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An association of European defence lawyers

**Proposal for a Council Framework Decision on the European Supervision order
in pre-trial procedures between Member States of the EU**

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Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further seven European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

The European Criminal Bar Association (ECBA) is the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons. The ECBA also acts as a platform for lawyers to meet with colleagues from all Member States and to exchange information and knowledge.

Both organisations has a joint meeting to discuss the proposal for a Council Framework Decision on the European Supervision order in pre-trial procedures between Member States of the EU and in this respect, would like to make the following comments.

Comments

In several expert's meetings concerning the mutual recognition of non-custodial pre-trial supervision measures in the EU which have taken place in Brussels in recent years, the CCBE and the ECBA have mentioned the lawyer's positions in this regard. The plans for a European legal instrument for reducing enforced remand and for promoting the equal treatment of resident and non-resident accused persons are welcome and meet our support.

A joint area of freedom, security, and justice demands equal treatment of citizens of the Union irrespective of their nationality. In addition, the replacement of arrest by a less drastic supervisory measure without custody corresponds with the principle of proportionality – ensured in many EU member states under constitutional law – and the right to personal freedom anchored in any constitutional law and in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, avoiding remand strengthens the principle of presumption of innocence. Insofar as the aims of the initiative are to be approved without reservations – also in the interest of the persons concerned. We support the initiative, in particular in connection with the European Arrest Warrant, as corresponding measures would essentially lead to a reduction in enforced remand.

However, it should only be possible to impose the measures if the pre-requisites for issuing a European Arrest Warrant have been determined by a court and insofar as less drastic measures than imprisonment are applied. According to Art. 12 of the framework decision on the European Arrest Warrant the suspension of remand is envisaged anyway and the European Arrest Warrant can also be issued if a suspect, who is staying in another member state, does not wilfully appear at a hearing in another member state.

However, we have considerable doubts concerning an expansion or introduction of Europe-wide compulsory measures ("European Supervision Order") with the possibility for involuntary transfer of suspects for offences which, owing to their low eligibility for punishment (low threat of punitive actions), do not fall under the European Arrest Warrant proceedings. Principally, the following should be considered:

A measure, which concerns the mutual recognition of decisions under criminal law as one of the cornerstones in creating a European area of freedom, security and justice and which is introduced without the prior harmonisation of the various inner-state legal systems can lead to contradictory valuations, which can in the end lead to a fragmentation of the law altogether. The proposed legal instrument involves such risks. Not just remand, but also the ordering of non-custodial supervisory measures with the possibility to hand over the person concerned by force to the member state of

hearing, represents a considerable intervention with regard to basic rights. In an indirect way new legal reasons for arresting people would be created. Art. 6 and 17 of the Proposal clarify the unacceptable consequences of the breach of a Supervision Order: "Obstructing the course of Justice", whatever it means, may constitute a breach of the order and lead to an arrest "if the European supervision order was issued in respect of an offence for which pre-trial detention was initially not justified under the law of the issuing State" (Art. 17 No. 1 d).

On the other hand, it is to be taken into account that according to the applicable legal position, remand can also be ordered in the case of suspicion of such offences for which the threat of punitive action is below the threshold necessary for ordering a European Arrest Warrant. Alternative measures are often rejected in the case of non-residents claiming the risk of escape for these cannot be excluded. One solution could be in fact to envisage for these cases a "European Supervision Order", however without the possibility of an involuntary hand over. General extradition rules should apply here, as they are envisaged anyway outside of the European Arrest Warrant. According to the principle of proportionality and subsidiarity a regulation would in any case have to include the following restrictions:

- The unlimited access to a lawyer of his choice is to be guaranteed for each of the suspected or accused persons who may possibly be affected by the measure before ordering the measure.
- All trials and hearings associated with the ordering of the measure are, where required, to be executed with an interpreter for the accused.
- The measure may only be ordered if the pre-requisites for remand are fulfilled.
- The measure may only be ordered by a court.
- The measure has to be provided with effective legal protection of the person concerned (right to remedy etc.).
- In case of youths and children at the age of under 15 years have to be excluded, at the age of 15 years until age of consent the legal guardians should have a right to be heard by the prosecution authorities.
- The duration of the measure must be limited. The time limits are to be monitored by the court.
- The above bullet points are referred to as since the introduction of the EAW no complementary guarantees for common procedural safeguards are in place.

Conclusion

We understand that the motivation behind the proposal is well-intentioned and aims to address shortcomings in the current system of remand for EU nationals. However, we believe that there are too many deficits with the proposal which could result in creating new grounds for arrest. For instance, the arrest and surrender by applying compulsory means are to be refrained from if this is not apparently in proportion to the significance of the matter (especially in the expectation of low punishment). The catalogue of measures should be narrowed and restricted to a reporting obligation being the most lenient measure in restricting personal freedom and can also be effectively monitored.

We would be pleased to meet with the Commission to elaborate on the remarks contained in this paper.