the execution of warrants.

In the proposed mechanism, the Decision on the validity of the European arrest warrant and the principle of its execution falls to be taken by the judicial authority of the arresting country. But Member States can provide that, on certain questions listed exhaustively, a central administrative authority may be involved, for example because this type of Decision falls to be taken by an administrative authority in the system of the Member State concerned. Examples might be a decision that the person enjoys immunity (Article 31), a decision that execution of the warrant should be deferred on serious humanitarian grounds (Article 38) or a decision to ascertain whether there are adequate guarantees from another Member State that life imprisonment will not be ordered (Article 37).

Where a Member State makes use of this possibility, it will have to organise relations between the judicial authority having jurisdiction to take this decision and the central authority so that the former authority can have regard to the opinion expressed by the latter authority and so that these powers are exercised within no more than ninety days. These relations must also be organised in such a way that the central authority can take its decision in full knowledge of the views of the person against whom the warrant is issued.

Article 6 - Content of the European arrest warrant

The information contained in the European arrest warrant corresponds for the most part to the information listed in Article 95 of the Convention implementing the Schengen agreement. The following information is added:

- the penalty, if there is an enforceable criminal judgment, or else, the prescribed scale of penalty;
- where the judgment has been given *in absentia*, a statement as to the right to lodge an opposition and on the applicable procedure;
- whether the person has already been arrested for the same offence and let free, or has escaped from prison.

The latter condition is important because it will entail a difference in the procedure applicable to the execution of the European arrest warrant. If the person has been conditionally released, the European arrest warrant will generally be executed, subject to the appraisal of the judicial authority executing it (Article 17), by a simplified procedure with no need to verify that the person concerned consents to it. This heading of the European arrest warrant will therefore have to be filled in very carefully. This can be done at various stages of the procedure: either ab initio, or when the issuing judicial authority applies Article 13(3) (suspension of execution of European arrest warrant subject to representation of person), or when the person has already been arrested on the basis of the same warrant and let free by the judicial authority of the arresting State (Article 14) but has failed to discharge his obligation to reappear. In the last two cases, it will be for the issuing judicial authority to add the relevant information to the warrant.

The transmission of this information constitutes a request for arrest and for surrender to the judicial authorities which took the decision under which the European arrest warrant was issued. Generally speaking, the information contained in the arrest warrant must be sufficient for the judicial authorities of the place of arrest to be able to execute the arrest warrant without the executing State needing to ask for further documentation, in all but exceptional cases.

Chapter II: Procedure

Section 1 : General

Article 7 - Communication between authorities

The principle, taken over from the Convention of 29 May 2000 on mutual assistance in criminal matters, is the direct communication of the European arrest warrant from judicial authority to judicial authority. The implementation of this principle supposes, of course, that the place of residence of the requested person in the other Member State is known to the authority issuing the arrest warrant.

As in the Union Convention on mutual assistance (Article 6), it is possible for the Member States to provide that procedures must transit via a central authority in certain cases.

Section 2 : Use of the Schengen Information System

Article 8 - Alert

When it is not known where the requested person is, the mechanism set up by the Convention implementing the Schengen Agreement will apply. The Framework Decision replaces Article 95(1) and (2) of the Convention implementing the Schengen agreement in this respect. The content of the additional information to be disseminated by the competent national authorities (SIRENE offices) is amended and is aligned on the contents of the European arrest warrant (Article 6). Dissemination will be as before by the Schengen procedures. At this stage it must be emphasised that confidentiality must be secured in the transmission of this information. The use of the secure Schengen procedure will ensure compliance with European data-protection rules.

Article 9 - Flag

Article 95(3), (4), (5) and (6) of the Convention implementing the Schengen Agreement are repealed. Article 94(4) is to be regarded as repealed as regards its application to a European arrest warrant. This Framework Decision establishes the principle of implementation of the European arrest warrant throughout the Union. Execution can be refused only in limited cases. As a rule, when a European arrest warrant is issued, only the situations referred to in Article 27 (exceptional re-establishment of the principle of double criminal liability in a negative list), Article 28 (exercise of an extraterritorial jurisdiction), Article 30 (offence amnestied in the executing State) or Article 31 (immunity enjoyed in the executing State) can justify a flag being added by a Member State. The effect of the flag is that the person concerned will not be arrested on the territory of the State adding it. The same will apply where the judicial authority in the arresting State decides, in accordance with Article 14, to provisionally release the person concerned pending his surrender to the authorities of the issuing State so as to avoid the need for a second arrest in the same State or where the issuing judicial authority provisionally orders that the warrant shall cease to have effect (Article 13(3)). In this case, the Member State adding the flag will have to inform the issuing State that it is doing so, and in the event of control on its territory, information concerning the person's whereabouts must be supplied to the competent authorities of the State issuing the European arrest warrant. The latter obligation is taken over from Article 95(5) of the Convention implementing the Schengen Agreement.

Regarding the question of the time-limit for introducing the European arrest warrant into the Schengen system, the effect of the principle of mutual recognition is to reverse the rule in relation to the current Article 95(3), (4) and (6) of the Convention implementing the Schengen Agreement. The principle must now be that the warrant must be disseminated systematically. The alert for the purposes of non-arrest can be entered at a later date, but the period during which the dissemination of the European arrest warrant is deferred pending examination of its conformity with national law is abolished.

Section 3 : Arrest and detention

Article 10 - Coercive measures

On this point, the Framework Decision makes no change in relation to the current situation. It is the legislation of the executing Member State which applies to the coercive measures applied to the person arrested, subject to the right to legal counsel and an interpreter which are specific to the European arrest warrant (see *infra*, Article 11(2)).

It will be for the police and the competent judicial authorities, acting in accordance with their national law, to take the first measures aiming to secure the person and check his identity. The

case-law of the European Court of Human Rights requires these measures to be necessary and proportionate. The European arrest warrant operates as a request for detention, so the person must be detained until the judicial authority in the executing State can rule on his situation in accordance with national law (Article 14). It will be for the Member States to regulate in their national law the controls applicable during the period between the person's physical arrest and his presentation before the judicial authorities of the executing State. The position here is comparable to the position regarding extradition.

Article 11 - Rights of a requested person

The Framework Decision takes over the distinction made by the 1995 and 1996 Union Conventions between cases in which the person agrees to be surrendered to the authorities of the issuing State and cases in which he challenges it.

Consequently, as soon as he is arrested on the basis of the European arrest warrant, the person must be made aware of its contents and, if appropriate, consent to be immediately surrendered to the issuing judicial authority. This Article takes over Article 6 of the 1995 Convention.

From the time of his arrest, a person against whom an arrest warrant is issued is entitled to the services of a lawyer and, if necessary, an interpreter. This is an important guarantee for the protection of individual rights. It is justified by the fact that, being arrested in a probably unfamiliar legal and linguistic context for transfer to another Member State, the person must have legal advice from the beginning of the procedure. This is a guarantee that is specific to the European arrest warrant and independent of the procedure applicable in the Member State in the event of arrest on the basis of a national arrest warrant (see supra).

Article 12 - Notification to the judicial authorities

The judicial authorities must immediately be informed of the arrest. The judicial authorities in the executing State are notified in accordance with the applicable national procedure. The judicial authorities in the issuing State are notified of the arrest either by the competent authority of the State of arrest or by the central authorities mentioned in Article 5.

Article 13 – Verification and suspension

As a safety measure, the validity of the European arrest warrant must be checked systematically and immediately by the issuing judicial authorities or the central authority in the issuing State. This check is all the more necessary as it is no longer necessary for the issuing State to ask for surrender at a later date since this is included in the very definition of the European arrest warrant.

If the arrest warrant is not upheld, the person is released at once unless there is another proceeding against him.

The issuing judicial authority may decide to suspend temporarily the execution of the European arrest warrant in exchange for the commitment by the person arrested to appear voluntarily at a specified place and time. It may also take additional guarantees or impose conditions for its agreement, such as the lodging of a security. The person's commitment to appear will be recorded by the judicial authority of the arresting State and notified to the issuing judicial authority. The person concerned will also be informed of the potential consequences of failure to appear. The issuing judicial authority must also transmit information regarding the suspension of the European arrest warrant to the Schengen Information System if the warrant was disseminated through it.

If the person appears as agreed, the European arrest warrant will lapse definitively (Article 25). Otherwise, it will be for the issuing judicial authority to record the failure to appear,

whereupon the warrant will become enforceable again. If the person is then re-arrested, the procedure of Article 17, whereby the warrant becomes immediately executable regardless of assent and without further hearings, will apply without exception.

