Preliminary Remarks:

The following answers are to a great extent those given by my colleague, ao Univ. Prof. Dr. Hubert Hinterhofer, in his Austrian Report on the European Arrest Warrant as a national correspondent of the AGIS-project: The European Arrest Warrant, http://www.eurowarrant.net/. I inserted that answers into the following questionnaire and adapted them if necessary.

There are a number of questions which caused difficulties, especially question concerning the doctrine of European law as such.

I hope that these difficulties can be overcome by the publication:


which contains contributions to a seminar in April 2006. Proofs can made available to you if you want. Where there is a gap, I hope that you will find the condensed information in that book.

1. Constitutional issues

a. Please specify views of doctrine and judicature in your country concerning the legal charakter of the third pillar framework decisions (FD) issued on the basis of art. 34.2 TUE

b. Please indicate the position of the doctrine and courts in your country concerning the relation between the domestic norms being a result of implementation of framework decisions – and conventions on European cooperation in criminal matters, accepted within the EU/Council of Europe?

The implementing law, the EU-JZG, derogates the conventions, see para. 77 of that law.
c. Is the doctrine and judicature in your country opting for “pro-european” (“European – friendly”), interpretation of domestic law, including constitutional law? Is it also applied as regards third pillar instruments?

In Austria there exists the principle of EU-friendly and EU-conform interpretation

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d. What is the influence of ECJ judicial decisions on the implementation of domestic law (e.g. Pupino case)?

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e. Is interpretation of domestic law implementing framework decisions in your country possible solely by referring to the wording or inhalt of the framework decisions? Is it possible also when a framework decision is not yet implemented into the domestic legal order?

In principle, there is “framework-conform” interpretation of domestic law.

f. To what scope, if at all, is it possible to ask EJC preliminary questions as refers to the interpretation of framework decisions (art. 35 TUE). Can such question be asked by constitutional court (or equivalent)?

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g. What is the technical form of implementation of the framework decision on EAW in your country (e.g. separate law, a part of the CCP, separate from extradition provisions, other ways?)? When exactly did the law implementing the framework decision enter into force?

1 May 2004

h. Was the law implementation the framework decision and the framework decision itself subject of proceedings of the constitutional court in your country?

No

i. Is the surrender procedure according to the EAW understood as a form of extradition or is it treated as a separate legal instrument?

As a form of extradition, albeit the EU-JZG does not explicitly speak about “extradition”

2. The implementation of the FD on the EAW in the domestic legal order

a. Are there differences between the way of implementation of the EAW in your country and the “pattern” provided by the framework decision? If so, do the differences concern:
- the negative premises (compulsorily and optional) of surrender?

- the catalogue of “crimes” listed in art. 2.2. FD. Are all those “crimes” criminalised in your country. Please specify which are not criminalized?

- the period of time for execution of the EAW?

- other issues. Please specify.

As to this question: see 6.1 of the report of Hinterhofer

b. Can lack of dual criminality in cases other than mentioned in art. 2.2. FD constitute optional reason to refuse the execution of the EAW (to surrender)?

As to this question: see 5.2.3 of the report of Hinterhofer

c. Did your country make a proper notification to the Secretary of the CUE, concerning the waiver of the specialty rule (according to the art. 27.1 FD)?

As to this question: 

d. Did your country appoint a central authority (art. 7 FD). If so, which one? What is the scope and tasks it is supposed to perform and its practical meaning?

No special authority was appointed

3. The principle *ne bis in idem* and EAW

a. What is the meaning of the identity of an act in the context of the art. 3 FD (ground for refusal of the execution of EAW) – is it its description or legal qualification as made by the domestic court?

As to this question: see 5.1.2 and 5.2.4 of the report of Hinterhofer

b. Is the valid judgement/conviction/discontinuance of the procedure in your country a mandatory ground for non-execution of the EAW?

As to this question: see 5.1.2 of the report of Hinterhofer

c. Is the valid judgement/conviction/discontinuance of the procedure in other UE Member State the same ground for refusal as in “b”?

Yes
d. What is the meaning and/or interpretation of “the finally disposal of the trial” in art. 54 SDU in your country?
   - Is such a disposal the valid decision on discontinuance of the criminal process because its legal inadmissibility?

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   - Is such a disposal the valid decision on discontinuance of the criminal process because lack of advisability of prosecution?

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e. Was the problem of the European application of the principle ne bis in idem a subject of judicial interpretation in your country (e.g. by the Supreme Court, Constitutional Court)?

   Yes, Supreme Court (Oberster Gerichtshof in Strafsachen) 12 Os 23/04 and 11 Os 96/03

4. The issuing of the EAW

   As to this question: see 4. 1.1.1 of the report of Hinterhofer

a. Which judicial authority in your country decides on the issuing of the EAW?

   Investigating judge at the court of first instance.

b. Is, according to the domestic law, the decision on issuing of the EAW made on a motion (on request) of a national organ or ex officio. If the former, on which organ’s motion/request?

   Request of the prosecutor

c. If a court is entitled to issue the EAW – of what rank and panel?

   The investigating judge at the court of first instance

d. Do the parties or other participants to the process have the right or duty to take part in the session?

