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Comments on the proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (14867/1/01 REV 1, COM (2001) 522 FINAL/2)

By the Standing Committee of Experts on International Immigration, Refugee and Criminal Law

CM02-01

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To the members of the European Parliament
The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE)
Rapporteur Mr. G.R. WATSON.

The Standing Committee of experts on international immigration, refugee and criminal law (hereafter referred to as the Standing Committee) is worried that the proposed Framework Decision fails to provide procedural certainty and protection to the rights of the individual and that it goes beyond the competencies of the Council as laid down in Title VI of the Treaty on European Union. Moreover, contrary to the impression conveyed by the Council when it proposed this Framework Decision in the aftermath of the September 11th terrorist-attacks, the Standing Committee can find no visible relationship with the combat of terrorism in this final draft of the proposed Framework Decision. This Framework Decision has therefore serious implications for local (e.g. non-transnational) crime as well. In addition to these general remarks the Standing Committee would like to draw your attention to the following points.

Article 2 – Scope of the European arrest warrant

The second paragraph of this provision contains a list of offences, which give rise to surrender pursuant to a European arrest warrant without verification of the double criminality of the offence. The Standing Committee has the following observations with regard to this list of offences:

Risk of diverging interpretation of the exact content of the offences due to absence of common definitions; Uncertainty regarding scope of offences

With the exception of "illicit trafficking in weapons, munitions and explosives" the first ten (categories of) offences listed under Article 2 paragraph 2 have been defined in international instruments, which means that common definitions of these offences exist on the European and international level. However, this is not the case for (most of) the remaining 22 offences listed under Article 2 paragraph 2. Article 2 paragraph 2 states that the definition of the offences listed there is governed by the law of the issuing state, which is presumably intended to prevent possible conflicts between Member States with respect to the interpretation of these offences.
In the opinion of the Standing Committee conflicts concerning the interpretation of those offences that lack common definitions in international instruments are nevertheless very likely to occur. The list of Article 2 paragraph 2 contains broad labels, enabling Member States to interpret them in any number of ways. For example, what does "computer-related crime" mean? This "offence" does not satisfy the requirements normally applicable to offences under national criminal law, namely that the nature and extent of the criminal responsibility can be inferred conclusively from the definition of the offence itself. As long as Article 2 paragraph 2 contains such vague labels, the scope of the European arrest warrant is not readily identifiable. This is alarming because the vague scope of the

proposed Framework Decision undermines the ambition of the Council to create greater legal security and equality by means of the European Arrest warrant.

Arbitrariness of the list of offences

Some of the offences listed under Article 2 paragraph 2 clearly have transnational implications, such as for example "trafficking in human beings", which warrants their inclusion in this provision as part of a European approach to crime. However, the list also contains such offences as "arson" and "rape", which do not have obvious transnational characteristics. The Standing Committee sees no reason for the inclusion of such offences in the list of Article 2 paragraph 2 and wonders why the Council found it necessary to do so. The impression of arbitrariness is further strengthened by the obvious lack of coherence between the offences when it comes to subject-matter or seriousness of the offence: "Illicit trafficking in endangered plant species" is followed by "facilitation of unauthorised entry and residence" and "murder, grievous bodily harm". This random listing of offences does not betray any clues as to the motives of the Council for their inclusion.

Lack of competence to take measures with respect to some of the offences listed in Article 2 paragraph 2

According to Article 31 sub e of the Treaty on European Union (TEU) common action on judicial co-operation in criminal matters shall include the progressive adoption of measures in the fields of organised crime, terrorism and illicit drug trafficking. This means that the competence of the Council to regulate the criminal law is limited to these fields. Although "organised crime" is a broad concept, offences such as "computer-related crime", "murder, grievous bodily injury", "swindling", "arson" and "rape" clearly fall outside its scope. Therefore, they should not have been included in this list of offences. In the annex to the proposed Framework Decision the Council states that it is acting in accordance with the principles of subsidiarity and proportionality. The Standing Committee does not share the opinion of the Council and stresses the need for restriction of the list of offences in Article 2 paragraph 2 to those offences that are in accordance with the mandate set out in Article 31 sub e TEU.

Article 17 – Lack of penalty for exceeding time-limits

This provision sets out time limits to ensure that a European arrest warrant is dealt with speedily. Article 17 paragraph 1 expressly states that a European arrest warrant shall be dealt with and executed as a matter of urgency. However, these time limits are not accompanied by sanctions for exceeding them. This raises the concern that there is no guarantee for the requested person that the procedure will be completed within the prescribed period (either 10 or 60 days).

Article 25 – Constitutional and democratic objections

The Standing Committee has serious doubts whether it is within the competence of the Council to replace provisions of Conventions by means of a Framework Decision. The TEU does not provide the Council with such a competence. One of the instruments provided to the Council in Article 32, paragraph 2 TEU beside the Framework Decision is the Convention. It goes without saying that Conventions can only be amended by other Conventions. Contrary to Conventions, Framework Decisions are taken without mandatory parliamentary scrutiny. For the Council to set aside rules developed through democratic decision-making processes in the Member States raises concerns from a constitutional as well as from a democratic perspective.

Procedural guarantees in the field of asylum

The Standing Committee wishes to express its concern that neither in the Preamble nor in the Proposal itself the non refoulement clauses of, among other conventions, the Refugee Convention,

the European Convention on Human Rights and the Convention Against Torture have been included. The Preamble and Article 1 paragraph 3 of the proposal only refer to Article 6 TEU. The Standing Committee is of the opinion that the reference to Article 6 TEU insufficiently guarantees the prevention of a violation of the non refoulement clauses of the before mentioned human rights treaties

The relevant paragraphs 1 and 2 of Article 6, TEU prescribe:
"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 an as they result from the constitutional traditions common to the Member States, as general principles of Community law."

First, it should be noted that the European Union is not a party to the Refugee Convention, the European Convention on Human Rights and the Convention Against Torture. Nor can the European Union be a party, since these conventions do not provide for membership for other entities than States, and the European Union cannot be qualified as a State. Second, Article 6 TEU does not offer of a legal basis for considering the European Union to be bound by the European Convention on Human Rights. Article 6 paragraph 2 TEU only contains an obligation to respect fundamental rights, as guaranteed by the European Convention for Human Rights, as general principles of Community law. Therefore, the European Union is only bound by the European Convention on Human Rights if the European Union in its legislation explicitly stipulates so. Third, Article 6 paragraph 2 TEU does not refer to other conventions- like the Refugee Convention and the Convention Against Torture- than the European Convention on Human Rights. Until now it has remained unclear whether the European Court of Justice will consider the Refugee Convention as one of the (human rights) treaties which are a source of inspiration for defining the general principles of Community Law. Finally, the guarantees in the preamble of the proposal are not legally binding and do not refer to the Refugee Convention.

The Standing Committee, therefore, would like to recommend the following amendment to Article 1 paragraph 3:

> *This Framework decision shall not have the effect of amending the obligations under international law of the Member States, specifically those based on the European Convention on Human Rights, the 1951 Geneva Convention relating to the status of Refugees, and the United Nations Convention Against Torture.*