Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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**Aan:** De Bijzondere Commissie voor de JBZ-Raad
van de Eerste Kamer der Staten-Generaal

**Betreft:** Vervolgcommentaar op het Kaderbesluit inzake het Europees tenuitvoerleggingsbevel en de overbrenging van gevonniste personen tussen de lidstaten van de EU (initiatief van Oostenrijk, Finland en Zweden), punt B4 op de agenda voor de JBZ-Raad van 15 februari 2007.

**Kenmerk:** CM07-02
**Datum:** 12 februari 2007.

Geachte leden van de Staten-Generaal,

Ten behoeve van uw overleg op 14 februari 2007 over de aanstaande JBZ-Raad, zendt de Permanente Commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht ('de Commissie Meijers') u, bijgaand commentaar op agendapunt B4; het Kaderbesluit inzake het Europees tenuitvoerleggingsbevel en de overbrenging van gevonniste personen tussen de lidstaten van de EU (initiatief van Oostenrijk, Finland en Zweden).

De Raad is eind november 2006 met een Nota van het voorzitterschap gekomen, waarin de laatste onderhandelingen aangaande het Kaderbesluit *inzake het Europees tenuitvoerleggingsbevel en de overbrenging van gevonniste personen tussen de lidstaten van de EU (initiatief van Oostenrijk, Finland en Zweden)* zichtbaar worden. Gestreefd wordt nu naar een politiek akkoord. Het Kaderbesluit dient ter verdere vervollediging van het programma van maatregelen dat is goedgekeurd teneinde het beginsel van wederzijdse erkenning van strafrechtelijke beslissingen gestalte te geven[1].

Op het ontwerp-Kaderbesluit is door de Permanente Commissie in 2005 reeds commentaar geleverd[2] (zie bijlage) en onderstaande noties borduren voor een deel hierop voort. Kritiekpunten uit het commentaar van 2005 die onveranderd zijn, worden niet opnieuw aangehaald.

Vooraf zij opgemerkt dat het de Permanente Commissie niet duidelijk is geworden wat de noodzaak en de winst zou zijn van dit nieuwe Kaderbesluit boven het reeds bestaande instrumentarium. Bovendien moet worden gevreesd voor verwarring die kan ontstaan doordat nu verschillende instrumentaria zullen gaan gelden voor tenuitvoerleggingsbevelen binnen en buiten de EU. In de optiek van de Permanente Commissie is het hanteren van verschillende regimes gevoelig voor fouten en vergissingen en daarom onwenselijk.

Op inhoudelijke gronden wenst de Permanente Commissie de volgende noties onder de aandacht van het Parlement te brengen.

1. De Permanente Commissie juicht het toe als samen met het certificaat, ook de beslissing wordt meegezonden aan de lidstaat waar het vonnis ten uitvoer zal worden gelegd (tenuitvoerleggingsstaat). Blijkens de nota zelf wordt met beslissing gedoeld op het vonnis van de rechter in de staat van beslissing (artikel 1). De Permanente Commissie adviseert dit onderhandelingsresultaat vast te houden in het definitieve Kaderbesluit om een gebrekkige informatievoorziening zoveel mogelijk te voorkomen.

2. Met betrekking tot de eis van dubbele strafbaarheid bevat de Nota een positieve wijziging in de toevoeging van lid 4 aan artikel 7. Deze toevoeging schept de mogelijkheid voor lidstaten om de 'lijst' van

[1] PB C 12, 15 januari 2001
[2] d.d. 7 november 2005

lid 1 niet over te nemen, wat er op neer komt dat lidstaten vrij zijn de eis van dubbele strafbaarheid zonder enige beperking toe te passen.

3. Met betrekking tot de 'lijstdelicten' van artikel 7 lid 1 zij nog opgemerkt dat het delict 'forgery of administrative documents and trafficking therein' in het Nederlands vertaald dient te worden met 'vervalsing van administratieve documenten en *handel daarin*' in plaats van de nu gehanteerde foutieve vertaling met 'vervalsing van administratieve documenten en *handel in valse documenten*'.

