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NOTE

from:	Presidency
to:	Article 36 Committee
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Subject:	Horizontal approach in relation to certain categories of offence – Progress report

Background

At its meeting on 1 and 2 June 2006, the Justice and Home Affairs Council reached a general approach on the proposal for a Framework Decision on the European arrest warrant and instructed its preparatory bodies to give further consideration to the broader issue of the categories of offence, with a view to the adoption by the Council of a horizontal approach by the end of 2007 in relation to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion, and swindling.

The horizontal approach stems from the wish of a Member State which argued that those categories of offence might differ greatly in substance and in coverage from one legal system to another. In its view, a common understanding by Member States of the substance of the six categories in question could eliminate that scope for differing interpretations. The object of the exercise should be to make state action more foreseeable and more transparent. An EU-wide core of established criteria to be fulfilled if, say, a European arrest warrant is to be issued for an "undefined" listed offence should bring greater trust on the part of executing Member States and make state action more predictable and more calculable for the public.

In preparing for the adoption of a horizontal approach, due account should also be taken of the information available in accordance with the review clause in Article 25a of the draft Framework Decision on the European arrest warrant and of any other relevant information, such as developments in the case law of the European Court of Justice.

Action taken so far

In response to the Council's instructions, Member States were sent a questionnaire enquiring, among other things, about any proposals for the horizontal instrument and any practical problems regarding the six categories of offence in question.

Member States held a first detailed discussion of the horizontal approach to certain categories of offence on 22 and 23 May 2007.

In that discussion, Member States basically took a positive view of work on a horizontal approach confined to the six listed offences in question.

However, some delegations wondered whether to take the course of defining the listed offences more precisely did not signify a step backwards in mutual recognition, which involved waiving consideration of double criminality.

As regards whether any horizontal instrument should take the form of binding rules or merely be couched in non-binding guidelines, most Member States came out in favour of non-binding provisions.

With regard to how the categories of offences might be defined more precisely, some delegations were in favour of referring to international conventions or other EU instruments. Others had misgivings about reference to international conventions, as many countries had made numerous declarations, exceptions and reservations in respect of individual provisions in conventions.

Consideration was also given to whether, perhaps at a later stage, delegations could entertain the idea of placing discussion of a horizontal approach on a broader footing. A horizontal approach could conceivably lay down uniform rules on matters such as grounds for refusal (e.g. territoriality, immunity and time-barring). Such an "extended" horizontal approach might simplify future discussions on a variety of framework decisions. The same problems and issues arising would not need to be discussed anew for each piece of legislation. On this point there were different schools of thought among delegations as to the pros and cons.

Options

More precise definition

The categories of offence could be defined more precisely by reference to international instruments, where available. For those categories of offence for which there are no international conventions or other instruments, a separate definition could be drafted. Another possibility would be to draw up separate definitions altogether, without reference to any international conventions or EU instruments.

Possible mechanism

It would be sufficient to define more precisely the core conditions to be met by offences in order for the executing country's authorities to be required to give effect to the other country's decision, without considering double criminality. It would be possible, for instance, for the forms for use under each framework decision to include a box for indicating whether or not an offence met the definition established by Member States. If, in the issuing authority's view, a case met the more precise definition of the offence, consideration of double criminality would not be allowed. If, in the issuing authority's view, while constituting a listed offence, a case did not meet the agreed precise definition of it (the "core offence"), double criminality could still be considered.

Conclusion

Legal instruments based on the principle of mutual recognition (such as the European arrest warrant) have not yet been in application for long enough to identify any problems in putting them into practice. In order to discover any such problems, the European evidence warrant would also need to be assessed. This will have to wait until the evidence warrant has been implemented in all Member States. Only then will it be possible to ascertain whether and, if so, on what basis any specific steps can be taken towards a horizontal instrument.