Article 14 - Provisional release

Between his arrest and his surrender to the issuing authorities, the person is the responsibility of the executing Member State. The competent judicial authorities there will have to take the decision in accordance with its national procedural rules and within the time allowed by national legislation governing arrests. This procedure, which concerns exclusively the question of provisional release, is distinct from the procedure of Article 18, which concerns the validity and execution of the European arrest warrant. The competent judicial authorities there will have to take the decision having regard to the assurances as to subsequent appearance that the person concerned can produce and his undertaking to allow the authorities to execute the warrant.

The purpose of this provision is to allow the provisional release of the person on the territory of the executing State until the date when he is surrendered to the issuing judicial authority. That date must be determined jointly by the judicial authorities in the issuing and executing States on the basis of the date when the former need the person to appear before them. So long as he remains on the territory of the executing State, that State will be responsible for ensuring that he does not seek to evade justice. The executing judicial authority may make its decision subject to conditions under national law in the event of provisional release, such as the payment of a security, a ban on moving outside specified geographical limits, the obligation to appear regularly before control authorities, etc.

The situation here is different from the situation referred to in the previous Article. Unlike Article 13(3), which provides for the suspension of the European arrest warrant, the warrant will here be actually executed, and the arresting State will be responsible.

Section 4: Judicial procedure for surrender

Article 15 - Examination of the European arrest warrant

The court with jurisdiction to rule on the execution of the arrest warrant must be apprised as soon as possible, and in any event no later than ten days after the arrest. For this period, it will be for the designated competent authority to obtain the person's consent to execution of the warrant, if necessary. Depending whether this consent is given or not, the authority with jurisdiction to rule on execution may change. It might be the prosecution service in the cases referred to in Articles 16 and 17 or a court in other cases.

Article 16 - Consent to surrender

This Article is inspired by Article 7 and 8of the 1995 Convention, in particular with regard to the procedures for obtaining the person's consent. If he agrees, the warrant must be executed immediately. The mechanism set up here does not differ appreciably from that laid down in the 1995 Convention, which already expressly derogated from the formal extradition mechanisms.[2] But in the previous situation, the requested State retained the full power to assess both the legality and the expediency of the surrender. Henceforth, this power will be constrained by the provisions of the Framework Decision concerning the refusal to execute the European arrest warrant. With regard to the authority with jurisdiction to take the

2 But the mechanism of the 1995 Convention enabled States to declare that the person's consent was revocable. This limitation was not kept here.

decision, it must always be a judicial authority, but Member States will be able to decide to confer that power on the prosecutor, which distinguishes this situation from that referred to in Article 18.

But the formalities for notifying the issuing authority of the person's consent have been simplified. Under the 1995 Convention the notification had a direct effect on the presentation of the extradition request by the requesting State. Since the European arrest warrant operates as a request for surrender, the chief value of the notification of the persons consent is as information for the issuing authority.

Article 17 - Previous release

This Article aims to take account of the previous procedure which could proceed on the territory both of the issuing State and of the executing State. When a person arrested and left free or released after pre-trial detention fails to return (this information is on the arrest warrant (Article 6 i)), or when the person escaped, the procedure for execution of the European arrest warrant is simplified and there will generally be no need for a court hearing, even if there was no consent. The same procedure applies if the person has already been arrested on the basis of the same European arrest warrant but, contrary to his commitment, he did not reappear before the issuing judicial authority (Article 13(3)), or when he was released on bail under Article 14 and fails to meet his obligations.

If, however, the executing State's judicial authority has reasons to believe that the request falls under one of the cases provided for by Articles 27 to 34, it may refer to a court in accordance with the procedure provided for by Article 18. If the person challenges the use of the accelerated procedure, the question may be referred to the courts. The case will then relate solely to the question whether the conditions of paragraph 1 are met (is this the right person? Has the person actually been released in manner described by paragraph 1? Etc?). The review here differs substantially from the action provided for by Article 18. In certain cases the action might prompt the judicial authority of the executing State to rule on the person's maintenance in detention in accordance with Article 14.

One of the aims of this Article is to improve indirectly the assurances that people residing in other Member States will actually appear in court. There is sometimes a greater tendency to keep them in detention than residents, because the judicial authorities consider that there is inadequate assurance that they will appear. Under the proposed mechanism, they will be placed in the same position as people residing on national territory. The assurance given to the judicial authorities that they can simply and effectively make the person return, even if he resides in another Member State, should make it easier to release him or leave him free.

Article 18 - Hearing

When the person does not agree to surrender or is in the situation referred to in Article 17(2) or (3), the decision concerning the execution of the European arrest warrant must be taken by a court. This Article aims, in these cases, to heighten the assurance given to a person against whom a European arrest warrant has been issued by giving him the possibility of being heard by an independent judge and to enjoy the benefit of adversarial proceedings. In other cases, the procedure could be implemented by the prosecution if that is compatible with the legal order of the Member State.

The person must be brought before a court within ten days following his arrest (Article 15). The hearing will proceed in accordance with the procedural rules applicable in the executing State. As a rule it will not extend to questions of substance but to points such as identity or the formal regularity of the warrant (Article 32). But the court's review of execution must also, if

necessary, cover all the exceptions provided for in Articles 27, 28, 29, 30, 31, 33, and 34 and the specific cases referred to in Articles 35, 36, 37, 38, 39 and 40, subject to the powers (if any) of the central authority.

It is provided that the issuing State as such is represented or makes submissions to the court taking the decision. This mechanism must allow a genuine debate, and will be able in particular to make it possible (in presumably rare cases) to provide the additional information which would prove necessary (Article 19).

Article 19 - Supplementary information

The requests here should be exceptional as the information contained in the arrest warrant is in theory sufficient for execution purposes. But in some circumstances (implementation of *ne bis in idem*, for example, or checking that the case is covered by the negative list of Article 27), it might prove necessary to provide the court with supplementary information. The court will therefore be able to postpone the hearing to a later date. This reference must not, however, lengthen the procedural deadlines, which are strictly framed (Article 20).

Article 20 - Time-limit for the decision whether to execute the European arrest warrant

It will be for each State to organise the procedure in accordance with its own rules, and in particular to provide, if appropriate, for the possibility of an appeal against the decision taken by the court referred to in Article 18. However, the procedure set up by this Framework Decision must above all be fast and effective. It is therefore necessary for a decision to be taken very quickly on the execution of the European arrest warrant and for the issuing authority to be acquainted as soon as possible with the action taken on its request. The proposed ninety-day period corresponds to that provided for in the Treaty between Italy and Spain. It may in no circumstances be lengthened. It includes all the phases of the procedure.

Article 21 - Refusal and expiry of the time-limit

In the event of a refusal to surrender the person concerned or of failure to stay within the ninety-day deadline, the person must be released except if, with regard to a judgment, it is being enforced in the State requested (Article 33), or if there are other grounds for detention.

The provisions on reasons to be given for the rejection are taken in adapted form from the 1957 Convention (Article 18 (2)).

Article 22 - Notification of the decision on whether to execute the European arrest warrant

This Article is taken over in part from Article 10 of the 1995 Convention on simplified extradition. The notification will be made directly by the executing judicial authority to the issuing judicial authority. This gives effect to the Article 8 principle of direct communication between judicial authorities. The central authorities will be able in practice to facilitate this communication (by arranging for translation, for example).

The Decision must be notified immediately. The 1995 Convention provided for a twenty-day deadline for notifying the decision to accept or refuse extradition. This period was designed to enable an applicant State whose request for the simplified procedure was rejected to request extradition by the ordinary procedure. This option is no longer relevant, and the period is therefore abolished with regard to the execution of a European arrest warrant. Since execution will be the rule and refusal will be the exception, it is preferable to minimise the notification phase and proceed immediately to the formalities for surrender so that it can take place as soon as possible.

Article 23 - Time-limit for the surrender of the person requested

The person must be surrendered within twenty days following notification of consent or the decision, whatever the authority which took it.

Paragraphs 2 and 3 are inspired by the 1995 Convention (Article 11). They concern situations where execution of a European arrest warrant has been accepted but is deferred because there are objections of force majeure to transferring him. As the 1995 Convention envisaged (cf. Explanatory Report), the concept of force majeure must be interpreted strictly, in accordance with the interpretation used in international criminal law. This refers to an unforeseeable and unavoidable situation (for example a transport accident, a strike preventing use of the planned mode of transport, no other means being available, serious illness of the person who needs urgent hospitalisation, etc). The new surrender date must then be as close as possible to the date when the period initially planned expires. The proposed form of words is more flexible than in the 1995 Convention. If the reason for not transferring the person is based on his personal circumstances, such as his state of health, the twenty-day limit does not apply (second subparagraph of paragraph 3).

