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NOTE

From : Presidency
To Working Party on Cooperation in Criminal Matters
Subject : Proposed subject for discussion at the experts' meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 - the proportionality principle

1. Introduction

The fourth round of mutual evaluations on the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States is finalised or nearly finalised as regards some Member States (BE/DK/ES/IE/PT/FR/UK) and is under process as regards several other Member States (CY/LT/PL/FI/HU).

The purpose of the mutual evaluation visits is to evaluate the distinct practical processes operated and encountered in the Member States both in their role as issuing and executing Member State and to make appropriate recommendations to enhance the means by which the EAW and its corresponding provisions may be further streamlined and improved.

During several mutual evaluation visits, the expert teams as well as representatives of Member States experienced that it would be appropriate to have a discussion on the "principle of proportionality" as practice had shown that in some Member States judicial authorities issued EAWs for what was perceived as very minor offences.

2. The principle of proportionality

The Framework Decision on the EAW does not include any obligation for a proportionality check either as issuing or executing Member State, nor does it include any ground for non-recognition related to it.

The principle of proportionality is enshrined in Article 5 of the Treaty establishing the European Community. It is thus a general principle of community law. According to this principle, any action taken in a specific field should be in proportion to the objectives set.

According to the judgment in case C-303/05 *Advocaten voor de Wereld VZM* (Article 45) "It must be noted at the outset that, by virtue of Article 6 TEU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like Member States when they implement the law of the Union (Emphasis added), (see, inter alia, Case C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-0000, paragraph 51, and Case C-355/04 P *Segi and Others v Council* [2007] ECR I-0000, paragraph 51)". It would therefore seem that the principle of proportionality would apply also as regard EAWs.

In respect of issuing EAWs, it appears that the principle of proportionality requires that in each case a comparison be made inter alia between, on the one hand, the seriousness of the offence and, on the other hand, the measure, resources to be deployed in the executing State and, in particular, that it involves the deprivation of liberty of an individual.

3. Current problems in application of the Framework Decision on EAW

It results from the evaluation visits that EAWs have been issued in cases such as the following:

- detention of 0.45 grams of cannabis;
- detention of 1.5 grams of marijuana;
- detention of 0.15 grams of heroin;
- detention of 3 ecstasy tablets;
- theft of two car tyres;
- driving a car under the influence of alcohol, where the limit was not significantly exceeded (0.81 mg/l)
- theft of a piglet

Although these offences might strictly legally speaking fall within the scope of Article 2 of the Framework Decision on the EAW, one could question whether in these cases it was appropriate to issue an EAW. In particular, one can have doubts whether issuing the EAW was proportionate to the objectives of the Framework Decision. This is however a delicate matter and, in particular in Member States which do not know the principle of opportunity, may raise issues of criminal procedure.

4. Recommendations to certain Member States by the evaluation teams

Several evaluation teams have come to the conclusion that in some Member States there is a need to set up mechanisms and rules at a national level allowing for a control of proportionality in order to avoid the issuance of EAWs for offences which, although falling legally speaking within the scope of Article 2 of the Framework Decision on the EAW, are not serious enough to justify the deployment by the executing State of the measures and the co-operation which the execution of an EAW requires.

Furthermore, the teams have advised to consider the benefit of inserting in the EAW legal framework, in addition to the definition of the scope of application of the EAW, a proportionality requirement for the issuance of any EAW, while at the same time making it clear that this control of proportionality, in line with the principle of mutual recognition, should be done in the *issuing State* only.

It should be noted, however, that some Member States have argued that if a national warrant can be issued in a specific case, the wanted person should not escape arrest simply because he/she is in the territory of another Member State. This idea would be in line with the objective of a single European judicial area.

The expert teams have observed that, when issuing an EAW, it would not be appropriate to set all practical considerations aside. Although simplified and much more efficient than the extradition procedure, the EAW procedure still requires significant resources in the executing State. While it is true that the objective should be that a wanted person is treated in the same way irrespective of his location in the EU territory, it should also be accepted that it might not be possible to accept this goal entirely in the immediate future.

5. Conclusion

The Presidency suggests that it would be appropriate to have a discussion at EU level on the principle of proportionality and how to take this principle into consideration by judicial authorities when issuing an European arrest warrant.