4. De Permanente Commissie betreurt het dat ook na de laatste onderhandelingen niet blijkt van ruimte voor omzetting van een vonnis in een nationaal vonnis. Er wordt duidelijk gestreefd naar een automatische erkenning van het vonnis van de beslissingsstaat. Dit kan echter leiden tot onrechtvaardige situaties, nu het resultaat kan zijn dat twee Nederlandse onderdanen voor een zelfde strafbaar feit, terzelfder plaats gepleegd een substantieel verschillende sanctieduur zullen moeten ondergaan.
   Met betrekking tot de mogelijkheid van aanpassing van de vrijheidsstraf aan de maximumstraf geldt bovendien dat artikel 8 lid 2 een strikter voorschrift bevat dan in het ontwerp-Kaderbesluit het geval was. Aanpassing is slechts toegestaan wanneer de sanctie boven de maximale straf van de tenuitvoerleggingsstaat komt en de duur van de sanctie dus in strijd is met het *recht* van de tenuitvoerleggingsstaat. Dit laatste is extra opvallend, temeer daar in het ontwerp-Kaderbesluit nog gesproken werd van 'strijd met de *fundamentele rechtsbeginselen'* van de staat van tenuitvoerlegging. Dit is een ruimere formulering. Benadrukt wordt tevens dat de aangepaste sanctie niet lager mag zijn dan de maximumstraf die krachtens het recht van de tenuitvoerleggingsstaat voor vergelijkbare strafbare feiten geldt.

5. De term permanent verblijfsrecht, die in het ontwerp-Kaderbesluit niet was gedefinieerd en veel vragen opriep, wordt in de Nota wèl gedefinieerd. Naast de geldige permanente verblijfsvergunning of een geldige verblijfsvergunning voor langdurig ingezetenen, duidt ook een recht van permanent verblijf overeenkomstig de nationale wetgeving tot omzetting van de communautaire wetgeving op een permanent verblijfsrecht voor de betrokken persoon.

6. De toestemming van de betrokken persoon is, ondanks de positieve formulering van artikel 5, ook na de laatste onderhandelingen geen vereiste. Dit is slechts in uitzonderlijke gevallen anders. In het eerdere commentaar heeft de Permanente Commissie erop gewezen dat het feit dat de toestemming van betrokkene niet vereist is én het feit dat de staat van beslissing geen plicht heeft over te gaan tot het toezenden van de beslissing en het certificaat, in strijd zijn met een van de doelen van het systeem: het bevorderen van de terugkeer van betrokkene in de maatschappij. Met betrekking tot dit punt moet ten positieve van de Nota worden opgemerkt dat de onderhandelingen hebben geresulteerd in een sterkere nadruk op een van de doelen van het Kaderbesluit, namelijk de bevordering van de reclassering van de gevonniste persoon.

7. De Permanente Commissie merkt op dat niet duidelijk is met welke reden de territorialiteitsexceptie aan artikel 9 zou moeten worden toegevoegd (artikel 9 lid 1 sub j). De vraag is immers waarom Nederland problemen zou hebben met het erkennen van een beslissing of de tenuitvoerlegging van een sanctie, indien het gaat om feiten die op het eigen grondgebied zijn gepleegd. Dat deze exceptie van groot belang is bij overlevering en bewijsverkrijging staat onomstotelijk vast, maar in dit geval is de ratio achter deze exceptie onduidelijk.

Uiteraard is de Permanente Commissie bereid tot nadere toelichting.

Hoogachtend,

Prof. mr. C.A. Groenendijk
Voorzitter

**Bijlage:** Commentaar van de Commissie Meijers op het Ontwerp-kaderbesluit inzake het Europese Tenuitvoerleggingsbevel (…) op 7 november 2005 verzonden aan het Nederlandse en Europese Parlement (LIBE) en de Minister van Justitie.

**Comments on the Draft Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU (Initiative of Austria, Finland, Sweden)**

Dear Sir/Madam,

Following the resolution to complete the programme of measures, in particular in the field of enforcing final custodial sentences, as formulated in the The Hague Programme on strengthening Freedom, Security and Justice, the delegations of Austria, Finland and Sweden have launched a Draft Framework decision regulating the transfer of the enforcement of sentences and of sentenced persons between Member States of the European Union[3] (hereafter: FWD European Enforcement Order).

The Standing Committee wishes to express its concerns regarding the following nine points in the draft FWD European Enforcement Order, which is meant to replace present regulations dealing with this subject matter. At present, the most important instrument in this subject is the Convention on the Transfer of Sentenced Persons 1983 (CTSP). We have therefore compared the FWD European Enforcement Order with the CTSP where necessary.