On the other hand, where the warrant was issued on the basis of a final judgment and the person is the subject of proceedings that have not given rise to a final decision in the executing State (Article 39(1), (2) and (4)), the latter State is released from the time-limits applying to surrender. The person will be surrendered only when the proceedings are over.

Whether the European arrest warrant is executed within the prescribed deadlines or is in one of the exceptional situations provided for by this Article, the final date of the person's surrender must be set by agreement between the competent authorities of the Member States concerned.

Article 24 - Deduction of the period of deprivation of liberty from the penalty

In the extradition system, the possibility of deducting the period served in prison in the extradition process from the total sentence to be served was not always available. This Article remedies this shortcoming. The executing State must for this purpose send the State requested an exact calculation of the time spent in prison by the person against whom the European arrest warrant is executed.

Article 25 - End of effect

Where the requested person has been surrendered, the judicial authority in the executing Member State must ensure that the arrest warrant ceases to have effect. It will be for the issuing judicial authority to act in accordance with its national law and to send information as required to the Schengen Information System. The cessation of effect will be able to take place at different stages in the procedure: obviously when the surrender takes place, but also when the executing judicial authority decides to execute the penalty on its territory, or when it notes that there is a non bis in idem situation.

Chapter III: Grounds for non-execution

Article 26 - General provision

The grounds for refusing to execute a European arrest warrant in a Member State are listed exhaustively in this Framework Decision. Subject, of course, to the general rules for the protection of fundamental rights, and particularly the European Convention for the Protection

of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union, it will not be possible for the judicial authority of a Member State to refuse to execute a European arrest warrant on a ground not provided for here.

Article 27 - List of exceptions

The principle of double criminal liability is abolished. This removal arises logically from the mutual recognition principle: the Decision of the judicial authority of another Member State is recognised in all its effects, *ipso facto* and without *a priori* review. It will hardly matter, therefore, if the offence for which the arrest warrant was issued does not exist, or that its components differ in the executing State. Under this principle each Member State not only recognises the entire criminal law of the other Member States but also agrees to assist them in enforcing it. This mechanism will make it possible in particular to solve the difficulties connected with delays in amendment of the Member States' criminal law when new forms of crime emerge.

But there are two restrictions in Articles 27 and 28.

Under Article 27, each Member State may draw up a list of forms of conduct for which it declares in advance it will refuse to execute European arrest warrants ("negative list" system). This list may include forms of conduct that do not constitute offences in the Member State making the list but which are in other Member States. Offences which have been decriminalised over the years (abortion, drug use, euthanasia, etc.) are typical of what might be on this list. Decriminalisation in these cases can be seen as the outcome of a democratic debate within the State which, consequently, no longer agrees to cooperate with other States which still treats these forms of conduct as criminal offences. The list will also cover more general aspects of criminal liability, such as the minimum age for liability. The list of offences provided for by this Article must be communicated to the General Secretariat of the Council and to the Commission, and it must be published. But at least three months will be needed after publication of the list before the Member State can rely on the exceptions in it.

Article 28 - Principle of territoriality

When a Member State exercises extraterritorial jurisdiction in relation to an offence which is not an offence under the law of the State in which execution is requested, the latter State will be able to refuse to execute the European arrest warrant. A State is considered to exercise extraterritorial jurisdiction when none of the components of the offence is located on its territory. Member States are generally required to provide mutual assistance and execute European arrest warrants issued by the judicial authorities of the other Member States, even where they exercise extraterritorial jurisdiction on the basis of their national law. However, the obligation does not apply in cases involving offences which do not constitute offences in the State in which execution is requested. This avoids obliging a State to execute a European arrest warrant for an offence committed entirely on its territory but not classified as such by its own law. The criterion to be taken into account here, to consider the restoration of the principle of double criminal liability, will be the definition of the offence in the substantive criminal law rather than the question of the jurisdiction of the State in which execution is requested for an identical offence. In other words, the execution of the European arrest warrant could be refused if the issuing State exercised extraterritorial jurisdiction and if the offence justifying the exercise of this jurisdiction does not exist in the State in which execution is requested. The assessment of whether the offence is provided for by the legislation of the executing Member State must be done on a strict basis and not include the question of jurisdiction in a similar case. Thus, if the offence exists in law but the courts of the executing State have no jurisdiction on the facts, the European arrest warrant must be executed.

Article 29 - Non bis in idem

The non bis in idem principle is a fundamental principle of law. All national courts are bound by this principle, which is reaffirmed by Article 50 of the Charter of Fundamental Rights of the European Union absolutely, for the entire Union.

The Convention of 25 May 1987 between the Member States of the Communities relating to the implementation of the non bis in idem principle specifies detailed rules and possible exceptions. But it has been ratified by only three Member States.

Article 9 of the 1957 Convention makes it possible to refuse extradition on this ground only if the Decision alleged to be the same was given by the judicial authorities of the State requested (or they had decided not to commence the proceedings or to end them). An identical solution is proposed here.

The mechanism proposed here takes account of the speed of proceedings that will flow from the adoption of the European arrest warrant. The solution will be different according to whether the Decision in question was taken by a judicial authority of the executing State or by a third country. In the first case, it will be for the judicial authorities of the executing State to verify whether the facts giving rise to the prosecution in the two States are indeed the same. In the second, the principle would be to execute the warrant and entrust the issuing court with the verification.

Admittedly, the 1975 Protocol extended the examination of the non bis in idem principle to Decisions given in third countries that were parties to the Convention (Article 2). It specified the situations in which extradition could be refused on the base of non bis in idem and a number of other possible exceptions to this refusal. This solution does not appear appropriate within the framework of the evaluation of the non bis in idem principle for the execution of a European arrest warrant. For one thing, the Protocol has been ratified only by six of the Member States; for another, the speed of the procedure now provided for will allow the verification to be made more quickly and more reliably than in the executing State, which might not have all the necessary facts to hand.

In addition, when there is concurrent jurisdiction as between the judicial authorities of the issuing State and the executing State as regards the offence that prompted the European arrest warrant, execution can be refused if the executing State takes a Decision not to proceed. The recommended solution is on this point identical to that of the 1957 Convention.

Article 30 - Amnesty

As regards amnesty, this Article does not innovate in relation to the previous situation resulting from the second Protocol to the European Extradition Convention (Article 4), which was taken over in Article 62 (2) of the Schengen Convention and Article 9 of the 1996 Convention. The drafting is identical.

The reason for accepting this exception is the same as that underlying the negative list provided for by Article 27. The amnesty of certain offences is the result of a democratic debate in the State. It is consequently logical to accept that this State no longer agrees to cooperate with other States which still treats these forms of conduct as criminal offences.

On the other hand limitation periods, which were covered by Article 8 of the 1996 Convention, are no longer among the grounds for refusal, even where both States have jurisdiction to prosecute for the offence. An amnesty is a positive action by the legislature in the executing State, but the expiry of the limitation period is no more than the consequence of failure to prosecute. It can be involuntary and result purely from the fact either that the authorities in that State are unaware that an offence has been committed or that investigations

have not enabled the offender to be identified. It should not, therefore, be possible to rely on these difficulties against the issuing judicial authority. In addition, it would be illogical for a State to execute a European arrest warrant for acts which it does not treat as criminal offences while refusing to execute it where they do constitute offences but the limitation period is past.

Article 31 - Immunity

This Article is taken over from the Treaty between Italy and Spain and makes it possible to refuse to execute a European arrest warrant when the person against whom it is issued enjoys immunity in the executing State. The introduction of this ground for refusal is the consequence of the conversion of the surrender process into a wholly judicial process. In the previous situation, it was for a political authority to rule on the immunity issue and act accordingly. Henceforth this situation must be seen as an explicit ground for exclusion. The decision whether or not to recognise a person's immunity may be entrusted to the central authority (Article 5).

Article 32 - Lack of necessary information

This is a traditional clause for refusal to execute an arrest warrant.

There must be certainty as to the identity of the person arrested and the warrant must have been established in accordance with Article 6 of the Framework Decision.

Chapter IV: Grounds for refusal to surrender

Article 33 - Principle of integration

If the European arrest warrant was issued pursuant to a final judgment, the judicial authority of the executing State may decide that it is preferable for the future social rehabilitation of the person in question to serve his sentence on the spot. The interest of the person is the only criterion which makes it possible to apply this provision, and his consent is necessary.