   The parties if they so demand (sec 21 of the EU-JZG and sec 31 para 2 of the ARHG)

e. Is evidence procedure made in the proceedings on the issuing of the EAW?

   The question of guilt: Only in exceptional cases (sec 19 of the EU-JZG and sec 33 para. 2 ARHG)

   Other questions: if necessary

f. Who (party, other participant), if anyone, is entitled to appeal against the decision on the issuing (accordingly: rejecting issuing) of the EAW? Which judicial authority reviews these decisions?
There is no appeal

g. Can the EAW be issued retroactively? (as regards to crimes allegedly committed before the implementation of the EAW)?

No, see sec. 77 para. 3 and 4 EU-JZG

h. How many EAWs were issued in your country until the day mentioned above in point 1g of the questionnaire?

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i. Which “crimes” mentioned in art. 2.2. of the FD on EAW were subject to issuing the EAW in your country? If possible, please specify exact numbers?

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j. Were the EAW’s issued in your country subject to crimes other than “crimes” mentioned in art. 2.2. FD. If so, in how many cases?

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k. How many such request were rejected by the deciding judicial authority? (applies only if EAW’s are issued on request)

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l. Which information channels are used before/along with the issuing of the EAW in your country (SIS, EJN, Europol, other means)? Is EAW issued only if the exact place of residence of the requested person is known? If not, what is the procedure if the place of residence of the requested person is not known?

Eurojust, Interpol, SIS, see sec. 29; 16 para. 2, 14 para. 4 of the EU-JZG

m. How many EAW’s issued by the judicial authority in your country were executed in other Member States? In how many cases was the requested person effectively surrendered?

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n. In how many cases did the executing of the EAW issued by judicial authority in your country refuse? What were the grounds for refusal?

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5. Executing of the European Arrest Warrant

a. Which judicial authority in your country decides on executing of the EAW?

Investigating judge at the court of first instance
b. Is the decision on execution of the EAW performed ex officio or on request of other domestic judicial authority. If yes – what is that judicial authority?

Request of the prosecutor

c. Does your domestic law envisage a period in which the decision on the execution of the EAW should be made? If so, what is that period of time?

In principle: 30 days (Sec 21 para. 1 of the EU-JZG)

d. Can the judicial authority deciding upon the execution of the EAW verify the information provided in the EAW? Can it perform evidence?

Yes, in principle:
Sec 19 para 1 sentence 1 and para. 2 offer the possibility to check the documents and to require additional information. However: the question of guilt is limited to very exceptional cases (sec 19 para 1 sentence 2)

e. How, if at all, does your domestic law regulate the solution of the concurrent EAWs?

According to sec 22 EU-JZG, the investigating judge has to decide. He may ask Eurojust for a statement in this matter which will not be binding on him.

f. Does the domestic law in your country envisage the collision of an EAW and extradition procedure? If so, please clarify.

In that case it is the Ministry of Justice which has to decide (see sec 23 EU-JZG)

g. Is the EAW issued in other Member State of the EU a sole legal basis for the deprivation of liberty for the sake of procedure of execution of the EAW, or is a separate judicial authority decision on arrest (provisional arrest) required?

The EAW is the basis (see sec. 18 EU-JZG)

h. What is the maximum period for the arrest of the requested person before his or her effective surrender?

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i. What rank – and panel – of the court decides on surrender (the execution of the EAW)?

Investigating judge at the court of first instance

j. Do parties or other participants of the proceedings have the right or duty to take part in the session?

Yes, see sec 18 of the EU-ZG and sec 29 of the ARHG

k. Can the decision on surrender be complained. Who has the right to complain? Which judicial authority reviews this decision?
Appeal can be made by the prosecutor as well as by the person sought (sec. 21 para. 1 EU-JZG and sec. 31 para. 6 ARHG). The court of second instance will deal with the appeal.

1. Does the person in question have the right to:
   - the assistance by the defense lawyer?

Yes, sec 21 EU-JZG and sec 31 para. 3
   - the right to interpreter?

m. Does the domestic law in your country envisage any barriers as refers to the surrender of own nationals?

Yes, the surrender of Austrians is inadmissible (see sec 77 para. 2 of the EU-JZG)

n. How many EAWs issued by other MS was executed by your country from the date mentioned in 1g of the questionnaire. In how many cases was the person effectively surrendered?

o. In how many cases did judicial authority in your country refuse to execute the EAW. What were the grounds for non-execution?

p. For what “crimes” listed in art. 2.2 of the FD were EAWs executed in your country. If possible, please specify by providing exact numbers.

q. Was the EAW executed for crimes other than listed in the above mentioned art. 2.2. FD? If so, in how many cases?

r. Were there cases in your country, in which courts rejected the executing of the EAW because of possible violation of quaranties of the requested person in the country of issuing of the EAW (esp. human rights)?

s. How often does the requested person person consent to the “fast track” surrender procedure?
t. In how many cases was the decision on the execution of the EAW subject of the judicial control? What were the results of such control? In how many cases was the decision on the execution of the EAW revoked?

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u. What is the average period of time between the execution of the EAW and the effective surrender of the requested person?

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6. Others

a. Are there any special difficulties in putting the EAW into practice, resulting from particularities of legal system in your country (esp. common law countries)?

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