**1.** The information enclosed with the Enforcement Order is limited to a summary of facts and a description of the circumstances for listed facts (see point G of the Annex-Form). For non-listed facts a full description of the offences is required. It is not required to hand over the judgement. This leads to an information gap because the judicial authority in the executing State is not informed of all relevant facts in the case.[4] Furthermore problems may occur easily; for instance, in a summary important information may be left out and mistakes are easily made. It is therefore recommended that the judgement should be always enclosed with the Enforcement Order. This is already common practice in the Framework decision *on the execution in the European Union of orders freezing property or evidence*, the Framework decision *on the application of the principle of mutual recognition to financial penalties* and in the Framework decision *on the application of the principle of mutual recognition to confiscation orders.*

**2.** The Netherlands have been practising the extradition/surrender of nationals to stand trial abroad for a great many years. Very often in such international cases Dutch courts have decided in favour of extradition/surrender, rather than handling the case before a Dutch court. Even in cases where the Dutch defendant has acted exclusively on Dutch territory priority may be given (and frequently has been given) to extradite/surrender but always with a guarantee for retransfer under the *conversion mode* (article 11 CTSP). The reason is clear: a defendant may never, when surrendered only for reasons of sensible criminal co-operation and procedural efficiency, be punished according to the standards of his 'guest-State', because these standards may be (much) tougher. The advantage to extradite a person is the concentration of proceedings. The disadvantage is that the Dutch defendant has to stand trial abroad. When the conversion mode is abolished it will easily lead to injustice if the defendant has to serve a much longer sentence that cannot be converted anymore only for the sake of procedural efficiency. It is therefore expected that Dutch courts will refuse to cooperate in this manner if the FWD European Enforcement Order will become effective in its present form. The *conversion mode* should by any means be retained with regard to the application of the return-guarantee. Otherwise it may well be to the detriment of sensible international cooperation in criminal matters and as such counter-productive.

**3.** The abolishment of the conversion mode may have other unreasonable effects as well. Under article 10 paragraph 2 CTSP even in a case of *continued enforcement* the sentence taken over in the executing State may never exceed the local maximum for the offences proven. A similar provision cannot be found in the FWD European Enforcement Order. In cases where similar facts lead to different crimes with different maximum sentences the continued enforcement can create problems in the case of re-transferring. The home State is now obliged to execute a sentence that is higher than the national maximum in case such a crime has been committed on its territory. It is therefore

[3] Official Journal of the European Union of 21-06-2005, C 150/01.
[4] A judgment (except for Common Law States) always contains a description of the proven facts it is based upon and, moreover, indispensable information about the personal circumstances of the person involved, his possible (partial) lack of criminal responsibility, etc.

recommended to bring the FWD European Enforcement Order in line with the practice under the CTSP.

**4.** Unlike the CTSP (article 9 paragraph 4) the FWD European Enforcement Order has no special provision with regard to *'persons who for reasons of mental condition have not been held criminally responsible for the commission of the offence'.* No information is given about the reason for this omission. Article 1 (b) however makes it clear that *'sentences'* is meant to include *'detention orders'* and the Explanatory Note on article 1 FWD European Enforcement Order makes it clear that the aforementioned category of judgments is included. Do all of the 25 Member States have more or less equivalent institutions to care for this category of '*sentencees*'? If not, what will be the consequence if the executing State is under an obligation to take over enforcement and what are the consequences for the *'sentencees'* in question? Moreover, it is very likely, that within and between the 25 Member States psychiatric and judicial ideas about this matter will vary considerably.

**5.** Article 9 (f) FWD European Enforcement Order does not guarantee that the person *necessarily knew* about time and place of the court session (e.g. in case of formal public notification for example) and consequently did not have the opportunity to defend himself in person or by counsel of his own choice (article 6 ECHR). The text should read 'or informed *personally* in some other way' in order to safeguard his right to be present at the session or having himself represented by counsel. Some other problems may occur. The last sentence of article 9[5] can only reasonably refer to a guilty plea before a judge and not to any other statement or before any other instance. Even in a case of a guilty plea before a judge a problem may arise. This problem occurs in case of appeal. If the defendant has not been put in a position to make an appearance in appeal it remains insecure whether he knew the outcome.

**6.** Some Member States acknowledge double (EU) nationality. *'Permanently resident'* is a term not defined or explained in the FWD European Enforcement Order. This may easily result in difficulties and conflicts. How long should a legal residency have lasted to be accepted as '*permanent*'? There is no rule of precedence provided in the FWD European Enforcement Order. This leaves it entirely to the discretion of the sentencing State to which State the sentencee will be returned.