This requirement of consent is not in conflict with Article 69 of the Schengen Convention. That Article covers situations where a person who has been convicted flees to another Member State and the issuing State transmits the conviction for enforcement. The interested party's consent to execution is not, of course, necessary. But the present situation does not primarily concern transmission of a conviction but execution of an arrest warrant. The principle must be that the warrant must be executed even if it concerns a national. However, it may be preferable for the requested person (national or permanent resident) to serve his sentence in the State where he was arrested. In that case, the executing State will be able, with the person's consent, to decide to execute the sentence on its territory rather than executing the warrant.

Technically, for the implementation of this principle, Member States may look for inspiration to the 1983 Convention on the Transfer of Sentenced Persons and the Agreement on the Application, between the Member States of the European Communities, of the Convention of the Council of Europe on the Transfer of Sentenced Persons of 25 May 1987, where they have ratified these instruments. Articles 6 (2), 7, 8, 12 and 15 of the 1983 Convention are particularly relevant. But the better reintegration clause in this Article could be implemented even between two States one of which has not ratified the 1983 Convention. It will then be for the two States to find the suitable procedures for executing the sentence.

Where this Article is applied, the amount of the penalty cannot be amended, even if it is different from what would have been ordered in the executing State. The text does not take over Article 10 (2) of the 1983 Convention, the implementation of which is basically

incompatible with the principle of mutual recognition. The executing State's system of execution of sentences will apply.

Article 34 - Videoconferencing

In a number of cases, it will not be necessary to physically surrender of the requested person, as he will be able to take part validly in the trial while remaining in the executing State. This mechanism could for example be used when the person is imprisoned in the executing State or his transfer is difficult for practical reasons. The procedures for setting in place such a mechanism are taken over from Article 10 (9) of the European Union Convention relating to mutual judicial assistance in criminal matters of 2000. It will be for the executing State's judicial authority to organise the videoconference procedures in close cooperation with the issuing State's judicial authorities. As the Convention provides, this is mandatory neither for the issuing State nor for the executing State. It can be organised only if both systems accept the videoconferencing mechanism. If one of the two judicial authorities refuses to do so on grounds connected with its internal legal order, the European arrest warrant will have to be executed, subject to the other provisions of this Framework Decision.

If this Article is applied, it will be for judicial authority in the executing State to decide what happens to the person pending the physical organisation of the videoconference (detention or provisional release) in accordance with its national procedure.

Chapter V: Special cases

Article 35 - Judgments *in absentia*

The fact that a judgment was given against a person *in absentia* according to the definition in Article 3d does not preclude execution of the European arrest warrant issued pursuant to it. The proposed text, however, goes further than Article 3 of the 1978 Protocol. Where the Decision which serves as a basis for the European arrest warrant has been given in absentia, the executing authority must record the person's opposition in accordance with the instructions in the European arrest warrant. In practice, in this type of case, there must be direct contact between the two judicial authorities, if necessary with the aid of the central authority, in order to ensure that the opposition is valid. The execution of the arrest warrant must proceed in such a way that the interested party can validly assert his rights to oppose it. In practice, at the time of notification of the opposition, the judicial authorities of the issuing State must notify the person of a date on which he must appear for trial. In practice, the execution of the arrest warrant must be so organised as to allow the person to attend the trial and secure his defence rights.

Article 36 - Return to the executing Member State

The executing State may make the execution of the European arrest warrant conditional on voluntary return condition once the person has been convicted. This condition should facilitate the execution of the European arrest warrant for Member States which have difficulties with the extradition of their nationals. The proposed text is inspired by the statements made at the time of the ratification of the 1996 Convention.

Article 37 - Life imprisonment

This Article is inspired by the declaration by Portugal on the 1996 Convention. It makes it possible to submit the execution of a European arrest warrant to an assurance by the issuing State that if the person is sentenced to life imprisonment the sentence will not actually be carried out.

Article 38 - Deferment of execution on humanitarian grounds

This Article concerns concrete situations in which the European arrest warrant should not be executed on account of the practical situation of the person, and in particular his health. It can be deferred until the person's situation has improved. The warrant will then have to be executed as soon as possible.

Article 39 - Concurrent proceedings in several Member States

This Article aims to regulate situations in which the person prosecuted is the subject of criminal proceedings on account of separate facts in the issuing State and in the executing State.

Three types of situation must be distinguished:

a) the document which gave rise to the issue of the European arrest warrant is a final judgment. In this case, the transfer to the issuing State will take place either at the end of the proceedings carried out in the executing State or when the sentence passed there is executed;

b) the document which gave rise to the issue of the warrant is a pre-trial decision or a judgment *in absentia*. In this case priority must be given to the current proceeding so that the issuing State can be in a position to arrive as soon as possible at a final decision. The person must therefore be transferred to the issuing State, which would be responsible for re-transferring him to the executing State to serve his sentence at the end of the proceedings.

   Of course, the possibility of using a videoconference system to try the case will have to be examined on the facts;

c) when the person is the subject of proceedings in both Member States for separate facts at the same time, there should be a provisional transfer so that the two judicial authorities can be in a position to arrive at a final decision as soon as possible. Depending on the progress of each proceeding, the judicial authorities of both Member States are invited to act in concert to transfer the person, if necessary several times, so as to allow the success of the investigations and of the trials. Here again, the possibility of videoconferencing will have to be considered.

Paragraph 4 is inspired by Article 9 (2) of the European Union Convention on mutual assistance of 2000.

When a Member State has had a European arrest warrant executed, it must ensure that the person subsequently appears before the executing State's judicial authority. If necessary, it might be convenient for the issuing State to enforce the executing State's judgment on its territory. All the documents required for enforcement of the judgment must consequently be supplied by the competent authority of the executing State.

In addition, if the nature of the offence for which the person is prosecuted in one of the two States allows, the judicial authorities there should consider the possibility of approaching the other State's judicial authorities with a denunciation in accordance with Article 21 of the 1959 European Convention on mutual judicial assistance to allow the two proceedings to be joined. The interest of the European Convention on the transfer of criminal proceedings of 19 May 1972 and the Agreement between the Member States relating to the transmission of the criminal proceedings of 6 November 1990 is worth highlighting in this connection.

Article 40 - Multiple requests

This Article deals with the rather more complex situation where the requested person is the subject of European arrest warrants issued simultaneously for different offences by several judicial authorities of several Member States. This situation can, moreover, exist in combination with the previous one.

On this point, the text broadly takes over the general provisions in Article 17 of the 1957 European Extradition Convention. The reference to the person's nationality, however, is abolished. The text also establishes the principle of close cooperation between the judicial authorities of the relevant Member States so that prosecutions can take place in each of them and a final decision be given as soon as possible. In this cooperation, the authorities concerned must be inspired by Article 39.

In addition, provision is made for Eurojust to be consulted on cases of this type.

In relations with such non-member countries as may be seeking the person, the principle of the priority given to execution of the European arrest warrant established by the Italian-Spanish Treaty is not included in relations with non-member countries parties to the 1957 Convention so as to avoid affecting relations between Member States and other signatories and in particular to avoid violating Article 17 of the Convention. If precedence is to be given to the European arrest warrant even when it is in competition with an extradition request from a third country party to the Convention, the Convention would have to be amended.

But with regard to an extradition request emanating from another third country, the rule is to give priority to execution of the European arrest warrant. This choice is justified by the fact that the procedure for execution of the European arrest warrant must be simple and fast while relations with the non-member countries remain subject to the traditional and longer mechanism of extradition. It will be for non-member countries to address their extradition request to the State whose judicial authorities issued the European arrest warrant.

As regards paragraph 4, which deals with the hypothesis of a conflict between a European arrest warrant and request for surrender from an international tribunal, cooperation between the States concerned in compliance with existing international obligations will be necessary.

Article 41 - Other offences

This Article enshrines the abolition of the principle of speciality. The only limits to this exception are the offences on the negative list provided for by Article 27, the situations to which Article 28 applies (extraterritorial jurisdiction exercised by the issuing Member State) or Article 30 (amnesty or limitation periods applicable to the offence in the executing Member State).

Article 42 - Handing-over of property

This Article is taken over direct from the 1957 Convention with the aim of preserving the existing legal order in this matter. It must be interpreted in the light of the specific provisions of the 2000 Convention on mutual judicial assistance in criminal matters, in particular Article 7.

Chapter VI: Relation to other legal instruments

Article 43 - Relation to other legal instruments

The purpose of this Article is to draw the conclusions of the major changes made by the Framework Decision in relations between Member States. The legal instruments governing extradition are replaced by the European arrest warrant in relations between Member States.

The Member States will accordingly have to make a notification to the Secretary-General of the Council of Europe pursuant to Article 28 of the 1957 Convention. The extradition provisions of the 1977 Convention on terrorism are also affected insofar as the principle of double criminal liability is abolished.

In addition, the extradition provisions in European Union instruments which enshrine the principle that a Member State which refuses to extradite its nationals would be required to submit the case to its prosecution authorities[3] will no longer be applicable when the Framework Decision on the European arrest warrant is in force. The more favourable provisions of instruments signed between some of the Member States of the Union (Benelux Convention, bilateral treaties, laws of the Nordic States) are not affected. It will be for the States concerned to decide if they extend among themselves the scope of the European arrest warrant in order to maintain the previous rule of their law.

Article 44 - Provisions relating to the Schengen acquis

This Framework Decision is a development of the Schengen acquis. But Articles 59 to 66 of the convention implementing the Schengen agreement, which refer to the extradition mechanism, are replaced, as is Article 95, since the contents of paragraph 2 henceforth constitute the European arrest warrant and "flag" cases will be limited. The same applies to Article 94 (4) as it concerns extradition requests.

The agreement concluded by the Council of the European Union with the Republic of Iceland and the Kingdom of Norway on 18 May 1999 applies to this Framework Decision.

Chapter VII: Practical provisions

Article 45 - Transit

This text is inspired partly by Article 16 of the 1996 European Union Convention that it extends.

No Member State may refuse transit on its territory of a person with respect to whom a European arrest warrant has been executed. It is systematically warned of all transits taking place on its territory and it will be for it to decide if specific safety measures must be taken at the time of the person's transit. It may if necessary allow the authorities of the issuing State or the executing State to accompany the person on its territory by themselves.

The person must be accompanied by the following supporting documents:

- evidence of identity;
- the European arrest warrant, with a translation;
- the Decision of the executing judicial authority, with a translation.

The provisions of the 1996 Convention concerning overflight of the territory are taken over unchanged.

The Framework Decision does not affect relations with non-member countries which might be crossed at the time of execution of a European arrest warrant. In this case, however, insofar as the usual documents concerning the extradition procedure will be abolished, it will be necessary to make sure prior to transit that the authorities of the crossed country are satisfied with the presentation of the European arrest warrant in place of the documents usually required.

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[3] For example, Article 10 (1) (b) of Council Framework Decision 2001/413/JAI of 28.5.1 (OJ L149, 2.6.1).

Article 46 - Transmission

The provisions of this Article are taken over from Article 6 of the European Union Convention on mutual assistance in judicial matters (29 May 2000). There is a major innovation here in that the European arrest warrant may be sent by any means, in particular by fax or e-mail, so long as its authenticity can be checked and perfect confidentiality is ensured. The transmission of the European arrest warrant must benefit from the mechanisms set up between Member States under the mutual assistance Convention (cf. Explanatory Report ad Article 6) so that "precise arrangements [are] made for establishing authenticity where requests are made by fax, e-mail or other means of telecommunication".

In addition, since the European arrest warrant is in itself a sufficient enforceable document, the transmission of related documentation and checks on their authenticity are highly simplified. It is mainly in the cases referred to in Article 33 (additional information) that questions of transmission of other documents and authenticity might arise. They will be regulated by mutual agreement by direct contact between the judicial authorities of the Member States, if necessary with the central authorities' support.

Article 47 - Languages

The European arrest warrant is to be transmitted in the language of the issuing State or in the language of the executing State. The text does not diverge from the 1957 European Extradition Convention.

On the other hand, the text takes as a starting point the Treaty between Italy and Spain when it makes the central authority of the executing State responsible for translation into its language of the warrant, if necessary, and of all documents that are required for the procedure.

Article 48 - Expenses

The text of the Framework Decision makes a minor change to simplify matters in comparison with Article 24 of the 1957 European Extradition Convention.

The principle is as follows: all expenses incurred on the territory of the executing State are to be borne by that State, whereas travel expenses and all other expenses are to be borne by the issuing State.

Chapter VIII: Safeguard

Article 49 - Safeguard

The system of the European arrest warrant can function only when there is perfect trust between the Member States as to the quality and reliability of their political and legal systems. It is accordingly possible for a Member State to decide unilaterally to suspend recognition of European arrest warrants issued by another Member State when it is suspected of serious and repeated violations of fundamental rights within the meaning of Article 6 of the Union Treaty. A declaration to that effect must be made to the Council and to the Commission. This declaration could serve as the starting point for the procedure provided for by Article 7 of the Union Treaty. But if the procedure of that Article has not been initiated within six months, the suspension of recognition of European arrest warrants must cease to operate.

Where this Article is applied, it will be for the executing Member State to decide, according to the circumstances, if it the person should be prosecuted on its territory for the facts which gave rise to the issue of the European arrest warrant.

The Article should, however, be applied only during a transitional period pending a Decision on the application of Article 7 to the relevant Member State.

Chapter IX: Final provisions

Article 50 - Publication

The information concerning the central authority and its jurisdiction pursuant to Article 5 must be published before the entry into force of the Framework Decision.

The "negative list" of offences for which a State could state that it does not recognise the European arrest warrant must be published. Any change to this list must be communicated to the General Secretariat of the Council and to the Commission at least three months before its entry into force. The General Secretariat of the Council will inform the other Member States of any change to this list. These changes will also be published.

Articles 51, 52 and 53 are self-explanatory.

2001/0215 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on the European arrest warrant and the surrender procedures between the Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31 (a) and (b) and Article 34 (2)(b) thereof,

Having regard to the proposal of the Commission[1],

Having regard to the Opinion of the European Parliament[2],

Whereas:

(1) The achievement of a Common Area of Freedom, Security and Justice is based on mutual trust in the criminal justice systems of the Member States. Those systems are founded on the principles of liberty, democracy and the rule of law and they respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and by the Charter of fundamental rights of the European Union.

(2) All or some Member States are parties to a number of conventions in this field. They include the European Convention on Extradition of 13 December 1957 and the European Convention on the Suppression of Terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(3) In addition, the following three Conventions dealing wholly or in part with extradition have been agreed upon among Member States, and form part of the Union acquis: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders in relations between the Member States which are parties to that Convention[3], the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union[4], and the Convention of 27 September 1996 relating to Extradition between the Member States of the European Union[5].

(4) In order to remove the complexity and potential for delay inherent in the present arrangements on extradition, it is necessary to introduce a new simplified scheme with

1 OJ ...
2 OJ ...
3 OJ L239 22.9.2000, p. 19.
4 OJ C78 30.3.1995, p. 1.
5 OJ C313 23.10.1996, p. 11.

respect to surrender of persons for the purpose of prosecution and execution of sentences. It would replace the traditional extradition schemes which are no longer adapted to the requirements of a Common Area of Freedom, Security and Justice where the importance of national borders is diminishing.

(5) The European arrest warrant provided for in this Framework Decision aims to replace the traditional extradition arrangements and must have the same scope of application as the multilateral system of extradition built upon the European Convention on Extradition of 13 December 1957.

(6) Since this objective cannot be sufficiently achieved unilaterally by the Member States and can therefore, by reason of reciprocity, be better achieved at the level of the Union, the Council of the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the EU Treaty and as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

(7) The European arrest warrant is based on the principle of mutual recognition: if a judicial authority of a Member State requests a person for the purposes of prosecution for an offence which is punishable by deprivation of liberty for a period of at least twelve months or for the execution of a criminal judgement involving deprivation of liberty of at least four months, the authorities of other Member States should comply with that request.

(8) The decision on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the person has been arrested will take the decision on whether to execute the warrant.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance, and to situations where the central authority is better placed to take the decision than a judicial authority.

(10) There is a need for a common format of the European arrest warrant in order to enable the executing judicial authority to decide whether to execute the warrant without need for any supplementary documents.

(11) In order to ensure the effectiveness of the procedure, and on condition that the execution of the warrant does not lead to a violation of fundamental rights, the possibility to refuse the execution of the European arrest warrant should be limited to clearly identified circumstances.

(12) Since the European arrest warrant is based on the idea of citizenship of the Union as provided in Articles 17 to 22 TCE, the exception provided for a country's nationals, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union, irrespective of his or her nationality.

(13) Due consideration should however be given to the possibility of reintegration of a person who serves a prison sentence. It should therefore be possible for a prison

sentence to be served in the Member State in which the person has the best chances of reintegration.

(14) A consequence of the application of the principle of mutual recognition is that the double criminality condition must be abolished as well as the rule of speciality. However, where the execution of a warrant for certain conduct would run counter to the fundamental principles of the legal system of a Member State, it must have a possibility to opt out for those offences. This can be done by giving each Member State the possibility of establishing a 'negative' list of offences for which the execution of the European arrest warrant would be excluded.