**7.** The consent of the sentenced person[6] (and both States) is no longer obligatory under the FWD European Enforcement Order for transferring a person. The FWD European Enforcement Order also contains no obligation for the sentencing State to issue an enforcement order. This may frustrate one of the aims of the system: promoting the person's social rehabilitation.

**8.** The FWD European Enforcement Order gives only a basic duty for the executing State to execute the Enforcement order. Article 2 paragraph 1 of the CTSP states: *'the parties undertake to afford each other the widest measure of cooperation in respect of the transfer (…)*'. The weak point in the CTSP is, even with regard to the *guaranteed conversion* mode, that the sentencing State has a habit of procrastination. It may take up to half a year after the final sentence before transfer takes place and it might take years because of the lack of such a guarantee. The FWD European Enforcement Order prescribes nothing to solve this problem. The sentencing State is free in its decision for the moment of instigating the transfer and is also free in choosing the State where the person will be transferred to. This is a serious shortcoming of the FWD European Enforcement Order and it is not explained why this is not taken into account. But if and when the decision to transfer is taken, the executing State is practically bound and must take its decision within three weeks. This is a lop-sided solution. Not even a fast re-transfer after surrendering a national is regulated. There should at least be a strict rule regulating re-transfer, if a guarantee to that effect has been given, immediately after a sentence has become final.

**9.** Article 13 paragraphs 3 and 4 FWD European Enforcement Order regulates *conditional release.* Some Member States may not only have rules for *conditional release* but also rules for *good-conduct and/or work-rebates*. At present there is no reliable overview of this sort of the national rules in the 25 Member States. The rule of article 13 paragraph 3

[5] 'or if the person has not indicated to a competent authority that he or she does not contest the case'
[6] Consent before transferring maintains a condition for persons who have other close links with the executing State (article 4 paragraph 1). Another example where consent remains necessary can be found in article 9 paragraph 1 (f).

may be to the detriment of the sentencee if the sentencing State has more lenient rules and the States concerned reach no agreement. More serious problems are caused by the rule of article 13 paragraph 4. There is a serious risk that the sentenced person will end in a worse position. In contrast, under article 13 paragraph 4 FWD European Enforcement Order only those provisions of the sentencing State may be taken into account 'under which the person is *entitled* to conditional release *at a specified point in time'*. This is a harsh restriction since conditional release is seldom a thing the sentencee is 'entitled' to. In some States a decision of an *execution-judge* is necessary, where all sorts of circumstances are taken into account. It is also clear from this paragraph that other possible rebates cannot be taken into account. Under the *conversion mode* it is good practice to take into account all possible rebates the sentencee will loose by being transferred in a best case scenario. Otherwise there is a serious risk the person ends in a worse position which of course is counter-productive to the purpose of rehabilitation as well as highly unreasonable and in conflict with article 11 of the CTSP[7].

**A positive point**
The FWD European Enforcement Order partly covers the rules applying when a national is surrendered to stand trial in another Member State with a *guarantee* to be retransferred if sentenced (article 3 paragraph 2). From the fact that article 7 FWD European Enforcement Order is not applicable in such a case (article 3 paragraph 3 (a)) it is, we hope, to be understood that the abolishment of the double incrimination does not apply in such cases. It is not entirely clear however, because article 7 covers more than the 'list' alone. It also covers (paragraph 3) the facts where double incrimination may still be made a condition. Moreover under the Framework decision concerning the European Arrest Warrant there is an obligation to surrender nationals with regard to 'listed' facts, where the double incrimination has been abolished. If double incrimination is indeed still required it solves the *ordre public* problem for States where sentences cannot be enforced with regard to facts not locally punishable.

**Conclusion**
The idea to regulate the procedure to transfer sentenced person to their 'Home' country in order to facilitate their social rehabilitation is a sound one. However, the way it has been given form in the Draft is highly problematic. The abolition of the *conversion mode* may not lead to ethical problems in case a person has *wilfully* decided to commit a crime abroad, but there may well be such a problem if the *locus acti* is just a *coincidence* (e.g. a couple on holiday abroad, quarrelling in such a fierce manner that one of them ends up dead). When a person is surrendered only for streamlining proceedings and his own State has jurisdiction as well, it could turn out rather unfair when it is not possible to convert his sentence into a sentence according to the level of his home country. As long as there is no obligation for the sentencing State to transfer, the Draft Framework Decision looks more like an instrument giving that State the opportunity to get rid of people they consider a nuisance, rather than an instrument offering the best way for sentencees to rehabilitate in their own habitat.

[7] Article 11 paragraph 1 (d): 'Shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.'