(15) The execution of a European arrest warrant could be restricted in cases where a Member State exercises extraterritorial competence for activities which are not considered as offences in the executing Member State.

(16) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Implementation of that mechanism may be suspended only in the event of a severe breach by one Member State of the principle of Article 6 of the Treaty on European Union which could lead to the application of Article 7 of that treaty.

(17) The European arrest warrant should replace between Member States all the former instruments concerning extradition, including the provisions of the Convention implementing the Schengen Agreement concerning extradition[6].

(18) All Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regards to automatic processing of personal data. The personal data processed in the context of the implementation of this Framework Decision will be protected in accordance with the principles of the said Convention.

(19) As regards the Republic of Iceland and the Kingdom of Norway, this Framework Decision represents a development of the Schengen acquis within the meaning of the Agreement concluded on 17 May 1999 by the Council of the European Union and those two States[7].

(20) This Framework Decision must respect the fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union, and notably Chapter VI thereof.

HAS ADOPTED THIS FRAMEWORK DECISION:

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6 Articles 59-66, 94(4) and 95 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L239 22.9.2000.

7 OJ L176 of 10.07.1999 p. 31.

Chapter I : General principles

Article 1 – Subject-matter

The purpose of this Framework Decision is to establish the rules under which a Member State shall execute in its territory a European arrest warrant issued by a judicial authority in another Member State.

Article 2 - Scope

A European arrest warrant may be issued for:

(a) final judgements in criminal proceedings, and judgements in absentia, which involve deprivation of liberty or a detention order of at least four months in the issuing Member State;

(b) other enforceable judicial decisions in criminal proceedings which involve deprivation of liberty and relate to an offence, which is punishable by deprivation of liberty or a detention order for a maximum period of at least twelve months in the issuing Member State.

Article 3 - Definitions

For the purposes of this Framework Decision, the following definitions shall apply:

(a) *"European arrest warrant"* means a request, issued by a judicial authority of a Member State, and adressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgement or a judicial decision, as provided for in Article 2;

(b) *"issuing judicial authority"* means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant ;

(c) *"executing judicial authority"* means the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant;

(d) *"judgement in absentia"* means any judgement rendered by a court after criminal proceedings at the hearing of which the sentenced person was not personally present. It shall not include a judgement given in proceedings in which it is clearly established that the person was effectively served with a summons, in time to enable him or her to appear and to prepare his or her defence, but he or she deliberately decided not to be present or represented, unless it is established that his or her absence and the fact that he or she could not inform the judge thereof were due to reasons beyond his or her control;

(e) *"detention order"* means any order involving deprivation of liberty which has been made in criminal proceedings in addition to or instead of a prison sentence;

(f) *"requested person"* means a person in respect of whom a European arrest warrant is issued.

Article 4 - Competent judicial authorities

Each Member State shall designate according to its national law the judicial authorities that are competent to

(a) issue a European arrest warrant

(b) take decisions under Section 4 of Chapter II without prejudice to Article 5(4).

Article 5 - Central authority

1. Each Member State shall designate a central authority, or when its constitutional system so requires, more than one central authority for the purposes of this Framework Decision.

2. The central authority shall assist the competent judicial authority. In particular, the central authority shall provide translation, administrative and practical facilities, and general information.

3. Each Member State may decide that its central authority shall be responsible for the practical transmission and reception of the European arrest warrant as well as for other official correspondence relating to it.

4. Each Member State may indicate that its central authority may decide on matters covered by Articles 31, 37 and 38.

   The Member State shall ensure that the requested person is given the opportunity to express his or her views on the question which will be decided by the central authority.

   The executing judicial authority shall decide on the execution of the European arrest warrant on the basis of the central authority's decision.

Article 6 - Content of the European arrest warrant

The European arrest warrant shall contain information set out in accordance with the form in the Annex regarding:

(a) the identity of the requested person,

(b) the issuing judicial authority,

(c) whether there is a final judgement or any other enforceable judicial decision, within the scope of Article 2,

(d) whether the European arrest warrant results from a judgement *in absentia*, and if so, a statement as to the right to lodge an opposition and on the applicable procedure in conformity with the second subparagraph of Article 35(1),

(e) the nature and legal classification of the offence,

(f) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person,

(g) the penalty, if there is a final judgement, or else, the prescribed scale of penalty,

(h) if possible, other consequences of the offence,

(i) whether the requested person has already been arrested for the same offence, and let free, or released after some pre-trial detention under condition of return, or whether the person has escaped from prison.

Chapter II: Procedure

SECTION 1 – GENERAL

Article 7 - Communication between authorities

1. If the whereabouts of the requested person are known, the issuing judicial authority shall communicate the European arrest warrant directly to the executing judicial authority.

2. Paragraph 1 shall not prejudice the possibility of the communication of the European arrest warrant or information concerning it and its execution

   (a) from a central authority of a Member State to a central authority of another Member State; ,

   (b) from a judicial authority of a Member State to a central authority of another Member State; or

   (c) from a central authority of a Member State to a judicial authority of another Member State.

SECTION 2 – USE OF THE SCHENGEN INFORMATION SYSTEM

Article 8 - Alert

If the whereabouts of the requested person are not known, the issuing judicial authority may request that an alert is entered in the Schengen Information System (SIS) for the purpose of arrest of that person for surrender.

The alert and the information referred to in Article 6 shall be issued via the national authority that has central responsibility for it. Both the alert and that information shall be sent by the quickest secure means possible.

Article 9- Flag

1. Insofar as an executing Member State considers that the alert is covered by Article 27, 28, 30 or 31 or if provisional release has been granted according to Article 14, it may subsequently add a flag in the SIS to the effect that the execution of the European arrest warrant will not take place in its territory. Prior consultations must be held in this connection with the other Member States.

2. If the arrest cannot take place because of the application of paragraph 1, the alert must be regarded as being an alert for the purpose of communicating the whereabouts of the requested person.

SECTION 3 – ARREST AND DETENTION

Article 10 - Coercive measures

An executing Member State may take necessary and proportionate coercive measures against a requested person according to the conditions laid down by its national law, including the provisions on judicial review that are applicable when a person is arrested with a view to extradition..

Article 11 - Rights of a requested person

1. When a requested person is arrested on the territory of another Member State, the competent authority of the latter state shall, in accordance with its national law, inform that person of the warrant and of its content, and of the possibility of consenting to surrender to the issuing judicial authority.

2. From the moment a requested person is arrested for the purpose of the execution of a European arrest warrant, that person shall have a right to be assisted by a legal counsel, and, if necessary by an interpreter.

Article 12 - Notification to the judicial authorities

The issuing judicial authority and the executing judicial authority shall immediately be notified of the arrest.

Article 13 - Verification and suspension

1. Immediately after notification of an arrest, the issuing judicial authority shall inform the executing judicial authority whether it maintains the European arrest warrant.

2. If the issuing judicial authority does not maintain the European arrest warrant, the arrested person shall be released immediately.

3. The issuing judicial authority may decide to suspend the warrant, under the condition that the arrested person undertakes to present himself or herself, at a certain date and place, on a voluntary basis. That undertaking shall be received by the judicial authority of the executing Member State and notified to the issuing judicial authority. The issuing Member State may add a flag accordingly in the SIS. If the arrested person fails to respect the undertaking the issuing judicial authority may reactivate the European arrest warrant, and complement the information contained in the European arrest warrant, in particular as regards the information referred to in Article 6(i). The person shall be informed of all the consequences of a non respect of the undertaking.

Article 14 - Provisional release

1. When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person shall remain in detention.

   If the executing judicial authority has reason to believe that the arrested person will not escape, continue to commit offences or destroy evidence with respect to the offence(s) on which the European arrest warrant is based, and if the arrested person undertakes to remain available for the execution of the European arrest warrant, the executing judicial authority may decide to release that person until a later date fixed in the agreement between the issuing Member State and the executing Member State. If necessary, the release shall be submitted to the respect by the requested person of conditions laid down by the executing judicial authority in accordance with the law of the executing Member State.

   The arrested person shall be informed of all the consequences of a non respect of the undertaking to remain available for the execution of the European arrest warrant.

2. If the requested person does not respect the undertaking to remain available for the execution of the European arrest warrant, the executing judicial authority shall inform the issuing judicial authority. In that case, the latter may complement the information contained in the European arrest warrant in particular as regards the information referred to in Article 6(i).

SECTION 4 – JUDICIAL PROCEDURE FOR SURRENDER

Article 15 - Examination of the European arrest warrant

The European arrest warrant shall be examined by the executing judicial authority as quickly as possible and in any case no later than ten calendar days after the arrest.

Article 16 – Consent to surrender

1. If the arrested person consents to his or her surrender, he or she shall be surrended as provided for in Article 23.
2. The consent shall be given to the executing judicial authority in accordance with its national law.
3. The consent shall be established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the consequences.
4. Consent shall be recorded in accordance with the national law of the executing Member State.
5. Consent may not be revoked.
6. Consent shall immediately be notified to the issuing judicial authority.

Article 17 - Previous release

1. The executing judicial authority shall execute the European arrest warrant immediately without the necessity to hear or verify the consent of the requested person if he or she escaped from detention or failed to comply with the conditions of return after

   (a) being allowed to remain free from the beginning,

   (b) being released after some pre-trial detention ,

   (c) benefiting from the provisions of suspension of the European arrest warrant under Article 13(3) or from the provisional release under Article 14.

2. If the executing judicial authority has reason to believe that the requested person referred to in paragraph 1 is in one of the circumstances referred to in Articles 27 to 34, it shall submit the matter for a hearing by a court in accordance with Article 18.

3. Where execution takes place according to paragraph 1, the requested person may contest before a court the reasons justifying the recourse to that paragraph.

Article 18 - Hearing

A court in the executing Member State shall decide on whether the European arrest warrant shall be executed after a hearing, held in accordance with the national rules of criminal procedure:

(a) if the requested person does not consent to his or her surrender;

(b) in cases referred to in Articles 17(2) and (3).

The issuing Member State may be represented or submit its observations before the court.

Article 19 - Supplementary information

If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on the execution of a European arrest warrant, it shall request the necessary supplementary information urgently and may fix a time-limit for the receipt thereof.

Article 20 – Time limit for the decision whether to execute the European arrest warrant

The decision on whether to execute the European arrest warrant shall be taken as soon as possible and in any case no later than 90 calendar days after the arrest of the requested person.

Article 21 – Refusal and expiry of the time limit

1. If the executing judicial authority refuses to surrender the requested person, or if no decision on the surrender of the requested person is taken within the period provided for in Article 20, the arrested person shall be released immediately unless it is necessary to maintain him or her in detention pursuant to Article 33, or on another ground for detention.

2. Reasons shall be given for any refusal to execute a European arrest warrant or on the reason of expiry of the time limit provided for in Article 20 without a decision.

Article 22 – Notification of the decision on whether to execute the European arrest warrant

The executing judicial authority shall immediately notify the decision on whether to execute the European arrest warrant to the issuing judicial authority.

Article 23 – Time limit for the surrender of the requested person

1. The requested person shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. Subject to paragraph 3 the requested person shall be surrendered no later than twenty calendar days after either:

   (a) the consent of the arrested person,

   (b) the decision of the executing judicial authority provided for in Article 17(1), or

   (c) the decision of the court pursuant to Article 18, to execute the European arrest warrant.

   After the expiry of that period, if the person is being held, he or she shall be released in the territory of the executing Member State.

3. Should the surrender of the requested person within the period laid down in paragraph 2 be prevented by circumstances beyond the control of the executing Member State, the executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within twenty calendar days of the new date thus agreed.

   If the person in question is still being held after the expiry of that period, he or she shall be released unless the delay is linked to the personal situation of the requested person.

4. The time limits provided for in paragraphs 2 and 3 shall not apply where Article 39 (1), (2) and (4) apply.

Article 24 - Deduction of the period of deprivation of liberty from the sanction

1. The issuing Member State shall deduct from the total period of deprivation of liberty which is imposed any period of deprivation of liberty arising from the execution of a European arrest warrant .

2. To this end, all the information concerning the duration of the deprivation of liberty of the requested person on the basis of the European arrest warrant shall be transmitted to the issuing Member State.

Article 25 – End of effect

The issuing judicial authority shall ensure that the European arrest warrant shall cease to have effect as from the date of the surrender and where necessary.

Chapter III – Grounds for non-execution

Article 26 - General provision

The executing judicial authority may refuse to execute a European arrest warrant under the circumstances described in Articles 27 to 34.

Article 27 - List of exceptions

Without prejudice to the objectives of article 29 TCE, each Member State may establish an exhaustive list of conduct which might be considered as offences in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that it would be contrary to fundamental principles of the legal system in that State.

The list and any change to it shall be published in the *Official Journal of the European Communities* at least three months before a Member State may invoke the first paragraph in respect of the conduct concerned.

Article 28 - Principle of territoriality

The executing judicial authority may refuse to execute a European arrest warrant issued in respect of an act which is not considered an offence under the law of the executing Member State and which did not occur, at least in part, on the territory of the issuing Member State.

Article 29 - Ne bis in idem

1. The executing judicial authority shall refuse to execute a European arrest warrant, if a judicial authority in the executing Member State has passed final judgement upon the requested person in respect of the offence for which the European arrest warrant has been issued.

2. The execution of a European arrest warrant shall be refused if the judicial authorities of the executing Member State have decided either not to institute or to terminate proceedings in respect of the offence for which the European arrest warrant has been issued.

Article 30 - Amnesty

The executing judicial authority may refuse to execute a European arrest warrant in respect of an offence covered by an amnesty in the executing Member State where that Member State was competent to prosecute the offence under its own criminal law.

Article 31 - Immunity

The execution of a European arrest warrant shall be refused if the legal system of the executing Member State grants immunity to the requested person.

Article 32 - Lack of necessary information

The executing judicial authority may refuse to execute a European arrest warrant, if:

(a) the European arrest warrant does not contain the information referred to in Article 6, or

(b) the identity of the requested person cannot be established.

Chapter IV – Grounds for refusal to surrender

Article 33 - Principle of integration

1. The execution of a European arrest warrant in respect of a requested person may be refused if this person would have better possibilities of reintegration in the executing Member State, and if he or she consents to serve the sentence in this Member State.

   In that case, the sentence pronounced in the issuing Member State shall be served in the executing Member State in accordance with the laws of the latter Member State. The sentence pronounced in the issuing Member State shall not be substituted by a sanction prescribed by the law of the executing Member State for the same offence.

2. The final judgement on the basis of which the European arrest warrant was issued, as well as all the necessary documents shall be transmitted to the competent judicial authority of the executing Member State in order to enable the execution of the sentence.

Article 34 - Videoconference

1. The executing judicial authority may refrain from surrending the requested person if:

   (a) it is possible by means of a videoconference system for the requested person to take part from a place in the executing Member State in criminal proceedings conducted in the issuing Member State;.

   (b) the executing Member State and the issuing Member State accept such proceedings.

   The proceedings shall be conducted in accordance with the national law of the Member States concerned and relevant international instruments, including the 1950 European Convention for the Protection of Human rights and fundamental freedoms.

2. The detailed arrangements for those proceedings shall be agreed between the executing judicial authority and the issuing judicial authority.

3. In case of application of paragraph 1, the executing judicial authority shall decide, in conformity with the provisions of its national law, on the detention of the requested person.

Chapter V – Special cases

Article 35 - Judgements in absentia

1. If the European arrest warrant has been issued on the basis of a judgement *in absentia*, a new hearing of the case shall take place in the issuing Member State after the surrender.

   The executing judicial authority shall inform the arrested person of his or her right to lodge an opposition to the judgement and on the procedure for lodging it.

2. Each Member State shall enable its judicial authorities to receive the opposition lodged by a person subject to a judgement *in absentia* and to inform the issuing judicial authority of this opposition.

Article 36 - Return to the executing Member State

The European arrest warrant may be executed subject to the condition that the arrested person is returned to the executing Member State to serve his or her sentence, if there are reasons to believe that he or she would have better possibilities of reintegration in that Member State.

Article 37 – Life sentence or life time detention order

If the offence on the basis of which the European arrest warrant has been issued is punishable by life sentence or life time detention order, the execution of the European arrest warrant may be subject to the condition that the issuing Member State undertakes to encourage the application of any measures of clemency to which the person is entitled under its national law and practice .

Article 38 – Deferment of execution on humanitarian grounds

1. The execution of a European Arrest Warrant may exceptionally be deferred , if there are substantial grounds for believing that the execution would manifestly endanger the requested person's life or health because of his or her age or state of health or because of other peremptory humanitarian reasons.

2. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist.

Article 39 - Deferment of surrender

1. Where a European arrest warrant has been issued on the basis of a final judgement against a person, subject to a criminal proceeding in the executing Member State, the execution of the European arrest warrant may be deferred until the final judgement in that proceeding or the completion of the sentence imposed, if any, in the executing Member State.

2. Where a European arrest warrant has been issued on the basis of a final judgement against a person serving a sentence in the executing Member State, the execution of the European arrest warrant may be deferred until the completion of any sentence imposed in the executing Member State.

3. Where a European arrest warrant has been issued on the basis of another enforceable judicial decision or a judgement in absentia against a person serving a sentence in the executing Member State, the European arrest warrant may be executed under the condition that after the final decision in the issuing Member State, the person returns to the executing Member State to serve the remaining part of the sentence, unless Article 34 applies.

4. Where the European arrest warrant has been issued on the basis of another enforceable judicial decision or a judgement in absentia against a person subject to a criminal proceeding in the executing Member State, the temporary transfer of the requested person in order to enable the procedure to take place on the condition that the person returns, shall be subject to agreement between the issuing and the executing Member State, unless Article 34 applies.

5. In cases referred to in paragraphs (3) and (4), the issuing and the executing Member States shall determine by mutual agreement the duration and conditions of the transfer.

6. In cases referred to in paragraphs (3) and (4), the issuing Member State shall ensure that the requested person will remain available for the executing Member State, either by enforcing in its territory the final judgement of the executing Member State or, where appropriate, on the basis of a pre-trial decision issued by its judicial authority.

Article 40 - Multiple requests

1. If two or more Member States have issued a European arrest warrant for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due regard to all the circumstances and especially the relative seriousness and place of the offences, and the respective dates of the European arrest warrants.

   All the judicial authorities involved shall co-operate closely in order to enable the prosecutions to take place in each of the Member States as soon as possible.

2. If multiple requests are made, they may be submitted to Eurojust, which shall deliver its opinion as soon as possible.

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country party to the European Convention on Extradition of 13 December 1957, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the executing judicial authority with due consideration of all circumstances, in particular those mentioned in Article 17 of the said convention.

In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country which is not a party to that convention, the execution of the European arrest warrant shall take precedence.

4. In the event of conflict between a European arrest warrant and a request for surrender presented by an international criminal court, whether or not that court is recognised by all the Member States, consultations shall take place between the Member States concerned as to how to meet the requirements of the statute of the criminal court before any decision is taken.

Article 41 - Other offences

A person who has been surrendered pursuant to a European arrest warrant may, in the issuing Member State, be prosecuted, sentenced or detained for an offence other than that for which the European arrest warrant was issued, except where that offence has been entered by the executing Member State in the list referred to in Article 27, or with respect to Articles 28 or 30.

Article 42 - Handing over of property

1. The executing judicial authority shall, insofar as its law permits, at the request of the issuing judicial authority, or on its own initiative, seize and hand over property which:

   (a) may be required as evidence, or

   (b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as possible after the trial.

Chapter VI – Relation to other legal instruments

Article 43 – Relation to other legal instruments

1. The following legal instruments or provisions of instruments shall cease to apply between Member States from 1 July 2004:

   (a) The European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

   (b) the Agreement between the Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

   (c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; and

   (d) the Convention of 27 September 1996 relating to Extradition between the Member States of the European Union.

2. This Framework Decision shall not affect the application of simplified proceedings or conditions existing in bilateral or multilateral agreements or agreed on the basis of uniform or reciprocal laws between Member States.

Article 44 - Provisions relating to the Schengen acquis

1. Without prejudice to Article 8 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's' association with the implementation, application and development of the Schengen acquis[8], this Framework Decision shall enter into force for Iceland and Norway [...].

2. Articles 59 to 66, 94(4) and 95; of the Convention implementing the Schengen Agreement, as far as extradition is concerned , shall cease to apply from 1 July 2004.

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[8] OJ L176 of 10.7.1999 p. 36.

Chapter VII – Transit, transmission, language and expenses

Article 45 - Transit

1. Each Member State shall permit the transit through its territory of a requested person who is being surrendered provided that it has been given:

   (a) information on the identity of the requested person ;

   (b) a copy of the European arrest warrant and its translation in the official language or one of the official languages of the Member State of transit;

   (c) a copy of the decision of the executing judicial authority to execute the European arrest warrant and its translation in the official language or one of the official languages of the Member State of transit.

2. In the case of transport by air without a scheduled stopover, if an unscheduled landing occurs, the issuing Member State shall provide the Member State concerned with the information and documents provided for in paragraph 1.

Article 46 - Transmission of documents

1. The issuing Member State may transmit the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish the authenticity of transmission.

2. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

Article 47 - Language

1. The European arrest warrant may be sent in the official language or languages of the issuing or the executing Member State(s).

2. When appropriate, the central authority of the executing Member State shall arrange for a prompt translation of the European arrest warrant, and of all the necessary documents transmitted for the purpose of the procedure. The translation shall be sent without delay to the executing judicial authority.

Article 48 - Expenses

1. Expenses incurred in the territory of the executing Member State for the execution of the European arrest warrant shall be borne by that Member State.

2. All other expenses, including travel expenses, and expenses incurred by transit on the territory of a third State, shall be borne by the issuing Member State.

Chapter VIII - Safeguard

Article 49 - Safeguard

1. Each Member State may, by a declaration to the Council and to the Commission, decide to suspend the application of this Framework Decision with regard to another Member State in the event of a serious and persistent breach of violation of fundamental human rights as provided in Article 6 (1) of the EU Treaty in that Member State. This unilateral suspension will have a temporary application. If the procedure of Article 7 in that Treaty is not initiated within six months, the suspension shall cease to have effect.

2. If a Member State applies paragraph 1, it shall take all the necessary measures to establish its jurisdiction over the offence on the basis of which the European arrest warrant was issued, if appropriate.

Chapter IX – General and final provisions

Article 50 - Publication

1. Member States shall communicate to the General Secretariat of the Council and to the Commission before 31 December 2002 the information relating to the central authority provided for in Article 5. This information shall be published in the *Official Journal of the European Communities.*

2. Member States shall communicate the list provided for in Article 27 and any change to it to the General Secretariat of the Council and to the Commission.

   The General Secretariat of the Council shall immediately inform the other Member States of any changes on this list made by one of the Member States.

Article 51 - Transitional provision

The legal instruments and provisions of instruments referred to in Articles 43 and 44 shall continue to apply to extradition requests submitted before the measures necessary to comply with this Framework Decision have entered into force.

Article 52 - Implementation

Member States shall take the necessary measures to comply with this Framework Decision by [31 December 2002].

They shall communicate to the General Secretariat of the Council and to the Commission the text of any provisions they adopt and information on any other measures they take to comply with this Framework Decision.

On that basis the Commission shall, by [31 December 2003], submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

The Council shall assess the extent to which Member States have complied with this Framework Decision.

Article 53 - Entry into force

This Framework Decision shall enter into force on the twentieth day following its publication in the Official Journal of the European Communities.

Done at Brussels, [...]

For the Council
The President
[...]

ANNEX

EUROPEAN ARREST WARRANT

I hereby certify that this warrant corresponds to the authentic documents on which the warrant is based and request that the person mentioned below shall be arrested and surrendered to the judicial authority mentioned below:

(a) Information regarding the identity of the requested person:

Surname: ....

Forename(s): ....

Sex: ....

Nationality: ....

Date of birth: ....

Place of birth: ....

Residence: ....

....

Distinctive marks: ....

....

Photo and fingerprints of the requested person (if available):

(b) The judicial authority, which issued the request, and to which the person shall be surrendered:

Name of the authority: ....

....

Competent official (title/grade and name): ....

....

Address: ....

....

Tel. nr.: .... Fax nr: ....

Email: ....

(c) Enforceable criminal judgement or other judicial decision, within the scope of Article 2 of the Framework Decision [date] on the European arrest warrant and the surrender procedures between the Member States of the European Union:

Type: ....

Date: ....

(d) Has the judgement has been rendered *in absentia* in accordance with Article 3(e) of the Framework Decision [date] on the European arrest warrant and the surrender procedures between the Member States of the European Union?

Yes o No o (Mark the appropriate answer with "x")

If the answer is "yes" a statement as to the legal means available to prepare his or her defence or to have the case retried in his or her presence should be provided here:

....

....

....

....

....

Authority to be contacted:...

....

....

(e) Nature and legal classification of the offence: ....

....

....

....

(f) Description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the person reported:

....

....

....

....

....

....

(g) The penalty, if there is an enforceable criminal judgement, or else, the prescribed scale of penalty, and, if possible, other consequences of the offence or the offences:

....

....

....

....

(h) Other consequences of the offence, particularly as regards the situation of the victim:

....

....

....

....

....

....

(i) Has the person already been arrested for the same offence and let free, or released under condition of return? If yes how long has been the deprivation of liberty? Has the person escaped from jail?

....

....

....

(j) Other information:

....

....

....

....

Signature of the competent official:

Title/grade and name:

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